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# JUDGES

OF THE

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(94 Ga. 442)

**DURANT v. WESTERN UNION TEL. CO.**

**RODGERS v. SAME.**

(Supreme Court of Georgia. Aug. 20, 1894.)

**TELEGRAPH COMPANIES—FAILURE TO DELIVER  
MESSAGE—PLEADING.**

The declaration in an action against a telegraph company to recover the statutory penalty for failing to deliver a message with due diligence is amendable so as to make it allege that the sendee, at the time of the sending of the message, resided in the town to which the message was directed, and within one mile of the defendant company's office in that town. *Smith v. Telegraph Co. (Ga., decided July 23, 1894) 19 S. E. 979.*

(Syllabus by the Court.)

Error from superior court, Wilcox county.

Actions by William C. Durant and W. A. Rodgers against the Western Union Telegraph Company. Judgment for defendant, and plaintiffs bring error. Reversed.

Hal Lawson, for plaintiffs in error. Gustin, Guerry & Hall, for defendant in error.

**PER CURIAM.** Judgment reversed.

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(94 Ga. 710)

**LESTER v. SAVANNAH GUANO CO.**

(Supreme Court of Georgia. Aug. 14, 1894.)

**MOTION FOR NEW TRIAL—AMENDMENT OF APPLICATION—LIABILITIES OF MARRIED WOMAN.**

1. There was no error in refusing to allow an amendment to a motion for a new trial by adding a ground which was palpably without any merit whatever.

2. The evidence warranted the verdict, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Randolph county; J. H. Guerry, Judge.

Action by the Savannah Guano Company against Travis Johnson and A. S. Lester. Judgment for plaintiff, and defendant Lester brings error. Affirmed.

The following is the official report:

Johnson did not defend, but the other defendant pleaded that she was a married woman, having a separate estate, and that she signed the notes merely as security, and received no benefit therefrom. At the trial, the notes were introduced in evidence. The husband of Mrs. Lester testified in support

of her plea, and Martin testified for the plaintiff in rebuttal. The jury found for the plaintiff. Defendant moved for a new trial, on the ground that the verdict was contrary to law and evidence, which motion was overruled, and she excepted. At the hearing, counsel for the movant proposed to amend the motion by alleging that, since the verdict, it had come to his knowledge (which he proposed to substantiate by affidavit) that defendant Travis Johnson had been subpoenaed as a witness in the case by plaintiff, for the purpose of proving by him that the guano was sold on the credit of Mrs. Lester, that the notes sued on were really her contract, and that she was not merely security on them; but that plaintiff's counsel failed and refused to introduce Johnson as a witness, because he would not so testify, but his testimony would be that he, and not Mrs. Lester, bought the guano, and the notes sued on were his own notes and contract, and that Mrs. Lester was merely security on them. The court declined to allow the amendment, on the ground that it was immaterial, and did not show due diligence in defendant's counsel in not ascertaining this fact before the trial. This ruling also is excepted to. The testimony of defendant's husband was: Johnson was Mrs. Lester's tenant, and rented land from her at a stipulated rent in cash. She furnished him nothing in the way of supplies to carry on his farming operations, she renting him the stock, lands, and farming tools at a fixed price. Martin, as plaintiff's agent, did sell and deliver to Johnson all the guano which is the consideration of the notes sued on, and take his notes for it, and then sent them down to the house for Mrs. Lester to sign, which she did, with the intention to become security. The guano was never in her possession or control, nor did she ever receive any benefit therefrom, either directly or indirectly. Witness was not present at any conversation between Martin and Johnson, and never talked with Martin about it. Martin testified: He sold the guano upon the written and verbal orders of Mrs. Lester, as delivered by Johnson, and on his account book (exhibited) charged it to her for Johnson. The eight sacks of phosphate

were the load delivered on the written order exhibited, and charged per order on the account book. This order was all the written authority he had from Mrs. Lester to deliver guano to Johnson. None of the guano which was the consideration of the notes sued on in this case was embraced in that load delivered upon this order. He had never spoken to Mrs. Lester in reference to the guano, but had delivered all upon the verbal requests of Johnson, who received it upon Mrs. Lester's wagon and mules, which he knew as well as he did his own. She was a married woman, and he, as agent for the company, selling the guano to Johnson, would not have sold and delivered the guano to him. Witness sent the notes by Johnson to her, for her to sign, which she did. Witness sold the goods to her, and gave her credit, and would not sell to Johnson; and, when the time for taking notes arrived, he took her notes, considering her the principal.

B. H. Lester, for plaintiff in error. W. C. Worrill, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 718)

**FLOURNOY et al. v. STEVENS.**

(Supreme Court of Georgia. Aug. 14, 1894.)

**NEW TRIAL—TERMS—REVIEW ON APPEAL.**

This being the grant of a first new trial, though the grant was made on terms with which the prevailing party refused to comply, the case is left to abide the general rule, without either approving or disapproving the terms prescribed by the trial judge.

(Syllabus by the Court.)

Error from superior court, Terrell county; O. L. Bartlett, Judge.

Action between Flournoy & Epping and one Stevens. From the judgment, Flournoy & Epping bring error. Affirmed.

J. W. Walters, Hoye & Parks, and Peabody, Brannon, Hatcher & Mastin, for plaintiffs in error. J. A. Laing and Wooten & Wooten, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 712)

**HOOKS v. BOOKER.**

(Supreme Court of Georgia. Aug. 14, 1894.)

**AMENDMENT OF PLEADING—NEW TRIAL.**

There was no error in allowing the amendment to the petition, nor in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Sumter county; W. H. Fish, Judge.

Action by Mrs. A. A. Booker against Malissa Hooks. Verdict for plaintiff. Defendant brings error. Affirmed.

The following is the official report:

Mrs. Booker, by her petition, alleged: On August 23, 1889, she bought from Malissa

Hooks a city lot in Americus, described in a copy deed attached, for which she paid said Malissa \$240. Petitioner has paid all the purchase money, and, at the time of the purchase, left Malissa Hooks in charge of the property, in order that the two small houses which were on it might be properly looked after and rented, until petitioner saw fit to improve the property, the son-in-law of said Malissa living at the time in one of the houses. Seven or eight months after the trade, Malissa paid petitioner the rent for the house for four months and a half, saying petitioner would have to try to get the balance of the rent herself. Petitioner agreed to this, and, as she was not then prepared to improve the property, left it still in charge of said Malissa, who promised to get suitable tenants for the houses. The property has rapidly increased in value, and petitioner is ready and desires to improve it, and for this purpose sent her agent L. M. Booker, to Americus to look after such improvement, and have a settlement with Malissa for the rent for the first seven months, the time that the same had been occupied by Malissa and her son-in-law; but Malissa not only refused to pay rent, but claimed to be in possession in her own right, and refused to give up possession to petitioner. Malissa has caused to be taken down and removed from the premises a stable which stood thereon at the time of the purchase, worth \$15. The rent of the two houses is worth \$5 per month, but would be worth much more if petitioner could have possession and make the improvements she desires. Malissa has no just or equitable claim to the property, and her possession of it by force is a flagrant violation of law and petitioner's rights; and her illegal conduct in holding possession prevents petitioner from the use of the property, and from improving it, to petitioner's damage \$500. Malissa has erected a dwelling on part of the property. She is perfectly insolvent. Petitioner prayed that Malissa be restrained from further interfering with the property, either by moving into the houses thereon, or finishing the one now being erected, or otherwise; for the appointment of a receiver to manage the property, rent it out, and hold the rents subject to order, until final decree; that a decree be entered declaring the premises to be petitioner's property, requiring Malissa to turn it over to her or her attorney, to pay petitioner the rents now due, \$35, and \$15 damages for moving the stable, and such other damages as petitioner may have sustained; and for general relief. Attached to the petition was a copy of the deed, which was an ordinary warranty deed, upon a consideration of \$210. Defendant answered: About the time alleged in the petition, her husband and Mr. Booker came to her, and she bargained the lot to Mr. Booker for \$245. He was to pay \$200 in three payments,—\$50 cash, and the balance to be paid by April 1, 1891, and the

balance of \$45 was to be credited on a debt respondent's husband owed Booker. No money was paid when the deed was signed, except \$50, paid two weeks afterwards. It was her understanding she was not to give possession until all the purchase money was paid. Being ignorant of her right, and not able to read, she signed the paper, not knowing that it was a deed, and being persuaded by her husband, but never gave possession to any one under the deed, and has held it as her own, as in pursuance of said contract, until the purchase money was paid. Of the purchase money, only \$139 had been paid. She never agreed to pay rent, and held the lot as hers until the purchase money was paid, and that she asked Booker if he would pay her what was owing on the lot, but he never has paid the money. In the \$139 paid, there is included the price of a cow sold to her husband by Booker, \$8, and \$5 for syrup so sold, which she never received. She denied having trespassed on the lot by tearing down or removing any building, except moving a house, which was agreed on at the time of the sale. She does not know petitioner, and Booker never told her he was petitioner's agent. Her husband told her, in the presence of Booker, that the paper she signed was a bond for titles, and she thought she was signing a bond for title to Booker.

Upon the trial, after the evidence for plaintiff was introduced, defendant moved for a nonsuit, on the ground that plaintiff had failed to prove any trespass committed by defendant or that defendant was insolvent. The only evidence introduced by plaintiff was the deed and the testimony of Booker. His testimony, in brief, was that he had fully paid defendant for the land; that he was the husband and agent of petitioner; that at the time of the purchase, as agent for his wife, he went into possession of the property, and rented a small house which was on the land to defendant, at \$1.25 per month, and she paid him the rent for eight months at that rate; that he held possession, as agent of his wife, until a short time before the bringing of the suit, and then went to the land and found that Mrs. Hooks had built a house on her land adjoining, and a small part of the house was built over the line on the land in dispute; that defendant then claimed that plaintiff owed her \$29.50, balance due on the property; that he stated to her that plaintiff had more than paid the purchase price, but, if she would move the part of the house that she had built on the land in dispute, he would give her the \$29.50, to prevent a controversy, or that she could let the part of the house built on the land remain, and that would be a final settlement; that Malissa well knew she was signing a deed, and not a bond for titles, it having been read over to her; that after agreeing to give her the \$29.50, or she to move the part of the house off the land,

he heard nothing more of any claim of hers until just before the bringing of this suit; that he went there, and found that some one had torn down and was moving off the stable witness had built on the land, and then it was that defendant notified him that she claimed the land; and that some \$300 had been paid to her on account of the purchase, the purchase price being only \$240 or \$250. When the motion for nonsuit was made, plaintiff's counsel moved to amend the petition, by striking the prayer for injunction and receiver, and adding a prayer that, on the final hearing, the premises be adjudged to be petitioner's property, and a writ of possession be granted her against defendant, and that petitioner recover \$120 per year for rent, beginning September 10, 1890. To this amendment, defendant objected. The amendment was allowed, and a motion for nonsuit overruled, to which rulings defendant excepted, and alleged the court erred in allowing the amendment, because it was adding a new cause of action, and changing the whole suit from a petition for injunction and receiver to a complaint for land. There was a verdict for plaintiff for the property in dispute, and for rent from September 1, 1890, at \$1.25 per month, "except the land on which the chimney stands." Defendant moved for a new trial, on the general grounds, because the court erred in overruling the motion for nonsuit, and because the court erred in allowing the amendment. The motion was overruled, and she excepted.

Hudson & Blalock, for plaintiff in error  
Fort & Watson, for defendant in error.

PER CURIAM. Judgment affirmed.

(34 Ga. 711)

MAYOR, ETC., OF AMERICUS v. CHAPMAN et al.

(Supreme Court of Georgia. Aug. 14, 1894.)

CITIES—DEFECTIVE STREETS—DAMAGES.

The evidence warranted the jury in finding for the plaintiffs; the damages awarded them were not excessive; and, there being no complaint that any error of law was committed by the trial court, the judgment is affirmed.

(Syllabus by the Court.)

Error from superior court, Sumter county; W. H. Fish, Judge.

Actions by O. K. Chapman and one Lowe against the mayor and city council of Americus. Judgment for plaintiffs, and defendant brings error. Affirmed.

The following is the official report:

Chapman sued for damages, laid in the sum of \$10,000, for personal injuries which he alleged he received while in his buggy, riding along a public street of the city, at night, not knowing of any obstruction or ditch across the street, by reason of his horse falling in the ditch which the city had dug across the

street for sewerage purposes, and which the city had left open, without any railing or other protection around it, and with no light or other signal to warn people traveling along the street of the danger of the ditch. He alleged that his knee was badly bruised and sprained, causing him considerable physical suffering; that he was bruised on his back and stomach, which caused him much pain and suffering; that said injury totally disabled him for 14 days, and he is still unable to attend to his every-day business, on account of the injuries; that he is a dentist by profession, and prior to the injury earned about \$20 a day in the practice of his profession; and that his physician's bill on account of the injuries was about \$100. Lowe brought a similar suit, alleging that he was riding in the buggy with Chapman. He claimed damages in the sum of \$10,000. His petition alleged that his knee and foot were both seriously injured, causing him great pain, and entirely disabling him from work for 14 days; that he was also injured internally by the accident, from which he still suffers; that prior to the injury he was making, as a drummer, \$—— per month, which, on account of the injury, he is now unable to earn; and that because of the injury he has had to employ a physician, at an expense of about \$100. By consent it was ordered that the two cases be consolidated, and tried together as one, the jury to render separate verdicts. The jury found in favor of Chapman \$565, and in favor of Lowe \$390. Defendant's motion for new trial was overruled.

E. A. Hawkins, for plaintiff in error. Hudson & Blalock and Clarke & Hooper, for defendants in error.

**PER CURIAM.** Judgment affirmed.

(94 Ga. 781)

**BANK OF SOUTHWESTERN GEORGIA v. TILLMAN et al.**

(Supreme Court of Georgia. Aug. 14, 1894.)

**DISMISSAL OF APPEAL — SERVICE OF BILL OF EXCEPTIONS.**

There being no appearance here for the defendant in error, and no evidence, by the sheriff's return or by the record, that she was a nonresident of Sumter county, and the return showing that the bill of exceptions was served upon her attorney by leaving a copy of the same at his residence, and not otherwise, the writ of error is dismissed for insufficient service of the same. Code, § 4259.

(Syllabus by the Court.)

Error from superior court, Sumter county; W. H. Fish, Judge.

Action between the Bank of Southwestern Georgia and W. M. T. Tillman and others. From the judgment, the bank brings the error. Dismissed.

R. L. Maynard, for plaintiff in error.

**PER CURIAM.** Writ of error dismissed.

(92 Ga. 596)

**PHILLIPS v. TROWBRIDGE FURNITURE CO.**

(Supreme Court of Georgia. Sept. 30, 1893.)

**EVIDENCE OF PARTNERSHIP—QUESTION FOR JURY.**

1. According to section 1890 of the Code, as construed and expounded in *Sankey v. Iron Works*, 44 Ga. 228, a joint interest in the profits of a business involves joint ownership, while a common interest negatives joint ownership, by the interested parties, and implies that one of them, at least, has no ownership of the profits whatever, and is therefore no partner. Where, under the evidence, there is any uncertainty as to whether the parties intended a joint interest in profits, or only a common interest, that question is one of fact for determination by the jury upon the contract, according to its real meaning, in the light of all the circumstances of the case, and not one for decision by the court; the contract not being in writing, but in parol.

2. Upon a question of partnership or no partnership, a letter to the plaintiff from the attorneys of the defendant, who denies the alleged partnership, written before the debt was created, and in respect to giving security for the prospective debt by incumbering specific property belonging to such defendant, and not with reference to crediting her as a partner, is irrelevant, and therefore inadmissible as evidence in behalf of the plaintiff.

(Syllabus by the Court.)

Error from superior court, Bibb county; A. L. Miller, Judge.

The following is the official report:

The Trowbridge Furniture Company, by their petition, asked for a judgment against Neal and Mrs. Phillips, as partners, and also for a judgment of foreclosure of a mortgage given by Mrs. Phillips to it. Plaintiff obtained a verdict against both defendants, and Mrs. Phillips moved for a new trial, which motion was refused by the court below, and the case brought to this court, which reversed the judgment. See 86 Ga. 699, 13 S. E. 19. The case being again tried, plaintiff again obtained a verdict against Mrs. Phillips for the amount claimed to be due, and for the foreclosure of the mortgage. Her motion for a new trial being overruled, she brings error. Reversed.

The motion contained the grounds that the verdict was contrary to law, evidence, etc. Also, that the court erred in charging: "In my opinion, taking the evidence of Mrs. Phillips herself,—what she contends to be proven by her evidence,—it makes her a partner in this case, and therefore eliminates from it the other questions raised by her pleadings about this bill of sale and her discharge." "If you find, under the evidence, that Neal was to carry on the business, and she was to become his security to the extent of a thousand dollars, and for that she was to receive thirty-three and one-third per cent. of the net profits of the furniture business, that, in law, constitutes her a partner, so far as third persons were concerned." Also, error in further charging, in same connection: "Whatever might be her relation between herself and Neal does not matter, as to the plaintiffs in this case. The law, under that sort of an arrangement, would make her a partner." The evidence of



Mrs. Phillips, referred to above, was: "I never was in partnership with Neal. Stood his security with plaintiff, and this was the only connection I had with his business. I had no interest in his business, except to stand his security, and never authorized any one to make a copartnership contract for me with him. I had no business transactions with Neal, except to stand his security, and for doing this I was to receive one-third the profits of the business. This transaction was conducted for me by my brother. The substance of it was, I was to stand Neal's security to plaintiff, and for this was to receive thirty-three and one-third per cent. of the profits of his business. Did not authorize my brother to make me a partner with Neal, and he reported to me afterwards that he had not done so. My brother told me about the bill of sale after it was made." The bill of sale referred to was given by Neal to plaintiff, and covered all the furniture in Neal's store, etc., and contained a stipulation that the mortgage against Mrs. Phillips, given by her to secure the debt mentioned in the bill of sale as being due by Neal to plaintiff, was not to be foreclosed before a certain date. Error in directing a verdict for plaintiff as follows: "The form of your verdict would be, in this case, 'We, the jury, find for the plaintiff, against Mrs. O. J. Phillips,' so much money, with interest from such a date. You have to call her name, because there are two defendants, and we decree the mortgage be foreclosed. The question for you to determine is the amount due." Error in not submitting to the jury, as a question of fact, whether or not Mrs. Phillips was a partner with Neal, to be determined by the jury from all the evidence in the case. Error in admitting in evidence letter from Lofton & Moore to plaintiff, of December 14, 1897, over objection of defendant on the grounds that it was irrelevant, and that no agency had been shown to exist between Lofton & Moore and Mrs. Phillips touching the particular transaction. The letter in question contained a statement of an examination of the records as to the title of Mrs. Phillips to the property she offered to mortgage to plaintiff, and as to incumbrances thereon, and the value of the property; also, the statement that the writers had been engaged by her brother to draw the agreement between Neal and her, to the effect that she was to receive one-third of the net profits of the business Neal expected to engage in; that she did not care for her name to be known in the business; it would be run under Neal's name alone. So the writers thought that would be a sufficient consideration flowing to her to bind her under her contract to plaintiff, etc. As to this letter, there was evidence from the secretary and treasurer of plaintiff that Neal applied for the goods, and offered as security a mortgage on the property of Mrs. Phillips; that the witness had the mortgage drawn up by Mr. Moore as security for the goods he

was to sell to Neal, and, after receiving the mortgage, commenced to ship goods to Neal; that he sold the goods upon the credit of Neal and Mrs. Phillips, and the letter in question was received from Lofton & Moore in reply to a letter witness wrote Mr. Moore after Neal had been in to see witness; that witness furnished the goods on the strength of this letter from Moore, and would not have furnished them if it had not been for that letter, and if the letter had been written without the mortgage he would not have furnished the goods. There was no material evidence upon the subject of this mortgage, in this connection, other than as appears from Mrs. Phillips' testimony.

L. D. Moore, for plaintiff in error. Lanier, Anderson & Anderson, for defendant in error.

PER CURIAM. Judgment reversed.

(94 Ga. 675)

McDONALD v. McDONALD et al.

(Supreme Court of Georgia. Aug. 14, 1894.)

ACTION ON NOTE—PRESUMPTION OF PAYMENT—INSTRUCTIONS.

The suit being founded upon a sealed note or single bond, and brought within 20 years after the maturity of the instrument, and there being no plea of non est factum, and no evidence that the words "witness my hand and seal" were not a part of the instrument when executed, it was error to charge that if these words were inserted after the execution, and without the knowledge or approval of the maker, the presumption of law is that it was paid.

(Syllabus by the Court.)

Error from superior court, Henry county; J. J. Hunt, Judge.

Action on a note by James A. McDonald against S. T. McDonald and others. Defendants had judgment, and plaintiff brings error. Reversed.

J. F. Wall, Stewart & Daniel, and J. L. Boynton, for plaintiff in error. F. D. Disuke and E. J. Reagan, for defendants in error.

PER CURIAM. Judgment reversed.

(94 Ga. 726)

DURDEN v. TRUBEE.

(Supreme Court of Georgia. Aug. 14, 1894.)

NEW TRIAL—MOTION FOR—DISMISSAL—FAILURE TO FILE EVIDENCE.

By an order passed in term, on September 18th, a motion for a new trial was set for a hearing during the next week at the superior court of an adjoining county, and the movant was allowed "until the hearing" to make out and file a brief of the evidence. On September 22d, an order was passed postponing the hearing of the motion till September 28th, and allowing the movant till that time "to perfect the brief of evidence." On September 29th, it was ordered that the hearing of the motion be postponed till October 13th, and that movant have until then to "prepare and submit the brief of evidence, without prejudice to the right of the other side to move to dismiss the motion on

the ground that the brief of evidence had not been prepared as theretofore required." No brief of evidence was ever filed or submitted to the court until October 13th, and the motion for a new trial was then dismissed for want of a brief of evidence. There was no error in dismissing the motion. The order of September 22d limited the time within which the brief of evidence might be filed to September 28th. The court had no authority to pass the order of September 29th, and, even if rightly granted, it expressly preserved the right of respondent to move to dismiss the motion for a new trial for failure to file in time the brief of evidence, as required by previous order.

(Syllabus by the Court.)

Error from superior court, Morgan county; W. F. Jenkins, Judge.

Action by Samuel C. Trubee, for the use, etc., against Blanche E. Durden. There was a verdict for plaintiff, and from a judgment dismissing a motion for a new trial defendant brings error. Affirmed.

J. H. Holland, for plaintiff in error. Foster & Butler, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 677)

#### JINKS v. LEWIS et al.

(Supreme Court of Georgia. Aug. 14, 1894.)

RES JUDICATA—PURCHASER PENDENTE LITE.

The uncontradicted evidence showing that the claimant purchased the land in controversy during the pendency of a claim case between the plaintiffs in execution and her vendor, which resulted in an adjudication that the land was subject, she, as a privy in estate of the latter, was concluded by that adjudication, and consequently there was no error in directing a verdict for the plaintiffs, this being the only result legally possible under the evidence.

(Syllabus by the Court.)

Error from superior court, Taylor county; W. B. Butt, Judge.

Action of claim by Mary A. Jinks against John F. Lewis & Son. Judgment finding the property subject. Claimant brings error. Affirmed.

The following is the official report:

An execution in favor of John F. Lewis & Son against W. H. Jinks and another, issued upon a judgment of August 28, 1886, was levied, November 8, 1886, upon land as the property of W. H. Jinks. The levying officer testified that, at the time he made the levy, the defendant Henry Jinks was in possession of the land in dispute; that he and his wife and family lived there, and are in possession of it yet. Witness knew Willis Jinks in his lifetime, who was in possession of the land for 30 years before his death, and claimed as his own. He was the father of Henry Jinks. Claimant introduced a deed to the land from Willis Jinks to Henry Jinks, dated March 30, 1874, recorded January 13, 1885, for love and affection; also, a deed from Henry Jinks to John F. Jinks, dated April 3, 1886, recorded August 23, 1887, consideration \$600; and a deed from John F. Jinks to claimant, dated January 23, 1890, recorded two days later,

consideration \$600. Plaintiffs then offered in evidence the record in a case of John F. Lewis & Son, plaintiffs in *fi. fa.*, v. Henry Jinks, defendant in *fi. fa.*, and John F. Jinks, claimant, condemning the land levied upon. To this the claimant objected, on the ground that she was not a party to it, and it should not be admitted against her. The objection was overruled, and error is assigned upon this ruling. This record showed a judgment rendered at the February term, 1890, of the superior court, the claim of John F. Jinks to the property levied upon, and the claim bond, which bond and affidavit were dated December 7, 1886, and filed in the superior court on the same day.

O. G. West and Thornton & McMichael, for plaintiff in error. O. M. Colbert, for defendant in error.

PER CURIAM. Judgment affirmed.

(92 Ga. 591)

#### STRONG et al. v. POWELL

(Supreme Court of Georgia. June 5, 1893.)

ADVERSE POSSESSION—ESTOPPEL BY DEED—EVIDENCE—DECLARATIONS—RECORD ON APPEAL.

1. When land is bounded in a deed by the land of an adjacent owner, there can be no prescription under the deed, as against such owner, further than the actual possession of the grantee in the deed extends. Occasionally, cutting and appropriating timber is not such possession of land as will ripen into title by prescription.

2. Where one of two adverse claimants of title to land took a conveyance without general warranty from the other, paying a consideration therefor, and thus settled certain pending litigation between them, in subsequent litigation between those holding under the parties to the compromise deed respectively no estoppel results from the introduction of that deed in evidence, together with the competing title of the grantee therein. Thus, where A. and B., both claiming the same land (A. having previously owned an adjoining tract, parcel of the same original tract, and conveyed it to C.), engaged in litigation wherein they asserted their respective titles, and this litigation was settled between them by A. making a conveyance without full warranty to B., in consideration of \$150, and afterwards B. conveyed to D., and still later D. and one holding under C. litigated touching a small parcel of land, which the latter claimed to be a part of the adjoining tract conveyed by A. to C., the other party (D.) contending that it was a part of the tract to which B. had title at the time A. executed the compromise deed, the acceptance of that deed by B., and its introduction in evidence by D., will not estop D. from relying on B.'s original title, and denying that A. had title to the small parcel now in controversy when the compromise deed was executed, or at any other time.

3. Although the conveyance under which a person claims title to a small parcel of land describes the tract conveyed as containing 100 acres, more or less, a deed made by him to a purchaser, which is admitted not to cover the premises in dispute, is not admissible in evidence against the maker solely because it also purports to convey 100 acres, more or less. This latter deed is no admission by the maker that he conveyed by it all the land which he acquired by the former, the descriptive terms in the two

instruments being in some respects materially different, though similar in their reference to acreage or quantity.

4. The declarations of the vendor to the vendee, or to her agent making the purchase, to the effect that a deed held by the former covered a particular parcel of land on which the parties then were, are not admissible in evidence in favor of the vendee, and against an adverse claimant, in a subsequent controversy touching boundary.

5. The record in this case furnishes an example of failure to set out evidence objected to, and of failure to specify the erroneous parts of long extracts from the charge of the court. Consequently, some of the matters embraced in the motion for a new trial cannot be dealt with. (Syllabus by the Court.)

Error from superior court, De Kalb county; R. H. Clark, Judge.

Action by Thomas S. Powell against C. H. Strong and others. Judgment for plaintiff. Defendants bring error. Reversed.

The following is, in substance, the official report:

This case was formerly before the supreme court, and a report of it will be found in 87 Ga. 138, 13 S. E. 280, under the name of Adams v. Powell. At the last trial, the plaintiff filed an amendment as follows: "The northern boundary of the land sued for is an old hedgerow, where an old fence once stood, which has long since rotted down; and the eastern boundary is a line parallel with the west line of said land lot No. 200, and is an extension northward of the east line of the tract of land formerly owned by Starling Goodwin, and now owned by plaintiff; said east line being 1,400 feet east of the west line of said land lot. Said hedgerow to which petitioner claims is about one hundred feet south of the line described in petitioner's original declaration. The number of acres claimed is eighteen, more or less." In addition to the general grounds, the motion for new trial sets forth the following: "(1) That the court erred in admitting in evidence a deed from the defendant to Mrs. Maud Edwards, defendant objecting, on the ground that the same was irrelevant and covered no part of the premises in dispute. As appears from the brief of evidence, this deed was dated March 15, 1889, and conveyed a parcel of land in the 18th district of De Kalb county, 'commencing at a stake on the west line of land lot two hundred, and running north, along the line, nine hundred and forty-two (942) feet, more or less, to the northwest corner of said lot; thence east, along the north line of said lot, to the northeast corner of said lot; thence south, along the line of said lot twenty-one hundred and forty-nine (2,149) feet, more or less, to a point dividing said lot from that owned by Dr. T. S. Powell; thence west, dividing these premises from Dr. T. S. Powell, fifteen hundred feet, more or less; thence north twelve hundred and twenty-seven (1,227) feet, more or less, to a stake; thence west fourteen hundred and sixty-nine (1,469) feet, to the beginning point,—all being part

of land lot number two hundred, containing one hundred acres, more or less, except the right of way of the air-line railroad.' (2) That the court allowed the plaintiff to testify as to what was said and done by John Hager at the time he sold the land conveyed in the deed to Julia L. Powell, declaring that part of the land in dispute was of the land covered by his said deed, and pointing out where the boundary of the land was, and how it was marked." The objection was that this evidence was not binding on the defendant, who did not claim under John Hager, and that there was nothing in the deed referring to the boundaries and landmarks pointed out by Hager. "(3-8) That the court erred in charging the jury as follows: 'Well, now you have heard the evidence; and, if you believe from the evidence that the plaintiff and the defendant both trace title back to Mrs. Dorsey,—Mrs. Mary E. Dorsey,—then she is the common grantor of both, and the plaintiff has shown his right to recover so far as that is concerned upon that ground. Upon that, gentlemen of the jury, I will charge you hereafter, you taking cognizance of what I charge you now, and applying it to what I will charge you hereafter in regard to this matter. In short, you must believe from the evidence that they both claim under Mrs. Mary E. Dorsey, to give the plaintiff a right to recover at all. Therefore, gentlemen of the jury, if you should believe from the evidence that Dr. Powell, the plaintiff here, holds under a title,—a paper title,—and that he has been in possession of a portion of this land continuously and adversely and under claim of right for as much as seven years, and that this piece of woodland that is in dispute is within the boundaries of Dr. Powell's deed, he would have a right to recover upon that prescriptive right; that is, though, gentlemen of the jury, providing that there was not another person who, under some legal claim, was disputing the possession or title to this strip of land, and exercising acts of ownership under it, because, as to that title by possession, it must be continuous and uninterrupted. If, during the time, there is another contending for it, and exercising acts of ownership over it, it may or may not interfere with his right to recover upon his prescriptive title. About that you will decide from the law that I have given you in charge. In respect, gentlemen of the jury, to the boundaries of this land, I charge you, as applying the law of prescription to it, that although Dr. Powell's deed may claim 93 acres, and that there is not 93 acres in his claim, counting this strip of woodland in, yet if you believe from the evidence, taking the deed and the evidence applicable thereto, that as far as he claims is a portion of the 93 acres, then he would be entitled to the benefit of it. The defendant, gentlemen of the jury, contends that this land belonged to Solomon Goodwin, Sr., way

back of the rights of Mrs. Dorsey, or any one this side of the Goodwins, and that Solomon Goodwin, Sr., deeded this land jointly to two of his sons, Solomon, Jr., and Starling; that Solomon had the north half, and that Starling had the south half (or what was substantially that), of that land lot; and that after having been given to them that way in consideration of the fact that that south half was worth so much more than the north half, that they agreed upon a boundary line which gave to the north half, say 120 acres, and to the south half 73 acres. Now, gentlemen of the jury, you must gather from the evidence what you believe upon this point. Do you believe that there was an agreed boundary between these parties? Before you can pursue that matter any further, or make it any more applicable to the case, you must believe that the two Goodwins established this agreed line between them. If you do not believe that, of course it is no element in the case, and you need go no further in the investigation of that branch of it. But if you do believe, gentlemen of the jury, that that was the case, that that is true, that that was the line, and that the subsequent owners of the land recognized that as the line, why then any one purchasing under that state of the case, while that was in existence, would be bound by that. That line, though, gentlemen of the jury, must be afterwards recognized by the subsequent owners, and the subsequent owners under which these parties claim; and, if you should believe that it was so recognized by the subsequent owners, it would still exist as a fact. I charge you, in reference to that, that notwithstanding you may believe that this was the agreed line between the two Goodwins, and that it was recognized by subsequent owners, yet if you believe from the evidence that, in the course of time, Mrs. Mary E. Dorsey came to own the whole of this land, and that, after coming to own the whole of it, she ceased to recognize that boundary line by giving to one person a deed to 93 acres, under whom Dr. Powell claims, and deeding to another 100 acres, under whom the defendant claims, that prior boundary line would go for nothing in this case. Now, in reference to the parties holding under a common grantor, it is conceded here that Mrs. Dorsey owned, or had a deed to, both of these lands, but that the defendant says they do not hold under Mrs. Dorsey, but they bought it at sheriff's sale, as the land of Solomon Goodwin. Well, if you should believe that John M. Dorsey, the husband of this woman, and under whom she claimed, bought this land from Solomon Goodwin, and that it was afterwards sold at sheriff's sale, and that James O. Powell bought it as the property of Solomon Goodwin, but that Mrs. Dorsey filed a bill to set aside that sale, and a decree was rendered in that case,—the decree that is before you,—

and that, in consequence of that decree, this defendant took Mrs. Dorsey's deed, they would be estopped, in my judgment, gentlemen of the jury, to deny that they held under Mrs. Dorsey.' "

Caudler & Thomson, for plaintiffs in error. Hall & Hammond, for defendant in error.

PER CURIAM. Judgment reversed.

(32 Ga. 577)

### JOHNSON v. STATE.

(Supreme Court of Georgia. March 14, 1893.)

CRIMINAL LAW—EVIDENCE OF ACCOMPLICES—TIME OF COMMITTING OFFENSE—BURGLARY.

1. It was not error for the court, in charging the jury, to instruct them to look at the case in two aspects—First, leaving out of view the evidence given by accomplices, to inquire whether there was enough proved otherwise to warrant them in finding a verdict of guilty; and, secondly, to consider the case upon all the evidence, the accomplice evidence included. The charge was not prejudicial to the accused, because the accomplice evidence bore against him,—none of it in his favor,—and the court charged that no conviction could be had upon it unless it was corroborated.

2. Generally, the time when the alleged offense was committed, so that it be not barred by the statute of limitations, is immaterial; but when the evidence renders it material, relatively to other facts in evidence, the jury may and should recognize its materiality. A charge to this effect, though apparently superfluous, was not erroneous.

3. It is not for the jury to pass upon the conduct either of the judge or of the solicitor general in conducting a criminal case.

4. Where there was no evidence connecting the accused with the alleged burglary, except the testimony of two witnesses who admitted that they were accomplices in the burglary, and the state sought to corroborate the accomplices by showing that a garment found on the person of the accused recently after the commission of the offense was a part of the goods taken from the broken building by the burglars, evidence which fails to identify the garment as such, with reasonable certainty, is not sufficient corroboration; the owner of the goods having testified as a witness in behalf of the state, and the record showing no reason or explanation why he failed to testify to the identity, or to a description by which the identity might appear. In consequence of this failure to corroborate the accomplices the evidence was insufficient to warrant the verdict, and it was error not to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Fulton county; R. H. Clark, Judge.

The following is the official report:

Delk, Moore, and Johnson were indicted for breaking and entering the tailor shop of B. Fresh, and stealing eight pairs of pants and five coats. Johnson was found guilty, and his motion for a new trial was overruled, and he brings error. Reversed.

The special grounds of the motion were that the court erred in the following parts of the charge: (1) "I will charge you first, upon this case, as though Delk and Moore had not testified at all. I will first present the case

to you with these men entirely out of it, and in no way in question in the case; and then taking the testimony that is before you as to the possession of a pair of pants, or couple of pair of pants, by this defendant, and all the testimony going to illustrate the possession of the pants, the management in regard to it, and the conduct about it, do you believe you would be justified, in the law, in finding this defendant guilty of burglary in this case? Do you believe, then, applying the rule of law above, as to the evidence, as I have given it to you, that you would be warranted in finding this defendant guilty? If so, and you so believe, you should do so." (2) "Perhaps I ought to charge you that the time that this burglary was committed, if you believe that a burglary was committed, is immaterial. The law allows the state to go back four years, in cases of this sort, prior to the date when the bill of indictment was found. But if, upon the testimony, the time is made by the evidence material, it may be made from the run of the evidence material, and therefore, if that is the case, you are to consider the time." (3) "The solicitor general, under the law, has a right to conduct a case for the state as he sees fit, and then, when it reaches the judge, he has a right to do the same; and it is not for the jury to pass upon that." (4) The motion contained also the grounds that the verdict was contrary to law and evidence. It appeared from the testimony of Fresh that his tailor shop was broken on Friday night, just before or just after the 1st day of August, 1892, which was Monday, and that second-hand clothes of the value of about \$125, which had been left with him to be cleaned and repaired, were stolen therefrom. He further testified: "When I found the goods missing, I reported the same to Wright, Bedford, and Cason, at police headquarters, and I got one coat and two pairs of pants back. I identified the two pairs of pants and coat at the station house about six weeks after the breaking. I went with the officers, and searched old man Johnson's house (the father of defendant), and started to identify a pair of pants we found there, but did not, as they were not mine. Mr. Johnson told me to take them if I wanted them, but they were not mine." D. S. Looney testified: "I got a pair of Fresh's pants off of defendant. We got two or three pairs of pants, and a coat or two, but only got one pair of pants—a brown pair—from defendant. He said he got the pants from a boy named Myers, and that he had had them about six weeks. I went to Anniston, Alabama, after Delk and Moore. I found Delk in the station house there. It was after he was brought back that he told me Johnson was one of them, and what kind of clothes he had on. In getting up these goods, we arrested a man by the name of Joe Montgomery,

who also went by the name of Myers. He sawed out of the station house and got away about the 30th of last August. The other goods I found that belonged to Fresh were in Oxanna and Anniston,—a pair of pants, and a coat or two." C. M. Cason testified: "The pants that Johnson had on when arrested were the pants that matched the coat that Fresh has on now. It was a week or two ago [in September] when Delk and Moore told us about Johnson. When we arrested Johnson he pulled off the old pants he had on, and started to put on the pants he wears out of the shop, and I told him we wanted the ones he had pulled off. I think some of the officers have the pants in their possession yet. Old man Johnson was perfectly willing for us to search his house." Will Harbuck testified: "I work at Frank E. Block's. Defendant worked there. I burned up an old pair of pants that belonged to him. Old man Johnson told me to do it. He had come after his son's clothes. I burned a pair of pants and an old undershirt. No one picked out the pants to burn. They were under the table with his clothes. I disremember the pants. They were black, with blue or green stripes. They had two patches on the seat,—sewed on the outside. Old man Johnson took a pair of pants away with him, and a top shirt." Cross-examined: "The next morning after defendant was arrested, I was at Mr. Johnson's house, and told him about his son's clothes being up at the factory, and went with him there after them. Did not tell him about the pants. When he came down after the clothes, he found those old patched pants, and said they were old and shabby, and said he didn't believe he would take them home, and to burn them up. They were old, shabby pants, with two patches on the seat. They were pants he had to work in. Mr. Johnson said I could burn them if I wanted to. He had left before I burned them. He did not know the things were there until I told him about them." Delk and Moore testified that they and Johnson committed the burglary. Delk testified that Johnson got two pairs of pants,—one a kind of yellow cheviot, the other of green checks. There was testimony for defendant that he had a dark brown pair of dirty pants on July 10, 1892, and that the burglary was committed on the night of August 19th. He stated that he got a pair of pants from a fellow who said his name was Charlie Myers, but whose name was Joe Montgomery,—gave him 75 cents, and was to pay him 15 cents more, but never saw him any more,—and that he knew nothing of the burglary, etc.

Frank L. Haralson, for plaintiff in error.  
C. D. Hill, Sol. Gen., for the State.

PER CURIAM. Judgment reversed.

(94 Ga. 680)

**EARLY COUNTY v. POWELL.**

(Supreme Court of Georgia. Aug. 14, 1894.)

**COMPENSATION OF CLERKS OF ELECTIONS—LIABILITY OF COUNTY—SERVICE OF PROCESS ON COUNTY—POWERS OF SHERIFF.**

1. A special act providing for the compensation of managers and clerks of elections in a given county, which declares that these persons shall each receive for their services in holding elections two dollars per day, entitles them to the per diem mentioned, not only for the day on which the voting is done, but for the next day, when their services are necessary in completing the count and making up the returns.

2. The county, when charged by statute with the expense of holding elections, may be sued for the same, after due presentation of the claim to the proper officers, and their refusal to audit and allow the same.

3. Proof that an account was presented to be audited and allowed implies that the account was in writing when presented.

4. By virtue of the act of October 17, 1885 (Acts, p. 68), the sheriff is empowered to serve a summons originating a suit in a justice's court. Personal service made by him upon county commissioners is personal service upon the county, where such commissioners, and not the ordinary, are the financial agents of the county.

(Syllabus by the Court.)

Error from superior court, Early county; J. M. Griggs, Judge.

Action by A. G. Powell against the county of Early. Plaintiff had judgment, and defendant brings error. Affirmed.

The following is the official report:

Powell sued Early county in a justice's court on an account for two days' service as clerk in the election for county officers (four dollars), and one day's service as clerk in the election for justice of the peace in the 866th district, G. M. (two dollars). Upon this account was an affidavit by plaintiff that the same was just, true, and unpaid; that he had presented it to the board of commissioners of roads and revenues of Early county, and they refused payment; and that it is lawful to be paid under the act of the legislature of 1885 (Acts 1884-85, p. 643). The suit was personally served by the sheriff on five named persons, as a majority of the county commissioners. At the trial, plaintiff testified that he served two days as clerk at the election in January, 1893, for county officers, serving from 7 o'clock a. m. to 11 o'clock p. m., when the managers adjourned to 8 o'clock next morning, and then "finished counting out in time to consolidate." He also served as clerk in the election for justice of the peace in 1893, for which he was entitled to two dollars per day. The justice gave judgment for six dollars in plaintiff's favor. By certiorari, defendant assigned error because: (1) There was not sufficient evidence to authorize the judgment, there being no evidence as to the time when the alleged service as clerk in the election for justice of the peace was rendered. Nor was there any evidence going to show that the account, or any part of it, had ever been presented to the county au-

thorities in writing, and refused by them, except the affidavit of plaintiff, and the law only contemplates judgment against defendant on affidavit when there has been personal service on defendant. (2) The court had no evidence that there had been any service on the county, the law requiring that a justice's court summons be served by a constable. Nor did defendant waive service. While it did appear at the trial by attorney, it did not plead, or offer any defense whatever. (3) The spirit and meaning of the law is that clerks of elections shall receive two dollars for their whole service therein. (4) The county, being an integral part of the state, is not liable under a suit of this kind, there being no provision of law for a county to be sued for a cause of action of this sort.

R. H. Sheffield and Harrison & Peeples, for plaintiff in error. A. G. Powell, H. C. Sheffield, and R. H. Powell, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 689)

**RAINES v. AMERICAN FREEHOLD MORTG. CO.**

(Supreme Court of Georgia. Aug. 14, 1894.)

**ACTION ON NOTE—USURY—CONFLICT OF LAWS.**

This case is ruled by Jackson v. Mortgage Co., 15 S. E. 812, 88 Ga. 756.

(Syllabus by the Court.)

Error from superior court, Quitman county; G. F. Gober, Judge.

Action on notes by the American Freehold Mortgage Company of London, Limited, against A. M. Raines, administrator. Plaintiff had judgment, and defendant brings error. Affirmed.

The following is the official report:

The plaintiff sued A. M. Raines, as administrator of T. B. Raines, deceased, upon a promissory note for \$1,000 principal, and upon an interest note for \$80, which had not been paid when due. The notes were payable in New York. Plaintiff also prayed for a special lien on land conveyed by deceased as security for the loan represented by the principal note. Defendant pleaded, among other things, that the notes and deed were absolutely void for usury, under the laws of New York, more than 6 per cent. interest having been charged and taken. Under instructions of the court, the jury found for the plaintiff; and defendant excepted on the ground that the court excluded from the consideration of the jury the question as to whether the parties to the contract sued on intended that the statutes of New York on the subject of interest and usury should control as to the lawful interest to be charged on the notes, and as to whether usury was contracted to be paid. The two notes sued on were signed by T. B. Raines, dated Georgetown, Ga., March 18, 1885, due December 1,

1889, at the office of the Corbin Banking Company, New York City, payable to Sherwood, and indorsed to plaintiff without recourse,—one for \$1,000, with interest from date at the rate of 8 per cent. per annum, waiving exceptions; the other for \$80, with interest from maturity at 8 per cent. per annum. The deed from T. B. Raines to Sherwood was headed, "Georgia, Quitman County," was dated March 18, 1885, recorded April 15, 1885, conveyed 355 acres of land in Quitman county, Ga., and contained the following: "This conveyance is made by the said party of the first part to secure a loan of \$1,000 made him by the second party herein, under the conditions of a certain bond for reconveyance executed by the said second party to the said first party, which said bond is made a part hereof. This deed and said bond are executed to conform to sections 1969, 1970, and 1971 of the Code of Georgia." The bond referred to, headed and dated like the deed, recited that, to secure said loan and interest, T. B. Raines conveyed by deed to Sherwood the property described in the deed, and bound him to reconvey the land "upon a full compliance with the conditions set out in said promissory note" for the loan "and this bond," and contained these words: "The deed above referred to and this bond, being executed in reference to each other, and to conform to sections 1969, 1970, and 1971 of the Code of Georgia, and are to be construed and enforced according to the provisions thereof." By deed of the same date, Sherwood conveyed to the plaintiff, subject to Raines' right to reconveyance. In evidence was an agreement of T. B. Raines with Worrill & Lumpkin, Cuthbert, Ga., dated Georgetown, Ga., March 6, 1885, whereby he constitutes them his agents to negotiate for him a loan for \$1,000 on five years' time, with interest at 8 per cent. per annum, to be evidenced by note; said note and loan to be secured by mortgage or deed, and in case of deed the lender to give bond to reconvey, according to the printed blanks used by said Worrill & Lumpkin, "in pursuance of sections 1969, 1970, and 1971 of the Code of Georgia of 1873;" said deed to convey T. B. Raines' farm of 355 acres in Quitman county, Ga., and "interest to commence on the loan the day this application is accepted by the lender," and binding Raines to pay Worrill & Lumpkin \$200 commissions. The deeds, bond, and agreement all describe the same land. The defendant introduced four notes for interest on the \$1,000, dated at Georgetown, Ga., March 18, 1885, payable to Sherwood or order, at the office of the Corbin Banking Company, New York City, indorsed to plaintiff, each stipulating for interest from maturity at 8 per cent. per annum; the first for \$56, due December 1, 1885, the others for \$80 each, due, respectively, December 1, 1886, December 1, 1887, and December 1, 1888. All of them were marked "Paid" by the Corbin Banking Company. Defendant

also introduced the statutes of New York on the subjects of interest and usury, whereby all contracts for a greater rate of interest than 6 per cent. per annum were void at the time of making the contract involved in this case. It was also in evidence that the deed from Raines to Sherwood was executed in Georgetown, Ga., and at that time, and until his death, Raines resided in Georgia, while Sherwood resided in New York. The special assignments of error are that the court erred: (1) In charging the jury: "From these papers, taken together, this contract should be construed under the laws of Georgia, and you will measure it by the laws of Georgia so far as the rate of interest is concerned. As to whether there is any usury in it or not, is a question to be determined under the laws of Georgia, and for you to determine from the evidence in this case." In charging: "As I have charged you, this matter is to be measured under the laws of Georgia; and, whether there is any usury or not in the transaction, it does not void the note, but simply excludes the illegal part of the interest. But it would void the deed made to secure it, if you should determine in this case that it is infected with usury." In refusing to charge: "A promissory note payable in the city of New York, with interest from its date at the rate of eight per cent. per annum, is open to attack for usury by proof that the law of New York limits the rate of interest to six per cent. per annum, and declares void all contracts in which any higher rate is stipulated or reserved. The fact that the note was secured by a deed conveying land situated in Georgia would not render the statute of New York inapplicable."

Wm. Harrison, J. H. Guerry, and W. D. Kiddoo, for plaintiff in error. W. C. Worrill and W. E. Simmons, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 459)

#### BOZEMAN v. BISHOP et al.

(Supreme Court of Georgia. April 2, 1894.)

##### DEED—NATURE OF ESTATE—EXECUTION.

A donee of land having two children and the conveyance made by the donor before to him by name, and to his children without naming them, passed to the father and each of the children an estate for the life of the father, with remainder to the children, and the father's life estate in the premises was subject to levy and sale for his debts; the terms of the conveyance, so far as material, being as follows: "I \* \* \* do give, grant, and convey unto [B.] and his lawful children [certain lands], to have and to hold \* \* \* to them, the said [B.'s] children, their heirs and assigns, to be for the use, support, and maintenance of the said [B.], and for the support and education of his children during the said [B.'s] natural life, and at his death to be equally divided amongst his lawful children; and should it become necessary, for the interest of said children, at any time, or for the interest of said [B.], to sell or dispose of the said lands, the proceeds therefrom shall be in-

vested in negro property, to be for the use of the said parties hereinbefore named, and at his, the said [B.'s], death, to be divided equally amongst his, the said [B.'s], children; the right and title to all of which I hereby relinquish and convey unto the said [B.] and his children, free from the claims of myself and all other persons whatsoever."

(Syllabus by the Court.)

Error from superior court, Fayette county; S. W. Harris, Judge.

Action by Bishop & Pritchard against L. J. Bozeman. From a judgment, Bozeman brings error. Affirmed.

Stewart & Daniel, for plaintiff in error. Dorsey, Brewster & Howell, for defendants in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 677)

### ROYCE v. SMALL

(Supreme Court of Georgia. Aug. 14, 1894.)

EXECUTION—CLAIMS OF THIRD PERSON—WITHDRAWAL—TRIAL.

1. The court having refused to allow the claimant to withdraw his claim, stating as a reason for the refusal that the claimant had stipulated not to withdraw, it was not error to deny a subsequent motion made by the claimant to dismiss the claim, there being no mode of dismissing a claim at the claimant's instance otherwise than by withdrawing it.

2. Where the claimant refuses to join issue with the plaintiff in the claim case, the plaintiff may proceed with the trial and submit his evidence without any joinder of issue, or he may, at his option, move to dismiss the claim; but the claimant cannot have it dismissed for his own default.

(Syllabus by the Court.)

Error from superior court, Taylor county; W. B. Butt, Judge.

Claim case between A. B. Small and H. H. Royce. From the judgment, Royce brings error. Affirmed.

W. E. Steed and Little, Wimbish & Worrill, for plaintiff in error. Thornton & McMichael and O. M. Colbert, for defendant in error.

PER CURIAM. Judgment affirmed.

(93 Ga. 584)

### BLOIS v. STATE

(Supreme Court of Georgia. May 2, 1893.)<sup>1</sup>

MURDER—TESTIMONY OF ACCOMPLICE—SUFFICIENCY TO CONVICT.

Corroboration of an accomplice upon the facts and circumstances of the corpus delicti, when these facts and circumstances have no more tendency to fix guilt upon the accused than upon any other person, will not dispense with corroboration of that part of the testimony of the accomplice which goes to identify the accused as the perpetrator, or one of the perpetrators, of the crime. In the present case all the facts and circumstances, taken separately or collectively, relied upon as corroboration, were consistent with innocence on the part

of the accused, and were therefore insufficient to satisfy the rule of law which requires the evidence of a single witness, who is himself an accomplice, to be corroborated, and forbids conviction on a charge of felony upon the evidence of an accomplice alone.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Joe Blois, alias Joe Johnson, was convicted of murder, and brings error. Reversed.

The following is the official report:

The plaintiff in error, together with Gus Williams, Charles Bacon, Marion Heyward, and James Gay, was indicted for the murder of August W. Meyer. The defendants severed. The plaintiff in error was tried, convicted, and sentenced to death. He moved for a new trial. The motion was denied, and he excepted. The special ground of the motion is that the following part of the charge of the court was argumentative, and tended to impress the jury with the idea that the court discredited the defendant's statements, and intimated an opinion as to what had been proved, and as to the guilt of the accused: "I charge you that you cannot convict the prisoner upon the testimony of an accomplice alone, uncorroborated by other circumstances connecting the prisoner with the perpetration of the crime. I mean by this that, if you find that Charlie Bacon is an accomplice in this crime, you could not convict the prisoner at the bar upon his testimony alone, unless it was corroborated by such circumstances as I have spoken of. You will therefore look into this evidence, and determine whether the testimony of Charlie Bacon shows that this prisoner participated in the crime, and whether there are sufficient corroborating circumstances to justify you in finding the prisoner guilty. If it appears from the evidence of Charlie Bacon that there was a deliberate agreement between the parties to rob Mr. Meyer; that the prisoner at the bar told them that he had a key, and would let them in for that purpose; and it appears further from the evidence that the witness was to do certain things (for instance, watch); that he was watching in the way he told, if such appear in evidence; that he saw certain conspirators named being let in by the prisoner at the bar; that afterwards Mr. Meyer came, and the prisoner at the bar let him in, and then, standing upon a pile of bricks, and looking through a window, he saw the crime perpetrated; he saw one man strike Mr. Meyer down with an axe helve, then the prisoner strike him with a soda-water bottle, and another, named in the indictment, cut his throat; if it appears further from the evidence before you, of a physician, that there are wounds on the head that could be made by the instruments named by the witness; if it further appears in evidence that the victim's throat was cut; if it further appears in evidence that there was a pile of bricks at the window where he said he looked through,—consider all these

<sup>1</sup> Case withheld by direction of the court.



facts and circumstances in determining whether you will believe what the witness says, more particularly if it appears that immediately upon the arrest of that person he made the same statement that he now makes before you, and has made the same statement before. Consider all these facts in considering whether you will believe his testimony. Has he been impeached? The credibility of witnesses is for you to determine under your oath. Suppose you believe his testimony. Are there corroborating circumstances connecting this prisoner with the crime? Is there any evidence in this case to show the presence of the prisoner at the bar at the scene of action, or near the scene of action? Does it appear in the evidence that he was seen within a short distance of the scene of the crime, upon West Broad street, by a party who spoke to him; that he was then in the presence of other parties? Does it appear in evidence in this case who those parties were upon the street near the scene of action at that time? Is there sufficient evidence before you to show that the prisoner at the bar was at some point near this scene of crime with Jim Gay and Gus Williams upon that evening? Was he at the scene of the crime before the very body of the victim of the crime was cold? What was his conduct at that time? Were there any inconsistencies as to the statements of what he did? Does it appear that he went immediately and informed of the crime, or does it appear in evidence that he went to another party, and counseled as to what he should do before he made the statement to this white man? If such appear in evidence, all these are matters for you to consider in determining whether there are sufficient corroborating circumstances testified to, corroborative of the testimony of the accomplice, as to whether you will convict him. I say to you, gentlemen, that the sufficiency of such testimony is for you to determine."

J. Gagan and L. Kenan, for plaintiff in error. W. W. Fraser, Sol. Gen., J. M. Terrell, Atty. Gen., and W. W. Osborne, for the State.

PER CURIAM. Judgment reversed.

(92 Ga. 591)

#### HEYWARD v. STATE.

(Supreme Court of Georgia. May 2, 1894.)

MURDER—TESTIMONY OF ACCOMPLICE—SUFFICIENCY TO CONVICT.

This case is controlled by the case of Blois v. State (decided at this term), 20 S. E. 12.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Marion Heyward was convicted of murder, and brings error. Reversed.

J. Gagan and L. Kenan, for plaintiff in error. W. W. Fraser, Sol. Gen., J. M. Terrell, Atty. Gen., and W. W. Osborne, for the State.

PER CURIAM. Judgment reversed.

(42 S. C. 40)

#### SELLERS v. HANCOCK.

(Supreme Court of South Carolina. July 26, 1894.)

PLEDGE—SALE ON DEFAULT—ORAL CONTRACT.

1. The statute (18 St. at Large p. 124) amending the law as to sales of personalty pawned under written instruments does not apply where the pledge is oral. There the pledges may sell, without formality, after default.

2. Where plaintiff's requests to charge are in writing, and embodied in the report of the case, and the justice had charged them all to be correct in law, except the ninth, an exception that the justice erred in not charging plaintiff's requests is sufficiently definite.

Appeal from common pleas circuit court of Chesterfield county; Ernest Gary, Judge.

Claim and delivery by Julius A. Sellers against James C. Hancock. Judgment for defendant before trial justice. From the circuit court's order for a new trial, defendant appeals. Affirmed.

Prince & Stevenson, for appellant. E. J. Kennedy, for respondent.

POPE, J. The appeal comes to us in this manner: The plaintiff began his action in a trial justice's court for Chesterfield county for the recovery, under claim and delivery, of a cow which he claimed the defendant wrongfully wrested from his possession. At the trial the plaintiff requested the trial justice to charge the jury: "(9) If the cow was delivered to Brown [through whom plaintiff claimed] simply as a pledge, and not sold to Brown," "then Brown, when Covington failed to pay at the stipulated time, had a right to sell the cow." The trial justice refused to make this charge because, as he declared, it was in violation of the statute of this state, as found at page 124, 18 St. at Large, amending the law as to the proceedings attending sales of personal property under pledge or pawn or mortgage under written instruments. The jury found a verdict for defendant. On appeal to the circuit court, Judge Gary held that this charge was misleading,—being influenced, no doubt, in view of the fact that the pledge here was not under a written instrument,—and ordered a new trial. The defendant appeals to this court on six grounds: (1) Because the court erred in holding that the charge of the trial justice as to plaintiff's ninth request was misleading. (2) Because the court erred in ordering a new trial when he did not find any error in the proceedings below. (3) Because the court erred in considering the exception raising the question of the legality of the charge as to plaintiff's request, the ex-

ception being too general. (4) Because the court erred in holding that the trial justice improperly refused to charge the plaintiff's ninth request to charge. (5) Because the court erred in holding that the trial justice instructed the jury improperly that a pledgee must follow the statute regulating the sale of pledged property, in order to legally sell a pledge. (6) Because the court could only grant new trials for error of law or fact, but in this case it is granted merely on the ground that part of a charge was misleading; there being no error of law or fact announced, and no motion of counsel to set aside the verdict on that ground, and no exception raising that question.

(a) Was it misleading for the trial justice to refuse a request, and announce that the reason he did so was because the law (quoting it) made such a sale illegal? It seems to us that a graver error, and one more prejudicial to the vindication of the plaintiff's rights at the hands of the jury, could scarcely have been committed by the trial justice. Here Sellers, the plaintiff, was resting his right to recover property, for which he had paid full value, almost entirely upon the verbal pledge of one Wiley Hancock, its owner at that time, of the very property in dispute, to Edmond Brown, with a positive agreement, "by word of mouth," that the property pledged should be Brown's if he (Wiley Hancock) did not pay a certain sum in two weeks, leaving the cow in Brown's possession; and when Brown traded the cow for full value to the plaintiff, Sellers, and delivered him possession of the property, it must appear to every one that his (Sellers') right of property did not rest upon any written instrument. But the trial justice directed the jury that the law as to the sale of property in pledge by the pledgee, when such pledge is under a written instrument, must govern. This was error, and the circuit judge did right in so holding.

(b) The next (2) exception overlooks the fact that the circuit judge did find an error of law in the refusal of the charge by the trial justice, and one very serious in its consequences to plaintiff's rights. The circuit judge ordered a new trial because of this error.

(c) We do not think the exception to the trial justice's refusal to charge the ninth request was too general. The plaintiff had embodied his requests to charge in writing, that were set out in the trial justice's report of the case. The trial justice had charged all to be correct in law, except the ninth. Such being the case, when the plaintiff in the court below, in his tenth exception, stated: "(10) Because the trial justice erred in not charging the requests made by the plaintiff,"—he enabled the circuit judge to lay his finger directly upon the alleged error. Hence, it cannot be said the exception was too general.

(d) We think the trial justice should have charged the jury as, in the ninth request of

the plaintiff, it was asked of him. This being a pledge not under a written instrument, it would have been proper for the trial justice to have charged: "If the cow was delivered to Brown simply as a pledge, and not sold to Brown, then Brown, when Covington failed to pay at the stipulated time, had a right to sell the cow."

(e) We think the fourth and fifth grounds of appeal are already disposed of in our previous declarations of the law.

(f) We think the sixth ground of appeal is disposed of by what we have held under the division b.

It is the judgment of this court that the judgment of the circuit court be affirmed.

McIVER, C. J., and McGOWAN, J., concur.

(42 S. C. 158)

NURNBERGER v. TOWN COUNCIL OF BARNWELL. CALIFF v. SAME. BROWN v. SAME. ANDERSON v. SAME. FURMAN et al. v. SAME.

(Supreme Court of South Carolina. July 27, 1894.)

MUNICIPAL CORPORATIONS—LIABILITY FOR EXCESSIVE LICENSE FEES.

The dispensary act authorized licenses for the sale of liquor to be issued to June 30, 1893, and no longer, on payment of half the required annual fee. Plaintiff paid the full annual fee for a license to January 1, 1894, upon the promise of the town council to refund the excess if the license should be held void after June 30th. Plaintiff was compelled to cease business under the license on June 30th. Held, that an action against the council for money had and received would lie to recover the excess paid.

Appeal from common pleas circuit court of Barnwell county; James F. Izlar, Judge.

Actions by O. F. Nurnberger, O. C. Califf, Charlie Brown, H. K. Anderson, and J. E. Furman & Bro., respectively, against the town council of Barnwell, to recover excessive license fees exacted from them. The cases were considered together, and judgment rendered for plaintiffs. Defendant appeals. Affirmed.

Robert Aldrich, for appellant. Bellinger & Thompson, for respondents.

McGOWAN, J. The complaint in each of the above five actions, except in the single particular of the name of the plaintiff, is identical; and, to avoid confusion, we will confine ourselves to the first one, regarding what may be said in that as applying to each of the others.

The complaint stated, among other things, "that the town council of Barnwell, up to the 30th of June, 1893, had the power of fixing the amount of license for the retail of intoxicating and malt liquors within the limits of the town of Barnwell; that the defendant town council fixed the amount of the license for the retail of liquor within the said town of Barnwell from the 1st day of January, 1893, to December the 31st of

same, at the sum of \$560; that the act approved December 24, 1892 (section 6), and known as the 'Dispensary Act,' provides 'that no license for the sale of spirituous liquors now authorized to be granted by municipal authorities shall be of any force or effect after June 30, 1893, but licenses may be issued or extended to said June 30, 1893, upon payment of one-half the annual license required by the municipal and county authorities;' that the plaintiff, as aforesaid, after having complied with all the requirements for obtaining license in incorporated towns, tendered to the said town council the sum of \$280,—one-half of the annual license as fixed by the said town council,—and demanded a license for six months, expiring on June 30, 1893; that the said defendant, as aforesaid, refused to accept the same, but demanded the full sum of \$560,—the full amount of the annual license as above; that the plaintiff thereupon, under protest, paid to said defendant the said sum as fixed for an annual license, and the said town council, through the proper officers, duly issued to the plaintiff license to carry on the business of retail liquor dealer in the town of Barnwell until the 1st day of January, 1894, etc.; that the said plaintiff was induced to pay the said excess of \$280 upon the promise by the said town council that if the said license was illegal and void after June 30, 1893, and the said plaintiff was not allowed by law to carry on his business as retail liquor dealer, then the said town council would repay to the plaintiff the said sum of \$280 excess as aforesaid; that by force of the act of assembly approved December 24, 1892, known as the 'Dispensary Act,' above referred to, the plaintiff was compelled to close his doors on June 30, 1893, and now, notwithstanding the license of the said defendant as aforesaid, the plaintiff is informed and believes that it is now unlawful to carry on his retail liquor business in the said town of Barnwell; that the said sum of \$280, induced to be paid by the plaintiff by the representations, promises, and circumstances as aforesaid, was turned into the treasury of the town of Barnwell, and was expended on the streets and other improvements of said town, and for other corporate purposes. Wherefore, the plaintiff demands judgment against the defendant, the town of Barnwell, for the sum of two hundred and eighty (\$280) dollars and costs," etc.

After the complaint was read the defendant's attorney interposed an oral demurrer that the complaint did not state facts sufficient to constitute a cause of action, in that the contract sued on was ultra vires, and not binding on the defendant corporation. The defendant admitted the truth of each and every allegation in the complaint contained, and submitted the rights of the parties to the court. After argument, his honor, Judge Izlar, made the following order: "This cause comes on to be heard on the

complaint and answer admitting the facts stated in the complaint. I think the case comes clearly within the principles stated in the case of *Coleman v. Chester*, 14 S. C. 291. Ordered, that the plaintiff in each case have judgment against the defendant for the sum of two hundred and eighty-eight and 69/100 dollars and costs," etc. From this order the defendant appeals to this court, upon the following exceptions: "(1) That his honor committed error of law, as respectfully submitted, in holding that the case comes within the principal stated in *Coleman v. Chester*, 14 S. C. 291, but should have held that there being no authority for making such a contract as that alleged in the complaint proved, nor alleged and admitted, the action could not be maintained," etc. "(2) That his honor the presiding judge should have held, as it is respectfully submitted, that the promise to repay to the plaintiff one-half of the amount paid by him for license was ultra vires, and not binding upon the defendant corporation. (3) That the said judgment is otherwise contrary to law," etc.

As we understand it, the case is not to be determined by the principle stated in the case of *Coleman v. Chester*, 14 S. C. 286, nor can the alleged contract made be considered as ultra vires. The facts admitted to be true show that the half year's license left with the city council did not, in any sense, belong to the corporation, but was to be kept and returned in case the license should be held void at a future day, but, instead of doing so, the money was turned into the treasury, and expended on the streets and other improvements of the town of Barnwell. "If A. wrongfully takes goods from B., and sells them, or has obtained money from B. by fraud or by B.'s mistake, or the like, B. may sue A. for the amount on an implied contract by A. to pay it to him. This is called 'an action for money had and received by the defendant for the use of the plaintiff.'" "It is, undoubtedly, the general rule that a municipal corporation is only liable upon express contracts duly authorized. There are, however, exceptions to this rule. The exceptions relate to liabilities for the use of money or other property which does not belong to the municipality, and to liabilities springing from the neglect of duties imposed by the charter, from which injuries to the person or property of parties are produced. Municipal corporations, therefore, like private corporations, may be liable upon implied contracts, within the scope of their powers, 'to be deduced by inference from authorized corporate acts, without either vote, deed, or writing.' This doctrine is well established, \* \* \* and the principle upon which this doctrine rests is that if a municipality obtain the money or property of another by mistake, or without authority of law, it is her duty to make restitution or compensation,—not from any contract entered into by her on the subject, but from the general obligation to do justice, which binds all per-

sions, whether natural or artificial." "The obligation to do justice rests upon all persons, natural and artificial; and, if a municipality obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation." 15 Am. & Eng. Enc. Law, p. 1063, and numerous notes. "An executory contract, made without authority, cannot be enforced; but where the contract has been executed, and the corporation has received the benefit of it, the law interposes an estoppel, and will not permit the validity of the contract to be questioned." *Argenti v. San Francisco*, 16 Cal. 256, and cases cited. The judgment of this court is that the judgment of the circuit court for the plaintiff in each of the five cases named in the caption be affirmed, and the appeal dismissed.

McIVER, C. J., and POPE, J., concur.

(42 S. C. 97)

STROM v. AMERICAN FREEHOLD LAND MORTG. CO. OF LONDON, Limited.

SEIGLER v. SAME.

(Supreme Court of South Carolina. July 27, 1894.)

APPEALABLE ORDER—ASSIGNMENT OF ERRORS—INJUNCTION.

1. An order dissolving a temporary injunction to restrain a sale under a mortgage executed by a married woman, on the ground that she had no power to execute it, is appealable.

2. An assignment that the court erred in holding that an injunction order was irregularly issued is sufficient, where that was one ground of the motion to dissolve the injunction.

3. A sale under a mortgage given by a married woman should be enjoined until a hearing as to her power to execute it.

Appeal from common pleas circuit court of Edgefield county; J. H. Hudson, Judge.

Actions by Mary A. Strom and Mary M. Seigler, respectively, against the American Freehold Land Mortgage Company of London, Limited, to restrain sales under a mortgage. The two cases were considered together. From an order dissolving a preliminary injunction, plaintiffs appeal. Reversed.

S. McG. Simkins and Folk & Folk, for appellants. J. T. Sloan, Jr., A. J. Green, and H. P. Green, for respondent.

McIVER, C. J. These two cases, presenting the same facts substantially, and involving the same legal questions, were, by consent of the parties, heard and will be considered together. For convenience of phraseology our remarks will be applied to the first-named case, but what we shall say in that case must be regarded as equally applicable to the second case. At the proper time a motion to dismiss the appeal was made, but, as that motion was based solely upon the ground that the order from which the appeal was taken was not appealable, the court thought it best to defer any deci-

sion of the motion to dismiss the appeal until after the whole case was heard, as the court would be better enabled, after hearing the whole case, to determine whether the matter sought to be appealed from is appealable. We will, therefore, proceed first to dispose of the motion to dismiss the appeal. For this purpose a condensed statement is necessary. On the 4th of March, 1887, the plaintiff, then and yet being a married woman, executed a mortgage of certain real estate to the defendant company to secure the payment of her promissory note, which became due and payable on the 1st of March, 1892. This mortgage contained a provision empowering the defendant company to sell the mortgaged premises upon default in payment of the mortgage debt at maturity, and the defendant company, under this power of sale, advertised the mortgaged premises for sale on the 2d day of October, 1893. Thereupon the plaintiff commenced this action, alleging in her complaint, which was verified, that the contract sought to be enforced by the sale of the mortgaged premises was usurious by reason of the fact that, at the time said loan was made, 20 per cent. thereof, to wit, the sum of \$80, was reserved by the agents of the defendant company, with the knowledge of said company, as their compensation for their services in negotiating said loan; and also alleging that such contract was not such a one as she had the power to make, being a married woman at the time; and praying—First, that the note and mortgage be adjudged and declared usurious and illegal, and that she may have judgment for the penalties in such case provided; second, that said note and mortgage be declared null and void, and that the same be canceled; third, that defendant be perpetually enjoined from selling the mortgaged premises,—and for such other and further relief as to the court may seem meet and proper. An ex parte application for an injunction was made to his honor, Judge Ernest Gary, based upon the verified complaint, together with an affidavit of J. P. Strom, the husband of the plaintiff, in which, among other things, he states that he was well acquainted with all the facts and circumstances attending the negotiations for the loan, made with one Lockhart as the agent of defendant company, and that said Lockhart was distinctly informed and well knew that the money was borrowed to pay deponent's own debts, and that his wife would sign the mortgage to secure the loan, in order that he (the husband) might get the money; that the plaintiff never received any part of the money, but the whole of it was applied to the payment of his own debts, and none of it was applied to the use of the plaintiff, or for the benefit of her separate estate, in any shape or form whatsoever; and that, when said loan was perfected, the said Lockhart deducted therefrom the sum of \$80,—20 per cent. of the amount of the loan,

—claiming the same as his commissions for his services in negotiating the loan. Upon this showing, Judge Gary, on the 27th of September, 1893, at chambers, granted an order enjoining the defendant from selling the mortgaged premises until the further order of the court, with leave to defendant to move, before him or some other circuit judge, on 10 days' notice, to dissolve said injunction. The defendant gave notice that, on a day therein specified, a motion would be made before his honor, Judge Hudson, at his chambers, to vacate the said injunction, "because the same was irregularly issued, in that (1) it does not appear from the said complaint and affidavits that the plaintiff is entitled to the said injunction; (2) it does appear from the said order of injunction that the same is in violation of section 402 of the Code; (3) and, further, that the said order of injunction was improvidently granted,—and in support thereof will rely upon the attached affidavit." A copy of the affidavit thus referred to is set out in the "case" as follows (omitting the venue):

"I, Mary E. Strom, being first duly sworn, do depose and say that the money received on loan negotiated for me by Mess. Tutt & Lockhart, of Augusta, Ga., and secured by mortgage dated 4th day of March, 1887, given to the American Freehold Land Mortgage Co. of London, Limited, is not to be used in payment of my husband's debts, but for my sole use and benefit.

"[Signed] Mary E. Strom."

"Subscribed and sworn to before me and in my presence by Mrs. M. E. Strom, this 4th day of March, 1887.

"[Signed] S. C. Cartledge. [L. S.]"

In response to this affidavit the plaintiff presented her affidavit, which purports to have been duly sworn to before a notary public on the 30th of October, 1893, in which she deposes as follows: "That on the day said affidavit is purported to have been executed, that she signed a number of papers for securing the loan herein, being notes for the principal sum, coupon notes for the interest, and a mortgage to secure both; that she intended to sign said papers, and they were the only ones that she was informed she was expected to sign, and that, when she signed said papers on that day, they were the only ones she intended to sign, and had no knowledge or information of any others; that, if she signed said alleged affidavit, this deponent says she was never sworn, and that she did not know its purport, or the contents thereof, and the statements thereof were entirely inconsistent with the facts then in the knowledge of this deponent, and the agent or agents of the company." When the motion came before Judge Hudson, and before the pleadings were read, plaintiff moved, without previous notice to defendant, for leave to amend her complaint "by alleging tender under the plea of usury, but no tender has ever been made." Inas-

much as it does not appear that any ruling was made, or any other action taken upon this motion to amend, that matter is not before us, and may be dismissed from the case. The motion to dissolve the injunction was heard by his honor, Judge Hudson, upon the papers hereinbefore stated and set out, and on the 19th of November, 1893, he granted a short order, in which no reasons whatever are stated, or even indicated, dissolving the injunction.

This being the nature of the case, which we have deemed it necessary to state fully, and perhaps at unnecessary length, the first question which confronts us is whether the order of Judge Hudson is appealable. While it may be true that motions for injunction and to dissolve temporary injunctions are, to some extent at least, addressed to the discretion of the court, and are therefore not appealable, yet we are not prepared to go to the extent of holding that in no case is an order dissolving a temporary injunction appealable; and we do not think that any of the cases cited by counsel for respondent require us to go to that extent. On the contrary, it is not difficult to conceive of cases in which the remedy by injunction is absolutely essential to the assertion and preservation of the legal rights of a party, and, in such a case, to deny the right of appeal would be to deny a legal right secured to the citizen by the constitution and laws of this commonwealth. This case, it seems to us, in one of its aspects at least, presents an instance falling into the class mentioned; for, passing by the question of usury, and looking alone to the other ground upon which the plaintiff claims relief, to wit, that the mortgage under which the defendant is proposing to sell the plaintiff's land was not such a paper as the plaintiff, being a married woman, had the power to execute under the law as it stood at the date of the mortgage, it is very obvious that, if the sale is allowed to proceed, under the case of *Neal v. Bleckley*, 36 S. C. 478, 15 S. E. 733, the plaintiff will be deprived of her legal right to have the question of her power to make the mortgage determined by the proper tribunal constituted for that purpose. Whether the plaintiff will be able to establish her claim of want of power to execute the mortgage is a question entirely foreign to the present inquiry, and we do not desire to be regarded as expressing, or even intimating, any opinion as to that question. The only inquiry here is whether she shall be denied the opportunity of making that question, and of having it determined by the tribunal constituted for the trial of such a question. We do not think that such a question can be conclusively determined, under a motion before a circuit judge, heard at chambers, upon affidavits merely. It follows, therefore, that the motion to dismiss the appeal must be refused.

The appeal from the order of Judge Hud-

son is based upon the several grounds set out in the record. The first ground, as we have already intimated, cannot be considered, because we find nothing in the "case" upon which it can be based; for it does not appear that any ruling of any kind was made as to the motion for leave to amend.

The second and third grounds, relating to the question of usury, need not be considered under the view which we take of the case.

The fourth, fifth, sixth, and seventh grounds, all relating to the question whether the plaintiff, being a married woman, had the power to execute the mortgage, have already been practically disposed of by what we have said in considering the motion to dismiss the appeal. If the plaintiff shall, on the trial of this case upon its merits, be able to establish her claim in this respect, then, under the recent case of *Dunbar v. Foreman* (S. C.) 19 S. E. 186, she would be entitled to have the injunction granted by Judge Gary made perpetual.

The eighth ground presents the question whether the affidavit made by the plaintiff on the 4th of March, 1887, and offered by defendant in support of the motion to dissolve the injunction, "was duly and legally executed by her," by which we suppose is meant sworn to by her. This ground was not pressed in the argument here, but we presume it is based upon the fact that it purports to have been sworn to before one S. C. Cartledge, without any addition of his official title showing that he was competent to administer an oath; but as there does not appear to have been any objection when it was offered, on that or any other ground, the objection might, possibly, be regarded as waived. At all events, under the view which we take, the matter becomes unimportant.

The ninth ground is in these words: "Because his honor erred in holding that the temporary order of injunction herein granted was irregularly issued, and in dissolving the same." This ground is objected to by respondent as too general to be considered, and the case of *Garlington v. Copeland*, 25 S. C. 41, is cited to sustain that objection. That case, however, does not, in our judgment, sustain the objection. There his honor, Judge Cothran, granted an order continuing in force a previous restraining order until a hearing on the merits, stating his reasons, and the sole ground of appeal was, "Because his honor erred in making said order, which is contrary to law;" and it was held to be too general. Here, however, the ninth ground does state specifically that Judge Hudson erred in holding that the temporary injunction was irregularly issued, and, as that was one of the grounds upon which defendant based the motion to dissolve the injunction, plaintiff's counsel might well assume that such ground was sustained in dissolving the injunction. We see nothing irregular in the order of Judge Gary granting a temporary injunction. If the

facts stated in the complaint were true, as must be assumed in considering a question of irregularity, then, as we have seen, the injunction should have been granted until the hearing on the merits.

The second ground stated in the notice of the motion to dissolve the temporary injunction, to wit, that "it does appear from the said order of injunction that the same is in violation of section 402 of the Code," cannot be sustained. In what respect the order of Judge Gary violates that section has not been pointed out, and a careful reading of the section fails to disclose any such violation. The section is divided into eight subdivisions, the only one of which that could by any possibility be regarded as sustaining the defendant's position is the sixth, which forbids the granting of any order "to stay proceedings" for a longer time than 20 days, except upon previous notice to the adverse party. But the words quoted, as we understand them, relate to the proceedings of some court, or some process issued by its authority, and do not refer to an injunction addressed to a private individual. At all events, even if we are in error in this construction, the only effect would be to render the restraining order nugatory after the lapse of 20 days, but would not make it irregular *ab initio*.

The third ground upon which the motion to dissolve was based has already been practically disposed of.

The judgment of this court is that the orders of Judge Hudson dissolving the injunction in each of the cases be reversed, and that the cases be remanded to the circuit court for a hearing on the merits, and that in the meantime the temporary injunction be continued until dissolved by proper authority.

McGOWAN and POPE, JJ., concur.

(43 S. C. 71)

PHILLIPS v. OSWALD et al.  
(Supreme Court of South Carolina. July 27, 1894.)

MORTGAGE BY MARRIED WOMAN—SALE—IMPEACHMENT.

Since the constitution gives a married woman an absolute power of alienation, as to her separate estate, she cannot impeach a sale made by a mortgagee under a power of sale contained in a chattel mortgage executed by her on her property, except for fraud, though such mortgage contains no declaration of her intention to bind her separate estate, as required by the act of 1887.

Appeal from common pleas circuit court of Barnwell county; James F. Izlar, Judge.

Action by Almema Phillips against James L. Oswald and another for the conversion of a colt. From a judgment for plaintiff defendants appeal. Reversed.

I. L. Tobin, for appellants. James E. Davis, for respondent.

McIVER, C. J. The plaintiff brought this action to recover the value of a certain bay colt alleged to have been seized and converted to their own use by the defendants. The defendants answered, setting up as a defense to the action that the colt was taken possession of by defendant Oswald under the power and authority to that end contained in a chattel mortgage given by plaintiff to said defendant, and by him sold, in execution of said power, at public outcry, and bought by the defendant Williams. A copy of this chattel mortgage is set out in the case, but it is not necessary to refer to it, further than to say that it does contain the power of sale above referred to, in case of the nonpayment at maturity of the note which it was given to secure. The case is very meager,—does not set out, or even state, any of the testimony offered, except copies of the note and mortgage,—and we can only gather from the charge of the circuit judge, which seems to be set out in full in the case, the point upon which the case was made to turn in the court below. We infer from the charge that there was testimony tending to show that the plaintiff was a married woman at the time of the execution of the note and mortgage referred to, and that the case was treated as if the same were executed after the passage of the act of 1887, and before the passage of the act of 1891, although both the note and mortgage were dated on the 30th day of December, 1891, and the last-mentioned act was approved on the 23d of December, 1891. But we suppose that, inasmuch as the act of 1891 did not go into effect until the expiration of 20 days from its approval, the case was regarded as controlled by the provisions of the act of 1887. At all events, no question is made as to this point, and therefore we need not consider it. The circuit judge charged the jury that unless the mortgage contained a declaration of her intention to bind her separate estate, as provided for by the act of 1887, the plaintiff, being a married woman at the time, would not be bound thereby, but that the same was void, and ineffectual to bind her. Inasmuch as it was quite clear that neither the note nor the mortgage contained any such declaration, the jury, under this instruction, found a verdict for the plaintiff; and, judgment having been entered thereon, the defendants appealed, filing separate exceptions, which are set out in the record. All of the exceptions, except the first, second, and seventh filed by the defendant Oswald, impute error to the circuit judge in failing or refusing to charge the several propositions of law therein stated. But, as the case does not show that the circuit judge was requested to charge any of these propositions, it follows, necessarily, under the well-settled rule, that none of these exceptions can be considered.

We will first direct our attention to the seventh exception filed by defendant Oswald, which is in these words: "Because his honor

charged the jury that if the paper does not contain the declaration, neither the mortgage nor the note, then it is an invalid paper, and the power in that paper amounts to nothing." Under the authority of the recent case of *Neal v. Bleckley*, 36 S. C. 468, 15 S. E. 733, approved and followed in the still more recent case of *Langston v. Smyley*, 38 S. O., at page 124, 16 S. E. 771, this exception must be sustained. In the case first cited it is said: "The power of alienation conferred upon a married woman by the terms of the constitution being without any limitation or qualification, such as that found in the statute as to her power to contract, \* \* \* the plaintiff had full power to sell her separate estate, without regard to the purpose of such sale, or the application to be made of the proceeds, either by herself or by her agent. Having such power to sell, she could lawfully delegate it to another, \* \* \* and hence she cannot impeach such sale, except for fraud." This language is directly applicable to the present case. The plaintiff, though a married woman, had full power to sell, either in person or by an agent, any portion of her separate estate; and, having delegated this power to sell the property here in question to the defendant Oswald, the sale made by him in pursuance of such delegated authority cannot be impeached by her, except for fraud, which is neither alleged nor proved. Under this view of the case the points presented by the first and second exceptions presented by the defendant Oswald do not arise, and therefore need not be considered. The judgment of this court is that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial.

McGOWAN and POPE, JJ., concur.

(42 S. C. 43)

SIMMS, Clerk of Court, v. KEARSE et ux.

SAME v. WILLIAMS et al.

(Supreme Court of South Carolina. July 26, 1894.)

MORTGAGES — STATUTORY LIEN IN PARTITION — PAYMENT—PRESUMPTION FROM LAPSE OF TWENTY YEARS—TRUSTS.

1. The presumption of payment of a mortgage arising from the lapse of more than 20 years after maturity is not rebutted by an admission that it was not paid, made by the mortgagor more than 20 years before suit was brought to foreclose it. *Nobles v. Hogg*, 15 S. E. 359, 36 S. C. 323, distinguished.

2. Nor is such presumption rebutted by compliance with the recording acts as to such mortgage.

3. Under Act 1791 (5 St. 170), which declares that after condition broken a mortgagor is still the owner in fee of the land mortgaged, and the mortgagee has his lien on the land to secure his debt, a grantee of the mortgagor, after condition broken, does not hold the land in trust for the mortgagee or his successors in interest.

4. Act 1791 (5 St. 164), relating to partition, provides that the court may direct a sale on such credit as it shall deem right, and the property to stand pledged for the payment of the price.

*Held*, that payment of such price will be presumed 20 years after suit to foreclose such lien might have been brought, in the absence of proof of any facts in rebuttal thereof.

Appeal from common pleas circuit court, Barnwell county; James F. Izlar, Judge.

Two actions—one by W. Gilmore Simms, clerk of the circuit court of Barnwell county, S. C., against Henry C. Kears and wife, and the other by the same plaintiff against O. A. Williams and others—to foreclose certain mortgages. From a judgment for plaintiff in each case, defendants appeal. Reversed.

James B. Davis, Patterson & Holman, and I. L. Tobin, for appellants. Joseph M. Skinner and Thos. S. Moorman, for respondent.

POPE, J. These two actions were tried separately in the court of common pleas for Barnwell county, in this state, on its equity side, by Judge Izlar. By his decree in each case he adjudged the plaintiff entitled to the relief as prayed for in each complaint. The defendants respectively have appealed from such decrees, but, inasmuch as the issues in each case are the same, arising from identically the same state of facts, an order was passed, by consent, in this court, consolidating the two appeals. It seems that one John Manuel, while a citizen of Barnwell, in this state, departed this life in September, 1857, intestate, leaving as his heirs at law his widow, Mary; his sons, William, John, Melford, and Owen W. Manuel; and his daughters, Mary Bowen and Nancy E. Bowen. He was selsed at the time of his death of two tracts of land, one containing 217 acres of land, and the other tract of land containing 186 acres. In April, 1859, an action for partition of said lands among the said heirs at law was commenced in the court of equity for Barnwell, and such proceedings were had in such action that Johnson Hagood, then commissioner of equity for said Barnwell district (now county), was directed to sell said lands, to the end that the proceeds of such sale might be divided among the heirs at law of said John Manuel, deceased, according to their respective rights therein under the laws of this commonwealth. At such sale, which occurred on the 7th November, 1859, the said Owen W. Manuel became the purchaser of said 217 acres of land at the price of \$500, and as such purchaser executed his bond to said Hagood, as commissioner in equity, his successors in office and assigns, in the penalty of \$1,000, conditioned to pay \$250 and interest thereon on the 7th November, 1860, and to pay \$250 and interest thereon on the 7th day of November, 1861, and also executed a mortgage of said 217 acres of land to secure the payment of said bond. This bond and mortgage were duly recorded in the office of the register of mesne conveyances for Barnwell county. Of the purchase money only the sum of \$139 was credited on said bond as of the 7th November, 1859. And at such sale the said Owen W. Manuel

became the purchaser of the second tract, containing 186 acres, at the price of \$450; and such purchaser executed his bond to said Hagood, as commissioner in equity, his successors in office and assigns, in the penalty of \$900, conditioned to pay \$225 on the 7th November, 1860, and \$225 on the 7th November, 1861, with interest on each installment from date of bond; and also executed a mortgage of said 186 acres of land to secure the payment of its purchase money. Of the said purchase money only \$42 is credited on the bond as of the 7th June, 1859. This mortgage was also duly recorded in the office of the register of mesne conveyances for Barnwell county. On the 7th day of February, 1860, an order was passed in the court of equity confirming the sales of the two aforesaid tracts of land, and directing the commissioner in equity to collect the bonds when due, and pay out the same to the parties in interest. Early in 1861, Johnson Hagood resigned his office as commissioner in equity, and a successor was duly appointed, who served as such until the duties of said office were devolved, by a change in our organic law, upon the clerk of the circuit court. The present incumbent of that office is the plaintiff, who was elected to such office in 1883.

The present plaintiff, at the request of the distributees of John Manuel, deceased, has instituted—in February, 1893—these two actions for the foreclosure of the two mortgages executed by Owen W. Manuel to Johnson Hagood, as commissioner, etc. Owen W. Manuel sold both parcels of land during his lifetime, and died in 1869. Accordingly the plaintiff brought his actions for foreclosure against the present owners, the defendants named in the two actions. The defendants rely upon the presumption of payment arising from the lapse of more than 20 years from November 7, 1861, up to commencement of these actions, February, 1893. The plaintiff insists that such presumptions cannot be allowed to exist (1) because Owen W. Manuel admitted in his lifetime that he had not paid his two bonds, and promised to do so; (2) because the purchasers who now hold said lands had notice from the recording of the mortgages and the proceedings of record in the partition suit that such lands were held under the lien of the mortgages executed by Owen W. Manuel to Johnson Hagood, as commissioner in equity; (3) because the defendants hold such lands as trustees for the distributees of the estate of John Manuel, deceased; (4) because the act of 1791 gives a lien upon lands sold to effectuate partition among heirs at law until such purchase money is paid. We will dispose of these positions in their order.

When it is remembered that Owen W. Manuel, the principal obligor,—whose promise to pay the bonds is relied upon to defeat the presumption of payment arising from the lapse of more than 20 years



from the execution of the same by him,—died in 1869, and that more than 20 years have elapsed since 1869 to February, 1893, at which time the actions for foreclosure were commenced, it seems to us that no force can be given to this proposition to repel this presumption of payment. Such a conclusion would be at variance with the well-recognized principles of our laws. Reference to and reliance upon the decision of this court as made in the case of Nobles v. Hogg, 36 S. C. 328, 15 S. E. 359. In that case, a trustee appointed under a will which created a trust, when sued by his cestui que trust, admitted under oath in the trial of the cause that he had never at any time paid a farthing to such cestui que trust. It was there held that, inasmuch as the presumption of payment from lapse of time was rebutted, and inasmuch as the trustee had made a solemn admission that he had never paid anything to his cestui que trust, such presumption could not arise. The distinction between that case and that of the case at bar is palpable, for there the trustee admitted in solemn form at the trial that the presumption was untenable, while in the case at bar the obligor to the bond had been dead for 24 years before the trial. This exception is overruled.

As to the second proposition, growing out of the notice to appellants from the recording of the two mortgages in the office of the register of deeds in the proper county, as required by our law in such cases made and provided, we are unable, under the proof in this case, to agree that a compliance with the recording acts has such effect. It is quite true that recording of mortgages is notice to all persons of the lien set out in such mortgages, but this is true for only the 20 years reckoning from the date of such recording. Of course there may be added to this period any time additional which would arise from an admission by the mortgagor on such record that the mortgage was still a subsisting lien. Of this latter fact there is no evidence in this case, nor do we well see how this could arise when the mortgagor had been dead for 24 years before actions brought.

As to the third proposition, which insists that the defendants hold such lands originally covered by the mortgage as trustees for the distributees of John Manuel, who died in 1857, such an idea might have been tenable prior to the act of 1791, which struck down and destroyed the former law as to mortgages of land whereby, upon condition broken, the mortgagee had title to the land mortgaged. However, when the act of 1791 declared that, after condition broken, the mortgagor was still the owner in fee of the land mortgaged, and the mortgagee was left his lien on the land to secure his debt, all the prior law was gone. A uniform line of decisions in this state sustains this view. In Thayer v. Cramer, 1 McCord, Eq. 395, Judge Nott did say something that has given

color to the idea that a mortgagor is a trustee for the mortgagee, and that a purchaser from such mortgagor, with notice of the mortgage, occupied no better position; but, as was pointed out in Norton v. Lewis, 3 S. C. 32, such an expression by Judge Nott was not essential to the conclusion there reached. Chief Justice O'Neill in the case of Thayer v. Davidson, Bailey, Eq. 412, doubted whether there was any trust involved in the relation of mortgagor to mortgagee. This idea of a trust being enforceable in such cases does not meet with our approval, and, as we think, is not sanctioned by our decisions.

The last proposition, as to the effect of the act of 1791 upon the sales of land to procure a partition of the lands of John Manuel, deceased, among his heirs at law, according to their respective rights therein, presents a more serious question. That statute was thus summarized by Chief Justice Dunkin (McQueen v. Fletcher, 4 Rich. Eq. 159): "The act of 1791 (5 St. 164) provides that, where the land cannot be fairly and equally divided, the commissioners shall make a special return, certifying to the court their opinion, whether it will be more for the benefit of the parties to deliver over to one or more of them the property which cannot be fairly divided, upon the payment of a sum of money to be assessed by the commissioners, *or to sell the same at public auction* [italics ours]. and, if the court shall be of opinion that it would be for the benefit of the parties that the same shall be vested in one person or more persons entitled to a portion of the same, on the payment of a sum of money, they shall determine accordingly; and the said person or persons, on the payment of the consideration money, shall be vested with the estate so adjudged to them, as fully and absolutely as the ancestor was vested. But, if it shall appear to the court to be more for the interest of the parties that the same should be sold, they shall direct a sale on such credit as they shall deem right; and the property so sold shall stand pledged for the payment of the purchase money." In the case at bar, in the year 1859, upon a return of commissioners in partition made in an action to which all the heirs at law of John Manuel, deceased, were made parties,—such heirs at law being all of full age,—the court of equity for Barnwell county determined that it was for the best interest of all of such parties that the lands should be sold on a credit of one and two years, and it was so decreed. The commissioner in equity sold the lands, and his sales so made were confirmed, and he was ordered to collect the bonds when due, and pay out the proceeds, when collected, to the parties, according to their respective interest therein. The bonds are each credited with a partial payment as made in 1859, and no payments are credited on the bonds since that date (1859). The last installments of the bonds matured in November, 1861. Some of the

children of John Owen have died since the sales were made, leaving children, some of whom are minors. It may be as well that we should say at the outset that the decree of the chancellor directing a sale on a credit secured by a mortgage of the lands sold will not be construed by us as divesting the transaction of the statutory lien, under the act of 1791, for the payment of the purchase money. This, being an action for the partition of land belonging to the estate of intestate among his heirs at law, falls directly under the provisions of the act of 1791. We are inclined to hold, however, that there is a distinction to be made between cases where lands of an intestate are assigned to one or more persons in interest by the court, upon the condition that they pay the purchase money as assessed by the commissioners in partition to some of the other parties who get no land, and the cases where a sale is ordered by the court to effectuate a partition on a credit to be made by an officer of court to whom the bonds are made payable; and the distinction is this: In the first case no party comes between the parties as the representative of both, while in the late case the officer of court so intervenes. *McQueen v. Fletcher*, supra, is an illustration of the first case.

But does the statutory lien for the purchase money, or statutory mortgage, as it is sometimes called, never cease? This question was considered in *McQueen v. Fletcher*, supra, and that eminent chancellor, Job Johnstone, who heard the case on circuit, held: "But the statute of 1791 gives a lien for the purchase money of an intestate's land sold for partition, \* \* \* and I may be told that, independently of the judgment in partition in this case, this lien still subsists, *but I hold that the same lapse of time which would presume satisfaction of a judgment, a mortgage, or specialty debt, will raise a similar presumption under a statutory lien.*" (Italics ours.) When the court of appeals rendered its judgment it was therein held: "And so, if the judgment transferred the title and created a lien, and yet the court is satisfied, by presumption from lapse of time or otherwise, the debt has been paid, the judgment is gone, and the lien, which is merely an incident, has ceased to exist." This court has so recently examined the question of presumption of payment from lapse of 20 years in cases of title, mortgages, judgments, and debts by specialty that we fear we will be but repeating ourselves to enlarge at this time upon what has been so recently decided by us in the cases of *Trustees, etc., v. Jennings* (S. C.) 18 S. E. 257, and *Lauderdale v. Mahon* (S. C.) 19 S. E. 294. In the case at bar the commissioner in equity from 1859 till 1868, and from 1868 until 1893 the clerk of court, has had the legal capacity to sue upon these bonds, and the decretal order of 1860 made it their duty to do so. After this lapse of time—more than 20 years—everything will

be presumed to give effect to the plea of payment, such plea not being destroyed by the proof of any facts in rebuttal thereof. It is the judgment of this court that the decrees of the circuit judge in each of the cases be reversed, and that the causes be remanded to the circuit court, with directions that a decree be formulated in each case dismissing the complaint.

McIVER, C. J., and McGOWAN, J., concur.

(42 S. C. 84)

#### KUKER v. CARTER.

(Supreme Court of South Carolina. July 27, 1894.)

#### MORTGAGE BY MARRIED WOMAN—VALIDITY—EVIDENCE.

A mortgage made by a married woman will be held void where there is clear evidence that the money was advanced to buy supplies for her husband's farm, and plaintiff fails to produce his books to show to whom the money was charged.

Appeal from common pleas circuit court of Florence county; W. H. Wallace, Judge.

Action by John Kuker against Flora J. Carter to foreclose a mortgage. Judgment for defendant. Plaintiff appeals. Affirmed.

John A. Kelley, for appellant. Woods & Spain, for respondent.

McIVER, C. J. This was an action to foreclose a mortgage on real estate, bearing date the 24th of January, 1884, given by the defendant (who then was, and still is, a married woman) to the plaintiff to secure an alleged debt of \$1,692.29. The main defense, and the only one under which the questions presented by this appeal arise, is whether the defendant, as a married woman, had the power to make the contract which is the basis of this action. It appears that previous to the making of this mortgage the defendant had executed another mortgage on 200 acres of land to the plaintiff. The date of the first mortgage is not given in the case, but, by the written consent of the attorneys on both sides, it appears that such mortgage was executed on the 22d of November, 1882. Both of these mortgages were therefore executed after the amendment to the married woman's act, incorporated in the General Statutes of 1882, which went into effect on the 1st day of May of that year, and before any question had been mooted as to the effect of that amendment, as that question seems first to have been raised in the case of *Habenicht v. Rawls*, 24 S. C. 461, which was not decided until the 25th of March, 1886. The consideration of the debt secured by the first mortgage seems to have been supplies furnished by plaintiff to the husband of the defendant, and also the sum of \$500 advanced in cash at or about the time the first mortgage was given, but to whom such cash advance was made—whether

to the husband or the wife—is one of the contested questions in the case. A further advance in cash of \$300 being desired, the plaintiff agreed to make such advance if the defendant would give a new mortgage on 300 acres of land to secure the payment of such advance, as well as the balance due on the first mortgage. Accordingly, the plaintiff advanced in cash the further sum of \$300, but to whom such advance was made—whether to the husband or the wife—is likewise one of the contested questions in the case; and the first mortgage was canceled, and the mortgage which constitutes the basis of the present action was given, which purports to secure the payment of the balance due on the first mortgage, as well as the advance in cash then made, of \$300. The issues in the action were referred to a referee, who found that for so much of the debt secured by mortgage as represented supplies furnished the defendant was not liable, and, there being no exception to that finding, that matter is out of the case. But the referee also found that the advances in cash—\$500 and \$300—were made to the defendant herself, for which she is liable; his language being “that the two cash payments, of \$500 and of \$300, respectively, above referred to, were made to the defendant, or her husband, T. L. Carter, for her, and in her presence.” To this finding the defendant excepted, and, the case coming before his honor, Judge Wallace, he sustained defendant's exceptions, and rendered judgment dismissing the complaint, in a short order, which is not set out in the case, but it is admitted by counsel on both sides that such was the judgment of the circuit court. From this judgment, plaintiff appeals upon the several grounds set out in the record, which need not be repeated here; for, as it seems to us, the only question in the case is whether Judge Wallace erred in reversing the finding of the referee that the defendant was liable for the two items of cash advanced.

It is scarcely necessary, at this late day, to cite authority to show that, where money was loaned or advanced to a married woman (under the law as it stood at the date of this transaction), such money, as soon as it was received by the married woman, became a part of her separate estate, and her contract to repay the same was a contract as to her separate estate, upon which she would be liable, unless the lender knew at the time that the money was received for the husband or some third person. But to produce this result it is necessary to show, as matter of fact, that the money was really loaned or advanced to the wife, and the burden of proof to show that fact is upon the lender. *Taylor v. Barker*, 30 S. O., at page 242, 9 S. E. 115. So that it seems to us that the vital question in the case is whether the plaintiff has shown that the money was advanced to the defendant, and not to her husband. Upon this question there is direct conflict in

the testimony, and the referee has adopted one view, and the circuit judge another. In such a case, as is said by Mr. Justice McGowan in *Maner v. Wilson*, 16 S. O., at page 481, “the judgment of the circuit judge is at least *prima facie* right.” But, besides this, it seems to us, from a careful examination of the testimony, that the preponderance of the evidence is in favor of the view adopted by the circuit judge. Without going into any detailed examination of the testimony, it will be sufficient to point out some of the circumstances which have induced us to agree with the circuit judge rather than with the referee. The testimony clearly shows that the plaintiff, for several years, had been advancing supplies to the husband, who was cultivating the land which his wife owned at the time of the marriage, and, at the time both of these cash advances were made, the reason given for wanting the cash was that it would enable him to obtain supplies in Charleston on better terms if he had the cash. We do not think that there is any sufficient evidence that the husband ever was acting as the agent of his wife, except while running the turpentine business at Lake City, with which we do not understand that the plaintiff had any connection. Indeed, we do not see any occasion for his acting as agent of his wife in running the farm on what was called his wife's land; for there is a circumstance in the case which seems to have escaped the attention of the referee, as well as of the counsel in the cause, and that is that the wife owned this land at the time of her marriage, which, according to her testimony, which is not disputed, took place in 1866, prior to the adoption of the present constitution; and, if so, immediately upon his marriage the husband took a vested estate in the land, whereby he acquired the usufruct thereof during the coverture, without any liability for the rent thereof, which vested interest in him was not divested by the provisions of the present constitution. *Bouknight v. Epting*, 11 S. O. 71. Practically, therefore, the husband was the owner of the land during the coverture, and had a right to the use thereof, and he was not, and could not have been, the agent of his wife in farming or otherwise using the land. In this respect the present case differs materially from the case of *Scottish Co. v. Deas*, 35 S. O. 42, 14 S. E. 486, cited by appellant's counsel.

There is another circumstance which is not without significance, and that is the failure on the part of the plaintiff to produce his books in evidence, for if those books showed that these advances were charged, at the time they were made, to the defendant, and not to her husband, that would have been a very strong circumstance in favor of the plaintiff's view; but if, on the other hand, the books should show that these advances were charged, at the time they were made, to the husband, and not to the wife, that would be a circumstance fatal to plaintiff's claim.

Now, as the burden of proof was on the plaintiff, it was incumbent upon him to produce the best evidence in support of his claim, or to show that such evidence was not attainable. It does not seem to us that the plaintiff has satisfactorily accounted for the failure to produce his books. True, he says in his own testimony: "My books of original entry were left in my back wareroom when I left for New York, about five years ago. I have looked for them, but could not find them." But it is quite certain from the testimony that when the plaintiff removed to New York he left his business here in charge of agents, and no agent has been examined as to what became of the books, which must have been left in their charge. The statement of the plaintiff that he had looked for the books, but could not find them, is scarcely satisfactory, when he probably came out from New York on a hurried visit to testify in this case.

From a careful review of the whole testimony, we are satisfied that the preponderance of the evidence is in favor of the view which seems to have been adopted by the circuit judge, and that these cash advances, as well as the other supplies, were made to the husband for the purpose of enabling him to carry on the farm, which he had the right to cultivate, and which he was cultivating, as his own, and not as the agent of his wife; and therefore the mortgage was given by the defendant to secure the debt of her husband, and not her own debt, and hence she is not liable. The judgment of this court is that the judgment of the circuit court be affirmed.

McGOWAN and POPE, JJ., concur.

(42 S. C. 81)

PEEPLES v. BROWN et al.

(Supreme Court of South Carolina. July 27, 1894.)

**TRESPASS—SUFFICIENCY OF COMPLAINT.**

A complaint alleging that defendants unlawfully and maliciously seized and retained plaintiff's wagons and goods, while proceeding along the public highway, states a cause of action.

Appeal from common pleas circuit court of Barnwell county; James F. Izlar, Judge.

Action by Lizzie Peeples against Jennie Brown and D. P. Lancaster. Defendants demurred. Demurrer overruled. Defendants appeal. Affirmed.

Patterson & Holman, for appellants. James E. Davis, for respondent.

McIVER, C. J. The only question raised by this appeal is whether the circuit judge erred in overruling a demurrer based upon the ground that the facts stated in the complaint are not sufficient to constitute a cause of action. To determine this question, it is proper to set out here the allegations of the complaint, which are as follows: "(1)

That on the 16th day of July, A. D. 1893, the plaintiff was, and is now, the owner of a lot of household furniture, and as such was, on said day, engaged in hauling the same from her former house, in Barnwell, S. C., to her present home, near Millett, S. C. (2) That while so engaged as aforesaid, and while plaintiff's wagons were loaded with said furniture, and quietly driving along the public highway, the defendant Jennie Brown willfully, wrongfully, unlawfully, and maliciously caused the said wagons of the plaintiff to be overtaken by her codefendant, D. P. Lancaster, four or five miles from the town of Barnwell, seized the said wagons containing said furniture, and compelled all of them to return to Barnwell with him; and there, on the public streets of said town, in the face of the gaze, ridicule, and gibes of the public, defendants unloaded a portion of said furniture, and locked it in a building in said town, and detained the wagons, teams, and balance of said goods of the plaintiff in said town for a considerable time before they were released, and allowed to proceed on their way. The plaintiff, complaining, further alleges: (3) That by reason of the facts set forth above the plaintiff was greatly delayed in the effort to get her furniture home; that the said goods were ruined by water, caused by being overtaken by a severe rain-storm, which would not have happened, had it not been for the action of the defendants as aforesaid. (4) That the defendants have since returned the portion of the furniture taken by them, to the plaintiff, in a greatly damaged condition, and the plaintiff again had the misfortune of having said furniture carried through a severe rain, which greatly damaged the said property. (5) That the acts of the defendants were willful and malicious, and have greatly outraged plaintiff's feelings, and exposed her to the gibes, taunts, and ridicule of the public, and she has thereby been damaged in the sum of two thousand dollars. Wherefore plaintiff demands judgment against defendants for two thousand dollars damages and costs."

We agree with the circuit judge that the facts stated in this complaint are quite sufficient to constitute a cause of action. It will scarcely be denied that where a complaint contains allegations which, if true, show that a defendant has committed a trespass upon the rights, either of person or property, of the plaintiff, it would not be amenable to such a demurrer as this. Now, if the facts stated in this complaint are true (and for the purposes of this inquiry they must be so regarded), we do not see how it can be doubted that such facts show that the defendants have committed a most unprovoked and willful trespass upon the property of the plaintiff. If it is not a trespass for one person to stop and seize the wagons and teams of another on the public highway, take the same, as well as the contents of the wagons, from the possession of the owner,

and detain them even for a single hour, we confess it would be difficult to find any milder term than "trespass" to characterize such conduct. But it seems to us so plain that the facts alleged in the complaint are sufficient to constitute a cause of action that we find it difficult to discuss further so plain a proposition.

What is said in the appellants' argument as to the question of damages seems to us premature, for that is a matter which will be considered when the case comes to be tried on its merits. The damages which a plaintiff may have sustained by reason of the violation of his legal rights constitute no part of his cause of action; and therefore whether the plaintiff has sustained any damages, and, if so, of what kind and to what amount, cannot properly be considered in determining the question whether the complaint states facts sufficient to constitute a cause of action. See *Levi v. Legg*, 23 S. C., at page 285. The judgment of this court is that the judgment of the circuit court be affirmed.

McGOWAN and POPE, JJ., concur.

(42 S. C. 83)

#### STODDARD v. OWINGS.

(Supreme Court of South Carolina. July 27, 1894.)

##### LIMITATION OF ACTIONS—CHANGE IN STATUTE—WHICH STATUTE IS APPLICABLE.

Act Nov. 25, 1873, reducing the time within which an action on a note may be brought to six years, applies to an action on a note previously executed, but maturing after the passage of such act.

Appeal from common pleas circuit court of Laurens county; Ernest Gary, Judge.

Action on a note by W. B. Stoddard against Isaac M. Owings, administrator, etc., of G. B. Owings, deceased. Judgment for defendant. Plaintiff appeals. Affirmed.

F. P. McGowan and Ball, Simkins & Ball, for appellant. Johnson & Richey, for respondent.

McIVER, C. J. On the 18th of July, 1873, the defendant's intestate, by his note under seal, of that date, promised to pay to the assignor of the plaintiff on the 1st day of December, 1873, a certain sum of money, therein specified. Upon this note certain credits were indorsed, the last being dated 8th of December, 1874. On the 4th of June, 1892, the plaintiff, as assignee, commenced this action to recover the balance due on said note. The defendant pleaded the statute of limitations, and the circuit judge instructed the jury that unless they believed that this action was commenced within six years after the maturity of the note, or within six years after any payment was made thereon, their verdict must be for the defendant. The jury returned a verdict in

favor of the defendant, and, judgment having been entered thereon, the plaintiff appealed on the grounds set out in the record, which makes the single question whether his honor, Judge Gary, erred in the above-mentioned instruction given to the jury. The solution of this question depends upon the inquiry whether the law in force at the time of the making of the contract, prescribing that an action on a sealed note can only be commenced within 20 years "after the cause of action shall have accrued" (Code 1870, §§ 97, 113), should govern, or the law in force at the maturity of the note, and at the time the action was commenced, whereby the statutory period within which an action can be brought has been reduced to six years (Act Nov. 25, 1873). Section 96 of the original Code (now section 93) reads as follows: "The provisions of this title shall not extend to actions already commenced, or to cases where the right of action has already accrued; but the statutes now in force shall be applicable to such cases, according to the subject of the action, and without regard to the form." And in the next succeeding section it is provided that: "Civil actions can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, except where, in special cases, a different limitation is prescribed by statute, and in the cases mentioned in section ninety-six" (now 93). While it is true, as a general rule, that statutes are not to be construed retrospectively, or so as to have a retroactive effect, unless it shall clearly appear that such was the intention of the legislature,—*Ex parte Graham*, 13 Rich. (N. S.) 277, and the authorities there cited,—yet it seems to us, from the express terms of the sections above quoted, that the legislature clearly intended that the changes made in the statutory periods should apply to all actions upon contracts, whether entered into antecedently or subsequently; otherwise, there would have been no necessity or propriety in expressly excepting certain actions from the operation of the statute. There are only three exceptions provided for in the Code: (1) Where the action has already been commenced; (2) where the right of action had already accrued; (3) where a different limitation is prescribed by statute. So that the practical inquiry is whether the present case falls within either one of these exceptions. It is not and cannot be pretended that it falls within either the first or third exceptions, as the action had certainly not been commenced at the time of the passage of the act of 25th of November, 1873, changing the statutory period in an action on a sealed note from 20 to 6 years, and there is no statute prescribing a different limitation. The inquiry, therefore, is narrowed down to the question whether the plaintiff's right of action had accrued at the time of the passage of the act of 25th of November, 1873. It seems to us clear that it had not. By the express terms of the con-

tract the maker of the note was allowed until the 1st of December, 1873, to perform his promise, by paying the amount stipulated to be paid on that day; and until he failed to comply with his promise there was and could have been no breach of the contract, and hence no cause of action. So that when the statutory period, in an action on a sealed note, was reduced from 20 to 6 years by the act of 25th of November, 1873, the plaintiff having neither a cause nor a right of action, the case does not fall under the second exception above stated, and there was no error on the part of the circuit judge in instructing the jury as he did.

It is earnestly contended, however, that the words "right of action," in section 96 (now 93) of the Code, as construed in the case of *Hayes v. Clinkscales*, 9 S. O. 441, are in conflict with our view. That case, however, differs widely from this. There the action was based upon a verbal promise, made in October, 1869, to pay a note which had become payable in November, 1859, which promise was made upon a condition not performed until March, 1874, soon after which the action was commenced. The defense set up was the statute of limitations, and, to defeat that plea, plaintiff relied upon the verbal promise above mentioned, to which defendant replied that the Code required that a new promise, to avoid the statute, must be in writing. The court held that inasmuch as the promise, when made, though verbal, constituted a valid contract, and that any subsequent legislation could not be allowed the effect of impairing the obligation of such contract by importing into it additional requirements to its validity, which did not exist at the time it was entered into, the position taken by defendant could not be sustained; and hence, to avoid bringing this requirement of the Code into conflict with plain constitutional provisions, the court undertook to find some construction of the words "right of action" which would avoid such conflict, upon the well-settled doctrine that a court must always, if possible, adopt such a construction of the terms of a statute as would avoid any conflict with the constitution, and therefore in that case resorted to what may, without impropriety, be characterized as a somewhat strained construction of those words, inasmuch as the writer of this opinion also prepared the opinion in that case. But this was done solely for the purpose, as there declared, of avoiding the necessity of declaring that provision of the Code, if applied to antecedent contracts, to be in conflict with the constitution. Here, however, no such necessity arises, and hence we must place the obvious and natural construction upon the words "right of action," for there can be no doubt that the legislature may, without any violation of constitutional provisions, change the periods prescribed as a limitation to actions, either by extending or reducing the periods previously prescribed,

as well in reference to antecedent as subsequent contracts. The rule is well stated in *Bigelow v. Bemis*, 2 Allen, 496, in these words: "It is well settled that it is competent for the legislature to change statutes prescribing a limitation to actions, and that the one in force at the time of suit brought is applicable to the cause of action. The only restriction upon the exercise of this power is that the legislature cannot remove a bar which has already become complete, and that no new limitation shall be made to affect existing claims without allowing a reasonable time for parties to bring actions before their claims are absolutely barred by a new enactment." The judgment of this court is that the judgment of the circuit court be affirmed.

McGOWAN and POPE, JJ., concur.

(42 S. C. 111)

SHELDON v. PEARSON.

(Supreme Court of South Carolina. July 27, 1894.)

APPEAL FROM JUSTICE'S COURT—NOTICE—SERVICE ON RESPONDENT'S AGENT—WHEN SUFFICIENT.

Code, § 360, provides that a notice of appeal from a justice of the peace must be served, in case respondent is not a resident of the county, on the agent, if any, "who is a resident of such county," and appeared for respondent on the trial, etc. *Held* that, where respondent was a nonresident, service of the notice on the agent who appeared for respondent, but who was also a nonresident of the county, was insufficient.

Appeal from common pleas circuit court of Spartanburg county; W. H. Wallace, Judge.

Action by F. W. Sheldon against M. C. Pearson to recover possession of a bull, commenced in justice's court, and taken on appeal by defendant to the court of common pleas. From an order dismissing the appeal for want of service of notice thereof, defendant appeals. Affirmed.

S. M. Pilgram and Geo. W. Nicholls, for appellant. Munro & Munro and R. K. Carson, for respondent.

McIVER, C. J. This is an appeal from an order of his honor, Judge Wallace, dismissing an appeal from the judgment of a trial justice rendered in Spartanburg county, upon the ground that the appellant had failed to serve the respondent with notice of appeal within the time required by law. It appears from the papers set out in the case that the plaintiff, being a resident of Union county, through her agent, L. J. Browning, who was likewise a resident of Union county, brought suit before a trial justice in Spartanburg county to recover possession of a bull. The plaintiff having recovered judgment, the defendant undertook to appeal therefrom, and for this purpose, on the day of trial, at the trial justice's office, obtained an acceptance of service of the notice and grounds of

appeal in the following form: "Due and legal notice accepted. [Signed] B. B. Barnett, Trial Justice, [and] F. W. Sheldon, per L. J. Browning." It also appears that the plaintiff, by a writing signed by herself, demanded, "through Mr. L. J. Browning, my agent," the delivery of the bull, which writing concludes in these words: "And I hereby authorize my said agent to at once bring suit before a trial justice for a delivery of the animal." In pursuance of this authority, the said Browning, as agent of the plaintiff, brought the suit, and obtained the judgment sought to be appealed from. It further appears from the affidavit of the attorney who represented the defendant on the trial "that L. J. Browning appeared for the plaintiff, and conducted her case for her, by assisting in examining witnesses, and made an argument for her before the jury; that the plaintiff was not present, and that her whole case was managed by L. J. Browning, with the assistance of Mr. M. P. Patton, as her agent or attorney; that the plaintiff lives in Union county, some six miles from the place of trial; that the notice of appeal was served by getting said attorney or agent to accept service on the day of trial before leaving the place of trial, as soon as the decision was rendered."

Upon this state of facts the legal question presented is whether the respondent was served with notice of appeal within the time required by law; and this, of course, involves the inquiry whether the notice of appeal was given in the manner prescribed by law. The statute is very explicit upon this subject, and may be found in section 360 of the Code, where, after having prescribed in section 359 that the notice of appeal shall be given within five days after judgment, the provision is as follows: "The notice of appeal must, within the same time, be served on the trial justice personally, if living and within the county, or on his clerk, if there be one, and upon the attorney for the respondent, or on the respondent personally, or by leaving it at his residence, with some person of suitable age and discretion; or in case the respondent is not a resident of such county, or cannot, after due diligence be found therein, in the same manner, on the agent, if any, who is resident of such county, who appeared for the respondent on the trial: and if neither the respondent nor such agent or attorney can be found in the county, the notice may be served on the respondent by leaving it with the clerk of the appellate court." Now, while the legislature has seen fit to invest the court with power to relieve a party from defaults or omissions in taking some of the steps necessary to perfect an appeal, the matter of giving notice of appeal has always been specially excepted from such provisions; and hence, when the court is called upon to determine whether a notice of appeal has been properly given, it has no other alternative but to follow the express declarations of

the statute. The inquiry, therefore, is whether the defendant has complied with the explicit declarations of the statute, as applied to a case like the present, where both the plaintiff and her agent were nonresidents of the county. In such a case the statute requires that the notice of appeal must be served personally on the agent, who is a resident of the county, who appeared for the respondent on the trial. Now, the acceptance of service by Browning for the plaintiff certainly cannot amount to anything more than if he had been served personally by the sheriff, at the same time and place, with the notice; and such a service would not, in our judgment, have been a compliance with the statute. To make it so, three things must appear: (1) That he was the agent of the plaintiff; (2) that he appeared for her at the trial; (3) that he was a resident of the county. Now, while it is clear that the facts of this case meet the first two requirements, it is equally clear that the third is entirely wanting, for it not only does not appear that Browning was a resident of the county, but the contrary does appear. It follows, therefore, that the service on Browning, as evidenced by his acceptance of service of the notice of appeal, was not a compliance with the statute, and hence no notice of appeal has ever been served on the respondent in the manner prescribed by law. It is urged, however, that Browning may be regarded as the attorney (meaning attorney at law) of the plaintiff, and therefore the service upon him was good. There is no evidence to sustain this position, and on the contrary the evidence throughout shows that Browning was the mere agent of the plaintiff, and that in fact she was represented at the trial by another person (Mr. Patton) as her attorney. The judgment of this court is that the order appealed from be affirmed.

McGOWAN and POPE, JJ., concur.

(43 S. C. 114)

# RUFF v. COLUMBIA & G. R. CO.

(Supreme Court of South Carolina. July 27, 1894.)

PLEADING—MOTION TO COMPEL ELECTION — TIME OF MAKING MOTION—ACTION FOR NEGLIGENCE.

1. Where two causes of action are blended in one statement, a motion to require plaintiff to elect upon which he will proceed to trial may be made at any time before the beginning of the trial.

2. Where two causes of action are blended in one statement, plaintiff cannot complain that he was required to elect which he would proceed upon, rather than to amend by making more definite and certain, when no such motion was made.

3. A complaint alleging that a horse was killed by the negligent failure to keep a crossing in repair, and the negligent management of a train, with no averment of any connection between such acts, states two distinct causes of action.

Appeal from common pleas circuit court of Fairfield county; W. H. Wallace, Judge.

Action by Silas W. Ruff against the Columbia & Greenville Railroad Company. Judgment for defendant. Plaintiff appeals. Affirmed.

James G. McCants, for appellant. B. L. Abner, for respondent.

McIVER, C. J. This was an action brought by the plaintiff to recover damages from the defendant company for the killing of his horse, by reason of the negligence of said company. As some of the questions presented by this appeal turn upon the construction of the terms of the complaint, it is proper that a copy thereof should be incorporated in the report of the case. The defendant claimed that two causes of action were blended together; one being the alleged negligence of the railroad company in keeping in good and safe repair a crossing of the railroad track at a point where it was intersected by a public road, by reason whereof the horse was killed; and the other, negligence in the management of defendant's locomotive and cars, whereby the disaster complained of occurred. Three days before the case was called for trial, the defendant gave notice to the plaintiff "that, on the trial of the above-stated case," a motion would be made for an order requiring the plaintiff "to elect upon which cause of action stated in your complaint you will proceed to trial, the same being blended in one statement, to wit, whether you will proceed to trial upon the cause of action stating that the railroad crossing was out of repair, or upon the cause of action stated [stating?] that the accident occurred from the careless and negligent management of the locomotive and cars of the defendant." Accordingly, when the case was called on the calendar, on the first day of the term, "both parties announced their readiness for trial, and jury No. 1. was called. Defendant's attorney stated that he had a motion to make to require the plaintiff to elect which cause of action stated in his complaint he would proceed to trial on; that he was not advised when the motion should be made, and asked if the court would then hear it. The presiding judge said that, as the complaint had to be read to the jury anyway, it would save time to read the complaint to the jury, and make the motion after that. The jury was then accepted by both parties. The plaintiff read his complaint. The notice of the motion above mentioned was read;" and, after argument, his honor, Judge Wallace, granted an order requiring the plaintiff to elect. "The plaintiff duly excepted to the before-mentioned motion and the order of Judge Wallace thereon. In pursuance of the above-mentioned order, the plaintiff elected the alleged cause of action stating that the railroad crossing was out of repair, and proceeded to trial, reserving his exceptions to said motion and order." The testimony in behalf of the plaintiff, which is set out in

the case, was adduced; and, at the close of the testimony, the defendant moved for a nonsuit, which was granted, upon the ground that there was no testimony tending to show that the horse was killed by reason of the defendant's negligence in keeping the crossing in repair; and from the judgment entered thereon the plaintiff appeals, upon the following grounds: "(1) For that his honor erred in entertaining the motion to sever or separate the alleged causes of action contained in the complaint, as said motion was made at the trial of the cause, and was therefore made too late. (2) For that his honor erred in entertaining the motion to sever and separate the alleged causes of action contained in the complaint, as said motion was made after the filing of the complaint, and after the service of its answer by defendant, and was therefore made too late. (3) For that his honor erred in ordering that the plaintiff elect upon which cause of action he should proceed to trial, and that he proceed to trial thereon, when he should have also allowed the plaintiff the option to amend his complaint by making it more definite and certain. (4) For that his honor erred in ordering an election between the alleged causes of action stated in the complaint, when there was but one cause of action stated in the complaint, to wit, the negligent killing of the mare of the plaintiff by the defendant; and the want of repair of the crossing was only alleged as evidence of the straying of the mare on the ground and track occupied by the defendant, without plaintiff's fault. (5) For that his honor erred in ordering an election between the alleged causes of action stated in the complaint, when, if such an election be made as was made by the plaintiff under said order, the complaint is unintelligible, and no cause of action is stated. (6) For that his honor erred in granting a nonsuit, stating that there was no evidence showing that the mare attempted to cross the bridge at the crossing, which we submit was, from the testimony, a question of fact for the jury. (7) For that his honor erred in granting a nonsuit, because the facts in evidence and the killing of the mare by the defendant established a prima facie case of negligence, and imposed the burden of lack of fault and due care on the defendant, and, in the absence of such proof on the part of the defendant, should have been submitted to the jury, and would have sustained a verdict for the plaintiff."

As to the first and second grounds of appeal, it is only necessary to say that it does not appear in the case that any motion "to sever or separate the alleged causes of action contained in the complaint" was ever made. On the contrary, the only motion submitted was to require the plaintiff to elect upon which cause of action he would proceed to trial. But even if we take the most liberal view as to the real intent of these two exceptions, and assuming that the intention



was to present the question whether the motion which was actually made was made in time, we do not think that either of these grounds can be sustained, for two reasons: (1) It does not appear that any objection was made, at the time, that the motion came too late, and, of course, the circuit judge was not called upon to make, and did not make, any ruling upon that point, and hence the question would not properly be before us; but (2) even if objection had been made at the time, it could not have been sustained, for we know of no law or rule prescribing the time when such a motion should be made, except that, from the very nature of the motion, it must be before the commencement of the trial, and here the motion was submitted before the trial had commenced. The authorities cited by counsel for appellant are not applicable, for they relate to a motion of an entirely different character, to wit, to require the plaintiff to make the allegations of his complaint more definite and certain. Rule 20 of the circuit court, by its express terms, applies to a motion of that character, and not to a motion like the one in question here. In *Cohrs v. Fraser*, 5 S. C. 351, likewise cited by plaintiff, the motion was to strike out one of the paragraphs of the answer; and, even in a motion of that character, it should be made "before the trial, and certainly before the opening by the plaintiff to the jury." The case of *Van Wyck v. Norris*, 15 S. C. 242, so far as we can see, has no application to the point under consideration. In *Bowden v. Winsmith*, 11 S. C. 400, it is stated that a motion to make the complaint more definite and certain should be made before answer, though really even that point was not decided in that case, and was a mere passing observation of Willard, C. J., which, however, seems reasonable, as the defendant ought to have the means of knowing definitely what he is charged with before making answer. *Dowie v. Joyner*, 25 S. C. 123, speaks only of a motion to require the plaintiff to make his complaint more definite and certain, and does not even indicate when such a motion should be made. The case of *Thomas v. Railroad Co.*, 38 S. C., at page 487, 17 S. E. 226, simply declares that a motion to require the plaintiff to elect upon which cause of action he would go to trial should have been made "before the trial began," and here the motion was made before the trial commenced.

The third ground of appeal imputes error to the circuit judge in not allowing the plaintiff to amend by making his complaint more definite and certain. In response to this ground, it is sufficient to say that no such motion was made; and certainly it was not the duty of the circuit judge *ex mero motu* to make such a requirement as a condition precedent to requiring the plaintiff to elect. *Reed v. Railroad Co.*, 37 S. C. 55, 16 S. E. 289, where the court holds that, while different causes of action may be embraced in the

same complaint, yet they must be stated separately (*Latimer v. Sullivan*, 30 S. C. 111, 8 S. E. 639); but where, as in that case, as well as in this, two causes of action were blended together, the plaintiff should be required either to state his causes of action separately, or elect which he would retain for trial. Here the latter alternative was adopted, and we see no error.

The fourth ground of appeal imputes error to the circuit judge in construing the complaint as containing two separate and distinct causes of action, whereas it really contained only one. There is no error here. The complaint certainly does allege two distinct and separate acts of negligence,—one in failing to keep the crossing in proper repair, and the other in the careless and negligent management of the train. Between these two specific acts of negligence there was no necessary connection, and there is no allegation and no proof of any such connection. The horse might have been killed by the careless management of the train, even though the crossing was in perfect repair; and, on the other hand, the disaster might have occurred from the defect in the crossing, even though the utmost skill and care had been exercised in the management of the train. The evidence leaves no doubt of the fact that the horse was killed at the trestle, by being run over by the train, and was not killed at the crossing,—a point at least 110 feet distant from the trestle. So that it seems to us clear that the complaint did state two distinct and separate causes of action, blended together in one count, so to speak.

The fifth ground cannot be sustained, for it is very obvious that the complaint did state, as one of the causes of action, the negligence of the defendant in failing to keep the crossing in proper and safe repair; and, when the plaintiff elected to proceed to trial upon that cause of action, it was not only necessary to introduce testimony tending to show negligence in that respect (*Fell v. Railroad Co.*, 33 S. C. 198, 11 S. E. 691), but also tending to show that the injury to the horse was the result of such negligence (*Glenn v. Railroad Co.*, 21 S. C. 466; *Petrie v. Railroad Co.*, 29 S. C. 318, 7 S. E. 515; and *Barber v. Railroad Co.*, 34 S. C. 450, 451, 13 S. E. 630).

The sixth ground complains that the judge erred in holding that there was no evidence showing that the horse attempted to cross the railroad track at the crossing. A careful examination of the testimony satisfies us fully that the circuit judge was not only right in this respect, but he might have gone further, and held that the testimony tended to show that the horse did not attempt to cross at the crossing. No witness saw the horse, and the only evidence that the horse was at the crossing at all on the morning of the disaster was derived from the tracks of the animal seen on the railroad track, and these tracks showed that the horse had passed be-

yond the crossing, in the direction of the trestle, nibbling the grass as she went, and that the animal had reached a point beyond the crossing before she took fright, and, as inferred from the length of her stride, ran up the track towards the trestle, where she was overtaken and killed by the train. So that we think there was no error on the part of the circuit judge in holding that there was no evidence tending to show that the injury complained of was the result of any negligence upon the part of the defendant in failing to keep in safe repair the railroad crossing; and hence, as in Glenn's Case, *supra*, a nonsuit was inevitable.

The seventh ground is based upon the erroneous idea that the judge should have applied the rule in Danner's Case, 4 Rich. Law, 329. Now, whatever may have been said as to the propriety of the arbitrary rule of evidence, as established by that celebrated case, yet it has been too long recognized, in this state, at least, to warrant the court, at this late day, in questioning it. But the inquiry here is whether that rule can be properly applied to the present case; and we do not think it can, unless the wholesome doctrines established by the cases of Glenn v. Railroad Co., Fell v. Railroad Co., Petrie v. Railroad Co., and Barber v. Railroad Co., cited above, are totally disregarded, and those cases are overruled, which we are by no means disposed to do.

The judgment of this court is that the judgment of the circuit court be affirmed.

McGOWAN and POPE, JJ., concur.

(43 S. C. 125)

CALHOUN v. PORT ROYAL & W. C. RY. CO.

(Supreme Court of South Carolina. July 27, 1894.)

NEW TRIAL—FILING DECISION.

Under Code, § 286 et seq., which provides that a motion for a new trial "must be heard and decided" at the same term, a decision on such a motion may be filed after the term *nunc pro tunc*, where it was heard and argued during the term, though pending the decision a judgment was entered on the verdict.

Appeal from common pleas circuit court of Abbeville county; W. H. Wallace, Judge.

Action by Thomas Calhoun against the Port Royal & Western Carolina Railway Company. There was a verdict for plaintiff, and from an order granting defendant a new trial plaintiff appeals. Affirmed.

Graydon & Graydon, for appellant. Joseph Ganalel and Parker & McGowan, for respondent.

McIVER, C. J. This case was tried at the October term, 1893, of the court of common pleas for Abbeville county, on Tuesday, the 17th of October, and the jury rendered their verdict, in favor of the plaintiff, on Wednes-

day, the 18th of October. Thereupon a motion for a new trial was made on the minutes, and the same was heard during the term by his honor, Judge Wallace, who reserved his decision. The October term of said court expired by its own limitation on Saturday, the 21st of October, and the same was adjourned *sine die*, on that day, before any decision of the motion for a new trial was rendered; but on the 26th of November, 1893, Judge Wallace filed with the clerk of the court of common pleas for Abbeville county an order, of which the following is a copy: "This case was heard by me at the October term of the court of common pleas for Abbeville county, S. C., and the jury impaneled therein rendered a verdict for the plaintiff. A motion was made before me, during the term, on the minutes, and so entered, for a new trial, on the ground that the verdict was not supported by the testimony. After careful consideration of the testimony in the case, I am of the opinion that there was not sufficient testimony upon which to base the verdict. It is therefore ordered that a new trial be, and the same is hereby, granted. November 26, 1893." In the meantime, to wit, on the 3d day of November, 1893, after due notice to the attorneys for defendant, and without objection from them, counsel for plaintiff entered judgment on the verdict in favor of plaintiff, and issued execution for the enforcement of the same. Within 10 days after notice of the filing of the order of Judge Wallace granting a new trial, plaintiff's counsel gave notice of intention to appeal therefrom, "with consent that, in case the said order of Judge Wallace be affirmed, judgment absolute may be rendered against the appellant." The exceptions of the plaintiff are as follows: "(1) Because the Code of Procedure expressly provides that the motion for a new trial shall be heard and decided at the same term of the court at which the case is tried, and it was error in his honor to file an order granting a new trial in this case more than a month after the final adjournment of the court at which the case was tried; (2) because his honor had no power to make any order in the case after the final adjournment of the court at which it was tried; (3) because his honor did not give a different direction to the clerk, who thereupon entered the judgment herein in accordance with the verdict, and his honor had no power to set aside the verdict and grant a new trial after the judgment had been entered on the said verdict; (4) because his honor had no power to set aside a judgment entered in accordance with the provisions of the Code of Procedure and the rules of court without a direct, formal application for that purpose, and could only do it, in that event, at a regular term of the court; (5) because his honor was without jurisdiction to make the order aforesaid, and it is submitted that the same is null and void."

The first, second, and fifth exceptions make

substantially the same question, and may therefore be considered together. That question is whether Judge Wallace, under the circumstances of this case, had jurisdiction to make the order of 26th November, 1893. His power to do so is assailed upon the ground that the Code requires that a motion for a new trial on the minutes must be heard and decided during the term at which the case is tried. The sections of the Code relied upon to sustain this position are 286 and 287. So much of the former section as relates to this matter reads as follows: "The judge who tries the cause may, in his discretion, entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages; but such motions, if heard upon the minutes, can only be heard at the same term at which the trial is had." It is very obvious that the provision just quoted does not sustain the position taken by appellant, for it only requires that the motion shall be "heard" at the same term, but does not require that the motion shall be "decided" at that term; and, inasmuch as in this case it appears that the motion was heard at the same term, it is clear that appellant's position in this case is not sustained by section 286. It is contended, however, that the provisions of section 287 are still more explicit, and do sustain the position of appellant. So much of that section as is pertinent to the present inquiry reads as follows: "A motion for a new trial on a case or exceptions, or otherwise, \* \* \* must, in the first instance, be heard and decided at the same term;" and the words "or otherwise" are claimed to be sufficient to include a motion for a new trial on the minutes. The only authority (if it can be so called) cited to sustain this construction is certain language used by the writer of this opinion, in his dissenting opinion in the case of *Molair v. Railway Co.*, 31 S. C. 524, 10 S. E. 243, but which, so far as we are informed, has never yet received the approval of the court; for in that case the majority of the court based its opinion upon this point upon the ground that the motion for a new trial was submitted to the circuit judge at chambers, and therefore the motion was not heard during the term, as may be seen by reference to page 517. But, even granting that the construction placed upon these two sections in the dissenting opinion just referred to is the correct construction (and I am free to say that I still think so), yet that will not conclude the present inquiry. Assuming, then, for the purposes of this discussion, that, under a proper construction of sections 286 and 287, when considered together, a motion for a new trial on the minutes must be heard and decided during the same term at which the case was tried, the practical inquiry still remains whether the motion for a new trial was heard and decided during the term at which the case was tried. As we have already

said, the case shows beyond dispute that the motion was heard and argued pro and con during the term, and after argument the judge announced that he would consider it. Accordingly, after the lapse of a little over a month, the judge announced the result of his consideration in the form of the order appealed from. It is apparent from the nature of the motion and the basis upon which it rested—insufficiency of the evidence—that it was the duty of the judge to examine carefully all the testimony; and, taking notice judicially of the fact that he was then on the circuit, we will assume, as a matter of simple justice to the judge, that, as soon as he had completed the examination of the testimony, he expressed his conclusion in the form of the order in question, which was filed on the 26th of November, 1893, *nunc pro tunc*, and the motion must therefore be regarded as not only heard, but decided, during the term. The same principle upon which we rest this decision was recognized and applied in the recent case of *Aultman v. Utsey*, 35 S. C. 596, 597, 14 S. E. 351, as well as by the supreme court of the United States in *Mitchell v. Overman*, 103 U. S. 62, in which case Mr. Justice Harlan uses the following language, which, it seems to us, is conclusive of the present inquiry: "The adjudged cases are very numerous in which have been considered the circumstances under which courts may properly enter a judgment or a decree as of a date anterior to that on which it was in fact rendered. \* \* \* We content ourselves with saying that the rule established by the general concurrence of the American and English courts is that where the delay in rendering a judgment or a decree arises from the act of the court,—that is, where the delay has been caused, either for its convenience, or by the multiplicity or press of business, either the intricacy of the question involved, or of any other cause not attributable to the laches of the parties,—the judgment or the decree may be entered retrospectively, as of a time when it should or might have been entered up. In such cases, upon the maxim '*actus curiae neminem gravabit*,' which has been well said to be founded in right and good sense, and to afford a safe and certain guide for the administration of justice, it is the duty of the court to see that the parties shall not suffer by the delay."

The third and fourth exceptions seem to relate to the effect of the entry of the judgment in favor of the plaintiff, pending the consideration of the motion for a new trial. It will be observed that the order appealed from makes no allusion to such judgment. Indeed, we have no reason to suppose that Judge Wallace knew that a judgment had been entered when he filed his order granting a new trial; and we do not see how the nature or effect of such judgment can be injected into this appeal. Indeed, as was said in *Kaminitsky v. Railroad Co.*, 25 S. C., at

page 67, "it was certainly proper to withhold the judgment until the motion for a new trial was heard;" and it may admit of grave question whether any judgment could properly have been entered while the judge was considering the question whether there should be a new trial; but that matter is not now before us. It seems to us, therefore, that the order appealed from must be affirmed, and that the defendant is entitled to judgment absolute against the plaintiff, in accordance with the stipulation contained in his notice of appeal.

The judgment of this court is that the order appealed from be affirmed, and that the defendant have judgment absolute against the plaintiff; and, for the purpose of making such judgment effectual, the case is remanded to the circuit court for Abbeville county, for such further proceedings as may be requisite.

McGOWAN and POPE, JJ., concur.

(42 S. C. 121)

FINLEY v. CUDD et al.

(Supreme Court of South Carolina. July 27, 1894.)

REPLEVIN—EVIDENCE—DAMAGES—FORM OF VERDICT—CHATTEL MORTGAGES.

1. Defendant, who held a lien on plaintiff's crop for advances, took up an overdue mortgage on plaintiff's horses, agreeing not to foreclose for a year if plaintiff would apply his crop to the lien, but subsequently sold the horses. *Held*, in replevin for the horses, where a counterclaim for the amount due under the lien and on another mortgage executed by plaintiff was stricken out, evidence of what plaintiff owed defendant was prejudicial where it exceeded the largest amount he could recover as damages, since the jury might infer that he had sustained no damages at all.

2. A mortgagee who wrongfully seizes the mortgaged property before condition broken is liable for the full value thereof where possession cannot be delivered, and not merely for the value of its use for the time intervening between the seizure and the maturity of the mortgage debt.

3. Code, § 283, providing that in replevin, if the property have not been delivered to plaintiff, or if it have and defendant claim a return thereof, the jury shall assess the value of the property if their verdict be for plaintiff, or if they find for defendant, and "that he is entitled to a return thereof," requires an alternative verdict only where defendant is entitled to a return of the property.

Appeal from common pleas circuit court of Spartanburg county; J. J. Norton, Judge.

Replevin by Joseph Finley against J. N. Cudd & Co. From a judgment for defendants, plaintiff appeals. Reversed.

Duncan & Sanders, for appellant. Nicholls & Jones, for respondents.

McIVER, C. J. It appears that the plaintiff had given a lien on his crop for the year 1891 to the defendants, to secure advances; and some time in the latter part of that year an arrangement was entered into between the parties whereby the defendants were to

take up a mortgage, then past due, held by one Mitchell, on a mare and colt belonging to plaintiff, with the understanding that if the plaintiff would gather his crop, and apply the same to the lien held by defendants, they would indulge him for the balance due on the Mitchell mortgage until the fall of 1892. Soon after the Mitchell mortgage was transferred to defendants, they, alleging that plaintiff was neglecting to gather his crop, and permitting the same to waste in the field, seized the crop under a warrant to enforce the lien, and about the same time obtained possession of the mare and colt covered by the Mitchell mortgage, and sold the same under said mortgage. Exactly how the defendants obtained possession of this mortgaged property was one of the disputed questions of fact in the case, the plaintiff claiming that the same was seized by one Holt, as the agent of the defendants, under the mortgage, while the defendants claimed that the plaintiff voluntarily delivered the mare and colt to them. Thereupon this action was brought to recover the possession of the mare and colt, plaintiff insisting that, under the arrangement made with the defendants at the time they obtained an assignment of the Mitchell mortgage, the plaintiff was entitled to retain the possession of the animals until the fall of 1892. The defendants, on the other hand, insisted that, by reason of the plaintiff's breach of the agreement to gather his crop and apply the same to the debt secured by the agricultural lien, they were not bound to wait until the fall of 1892 before enforcing the payment of the balance due on the Mitchell mortgage, but were justified in proceeding immediately to do as they had done. The defendants, in their answer, set up a counterclaim for the balance due them under the agricultural lien, as well as a balance due them on a mortgage given by plaintiff to one Floyd, which had been assigned to defendants. To this counterclaim the plaintiff demurred, and his demurrer was sustained, and the counterclaim was stricken out. The testimony adduced, which is set out in the case, was conflicting, especially as to who first violated the agreement mentioned above; and, in the course of the testimony, the defendants, against the objection of the plaintiff, was allowed to prove what was the total amount due to them by the plaintiff, the circuit judge ruling that such testimony was admissible in mitigation of damages.

The circuit judge, in the outset of his charge, seems to have treated the case as if it was an action by the plaintiff to recover damages from the defendants for their violation of the agreement not to foreclose their mortgage on the mare and colt until the fall of 1892, whereas the true nature of the action seems to have been to recover possession of the mare and colt, together with damages for the alleged unlawful seizure and detention thereof. When counsel for plaintiff called the attention of the court to this misconception

tion of the nature of the action, and offered to allow the case to be considered as an action for damages simply, counsel for defendants declined the offer; and the circuit judge then proceeded to instruct the jury that, in an action for the recovery of personal property, the form of the verdict was prescribed by statute, and used these words: "The form of your verdict will be: 'We find for the plaintiff the possession of the property in dispute, and, if possession cannot be had, then so many dollars, the value thereof, and so many dollars damages.' In that event you would not calculate at all the loss of the animals as any part of the damages, but you would value the use of the animals for the year, and return that value as the value of the animals on the limited title that the plaintiff alleged that he had. As I understand the complaint, it is for the use of the property for one year, and then whatever damages you think the plaintiff would be entitled to. If you find for the defendants, you simply say you find for the defendants." The jury returned the following verdict: "We find for the defendants;" and, judgment having been entered thereon, the plaintiff appeals upon the several grounds set out in the record.

The first, second, and third exceptions, in different forms, impute error to the circuit judge in admitting the testimony of defendants showing the amount due by the plaintiff to the defendants "in mitigation of damages." After the demurrer to the counterclaim had been sustained, we do not see any ground upon which such testimony could have been admitted, as it certainly was in no way relevant to any of the issues in the action. While it is ordinarily true that an error in admitting irrelevant testimony will not constitute a ground for a new trial, yet, if it appears that the admission of such testimony tends to mislead the jury, then it does become an error of which this court can take notice. If, as the circuit judge instructed the jury, the plaintiff, if entitled to recover at all, could only recover the value of the use of the animals for one year, which some of the witnesses placed as low as \$25, and if the testimony in question was admissible in mitigation of damages, the jury may have supposed that the plaintiff had really sustained no real damage at all, for the testimony objected to showed that the plaintiff still owed the defendants the sum of \$77. It seems to us, therefore, that the admission of this testimony tended to mislead the jury and prejudice the plaintiff.

The fourth and fifth grounds of appeal were not pressed in the argument here, and need not be considered, especially as we are satisfied that they could not be sustained.

The sixth ground of appeal imputes error to the circuit judge in charging the jury as follows: "The form of your verdict will be: 'We find for the plaintiff the possession of the property in dispute, and, if possession

cannot be had, then so many dollars, the value thereof, and so many dollars damages.' In that event you would not calculate at all the loss of the animals as any part of the damages, but you would value the use of the animals for that year, and return the value as the value of the animals on the limited title that the plaintiff alleged he had." Before proceeding to discuss this exception upon its merits, it is proper to notice an objection to its consideration at all, which has been interposed by counsel for respondents, to wit, that the exception is simply a quotation from the judge's charge, and does not point out any specific error. It is true that this court has taken occasion in several cases to condemn this mode of stating an exception, and very possibly, if there was no other error in this case, it would not be considered; but, as the case has to go back anyhow, we will not decline to consider the point which was, doubtless, intended to be made by this exception, as it may save another appeal. This point, as we gather from the argument of counsel, is that there was error in directing the jury, in estimating the value of the animals, to confine their estimate to the value of the use of the animals for a year, without regard to their absolute value as property. Where a mortgagee, without authority of law, seizes a mortgaged chattel before breach of the condition of the mortgage, and the mortgagor brings his action to recover the possession of the chattel, it seems to us that he would be entitled to a verdict for the recovery of the possession of such chattel, and, in case possession cannot be delivered, then for the absolute value of the chattel, and not merely for the value of its use for the time intervening between the seizure and the maturity of the mortgage debt, for the simple reason that until breach of condition the mortgaged property belongs absolutely to the mortgagor, subject only to a lien for the payment of the debt. Any other view would require us to assume, without any evidence, that the mortgagor would not pay the mortgage debt at maturity. It seems to us that so much of the charge as required the jury to confine their estimate of the value of the mortgaged property to the value of its use for the year was erroneous.

The seventh ground is open to the same objection as that interposed by respondents to the sixth ground, but, for a similar reason, we will not decline to consider it in this case. The point of this ground is that the circuit judge should have directed the jury to find a verdict in the alternative, instead of simply a verdict for the defendants. It must be admitted that the language of section 283 of the Code, under which this question arises, is not as clear as it might be. So much of that section as relates to this matter reads as follows: "In an action for the recovery of specific personal property, *if the property have not been delivered to the plaintiff*, or if it have, and the defendant by his answer claim a return thereof,

the jury shall assess the value of the property, if their verdict be in favor of the plaintiff, or if they find in favor of the defendant, *and that he is entitled to a return thereof.*" The words which we have first italicized in the foregoing quotation would seem to imply that even where, as in the present case, the property in dispute has not been delivered to the plaintiff, and the verdict is for the defendant, it must be in the alternative; but the words last italicized would seem to repel such an inference, and to require an alternative verdict only where the defendant is entitled to a return of the property, which is not the case here. This provision of the Code has been applied in several cases, but none of them appear to be like the present. In *Robbins v. Slaterry*, 9 S. E. 510, decided as far back as November term, 1878, and reported in a note to *Lockhart v. Little*, 30 S. C., at page 328, 9 S. E. 511, the property in dispute had been taken from the possession of the defendant, and delivered to the plaintiff, under proper proceedings for that purpose authorized by the Code; and the defendant, in his answer, claimed judgment for the return of the property or its value, and it was held that a verdict for the defendant for \$250 (the value of the timber) could not be sustained, as it practically deprived the plaintiff of the right to return the property. In *Bardin v. Drafts*, 10 S. C. 493, the property in question was taken from the possession of the defendant, by proper proceedings, and delivered to the plaintiff. The verdict was in the following form: "We find for the defendant the return of the property, of \$507.95." And it was held in conformity to the statute, because practically it was a verdict for the return of the property, or for its value. In *Eason v. Miller*, 18 S. C. 381, a verdict in the following form, "We find for plaintiff, patterns, the value of \$100," was set aside as not in conformity to the statute. This case, however, throws but little light on the present inquiry, as the main objection to the verdict was its want of definiteness as to the number and character of the patterns intended. In *Thompson v. Lee*, 19 S. C. 489, the property in question was taken from the possession of defendant, and delivered to plaintiff, under proper proceedings for that purpose, and a verdict in this form, "We find for defendant one dollar," was set aside, on the ground, among others, that it should have been in the alternative. In *Archer v. Long*, 32 S. C. 171, 11 S. E. 86, the property in dispute was taken from the possession of defendant and delivered to plaintiffs, and a verdict in the following form, "We find for the defendant the property in dispute," was set aside for want of conformity to the statute. It will thus be seen that the question here presented has never yet been passed upon by this court; for in the present case the property in dispute was not taken from the possession of the defendants, and there was no necessity, therefore, for them to demand a return thereof, and no necessity for an al-

ternative verdict. It seems to us that the real object of the section of the Code under which this question arises is of a twofold character,—First, to protect the rights of the true owner to regain possession of his property in specie, if practicable; second, to save the party who may be innocently, but illegally, in the possession of the property of another from being compelled to pay such value as a jury may see fit to place upon the property, by giving him the alternative of returning the property to its rightful owner, and only paying such damages for its detention as may be determined to be proper. We do not think, therefore, that the seventh ground of appeal can be sustained.

To avoid any misapprehension, we desire to add that we are not to be understood as expressing or even intimating any opinion upon the question which lies at the very foundation of plaintiff's claim, to wit, whether, under the agreement between the parties, the defendants were bound to wait until the fall of 1892 before proceeding to enforce the Mitchell mortgage. That is a question of fact for the jury, which must be submitted to them under proper instructions; and the only reason why we grant a new trial is that there is reason to apprehend that, under the instructions given at the former trial, the jury may have been misled to the prejudice of the plaintiff. The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial.

McGOWAN and POPE, JJ., concur.

(42 S. C. 178)

Ex parte MIDDLETON et al.  
McDONALD'S ESTATE v. McDONALD.  
(Supreme Court of South Carolina. Sept. 12, 1894.)

#### DESCENT AND DISTRIBUTION—ADVANCEMENTS.

Testator provided that: "I do further will that what money I may have advanced from time to time to either of my children shall be deducted from their share of the estate, that all may share equal." Held, that money loaned by testator to a son, secured by a mortgage from the son's wife, which mortgage testator held till it was barred by limitation, and then satisfied without consideration, was not an advancement.

Appeal from common pleas circuit court of Anderson county; W. H. Wallace, Judge.

W. J. Middleton and H. L. McDonald, executors of W. H. McDonald, deceased, filed a statement for the final settlement of their accounts. S. K. McDonald excepted to a charge against him as an advancement. The probate court allowed the exception, but was overruled by the circuit court, and S. K. McDonald appeals. Reversed.

McDonald, Douglass & Obear and Friereson & Cochran, for appellant. Murray & Watkins, for respondents.

GARY, J. On the 6th of September, 1878, W. H. McDonald, deceased, sent to his son

S. K. McDonald, the appellant, a check for \$500, in response to letters from appellant that his house and lot in the town of Winnsborough were about to be sold by a building and loan association for a debt that was due said association. The money was applied to the payment of said indebtedness. On the 10th of September, 1878, S. K. McDonald conveyed the said house and lot to his wife, Maggie F. McDonald. On the same day, Maggie F. McDonald executed her bond for \$500 to her father-in-law, W. H. McDonald, and to secure its payment she executed a mortgage of said house and lot to the said W. H. McDonald. The bond and mortgage were then forwarded to W. H. McDonald, who kept said bond and mortgage in his possession until some time in 1886, when he returned it to his daughter-in-law, Maggie F. McDonald. Thereafter, during the year 1886, W. H. McDonald sent to S. K. McDonald a satisfaction of said mortgage. On the 3d of October, 1883, W. H. McDonald made his will, in which the following clause appears: "I do further will that what money I may have advanced from time to time to either of my children shall be deducted from their share of the estate, that all may share equal." In making a final division of the estate of W. H. McDonald, the executors sought to charge S. K. McDonald with the \$500 as an advancement, but the probate judge before whom the case was tried decided "that the loan to S. K. McDonald was satisfied by accepting the bond and mortgage of his wife, Mrs. Maggie F. McDonald, and that, testator having satisfied said bond and mortgage as to her, the share of her husband, S. K. McDonald, cannot be charged with the item of five hundred dollars as an advancement." The case came on for trial before Hon. W. H. Wallace, presiding judge, on appeal from the decision of the probate court, who decided that "the testimony satisfies me that the five hundred dollars was intended and treated by the testator as an advancement to S. K. McDonald and that he should account for the same," and reversed the decree of the probate court. Appellant's exceptions question the correctness of Judge Wallace's decision.

1. The \$500 sent by W. H. McDonald to S. K. McDonald was intended as a loan. This is shown by the following facts: W. H. McDonald accepted the bond and mortgage as a security for the payment of the \$500, and kept them until 1886. H. L. McDonald testifies, "It [the mortgage] was given for money borrowed." S. K. McDonald testifies: "I asked the loan of \$500. I sent my father a mortgage to secure the debt." Mrs. Maggie McDonald testifies: "I gave the bond and mortgage to my father-in-law, W. H. McDonald, to secure him for money loaned my husband to pay off the indebtedness to the building and loan association." Mr. Thornton, in his work on Gifts and Advancements, says: "If a parent take

a note or security from a child for money loaned or otherwise given him, the presumption is that the amount thus loaned or given is a debt; and neither a gift nor an advancement." "If a parent receives such evidence of indebtedness as a promissory note, or if he becomes surety for the child, the presumption is then in favor of a debt." 1 Am. & Eng. Enc. Law, p. 219. "A note given by a child to a parent is presumed to be, not an advancement, but a debt." Abb. Pr. Ev. 154, cited with approval in *White v. Moore*, 23 S. C. 460.

2. The acceptance by the testator of the bond and mortgage as security for the payment of the loan of \$500 was an extinguishment, under the circumstances, of the debt against S. K. McDonald. "The differences between the two classes seem to be that the taking of an equal or inferior security raises a question of fact, with the burden of proof on the debtor, while, when a higher security is taken, in the absence of testimony to the contrary, the law will imply a payment." *Chalmers v. Turnipseed*, 21 S. C. 142. See, also, *Felzer v. Steadman*, 22 S. C. 290; *Gardner v. Hust*, 2 Rich. Law, 608; *Chewning v. Proctor*, 2 McCord, Eq. 15. "The giving of a higher security constitutes the payment of a simple contract debt, unless it is otherwise agreed at the time." 18 Am. & Eng. Enc. Law, 185. "The rule is the same, whether the debtor gives his own note or that of another party." *Id.* 171. There is no testimony rebutting this presumption. On the contrary, it is strengthened by the fact that W. H. McDonald made no demand on S. K. McDonald, but kept the bond and mortgage for a longer time than was necessary to bar the claim by the statute of limitations. The letter of W. H. McDonald does not contain any evidence rebutting this presumption, and is consistent with the theory that the debt against S. K. McDonald was extinguished by the bond and mortgage. The certificate in testator's handwriting cannot be said to furnish evidence against this presumption, because the presiding judge decided that it was not competent evidence, and should have been excluded, and the correctness of this ruling is not before this court for consideration.

3. If the testator had retained the bond and mortgage until his death, it certainly could not have been contended for a moment that S. K. McDonald could have been charged with the \$500 as an advancement, in the settlement of testator's estate. The question then is, did the surrender of the bond and mortgage by the testator to Mrs. Maggie F. McDonald convert the \$500, which had been paid by the giving of a higher security, into an advancement against her husband, S. K. McDonald? Whatever may have been the law on this subject prior to the constitution of 1868, a gift to a daughter-in-law since that time does not become, by operation of law, an advancement chargea-

ble against her husband in the settlement of his father's estate. We think the principle governing this case is stated in *Kennedy v. Badgett*, 26 S. C. 592-594, 2 S. E. 574, in which Chief Justice McIver says: "It seems that Leannah Kennedy, during her lifetime, gave off property in unequal portions to her children, which they received at a valuation, to be accounted for in the final settlement of her estate, and by her will gave her entire estate, in equal shares, to her three daughters, Mrs. Franks, Mrs. Badgett, and Mrs. Bolt, and to her son, N. O. Kennedy, in trust for the use of his wife and children. Assuming that all the property thus given off had been fully accounted for at her death, then it appears that N. O. Kennedy had received more than one-fourth of the whole estate, and each of the three daughters less than that proportion; and the real controversy is whether the wife and children of N. O. Kennedy shall be required to account for the amount received by N. O. Kennedy during the lifetime of Leannah Kennedy before they can receive anything under the terms of her will. \* \* \* It may be that the conclusion which we have reached may result in favoring the Kennedy family, to the prejudice of the interests of the daughters, as it is but reasonable to suppose that his wife and children participated in the use and enjoyment of the property received by him from his mother during her lifetime; but at the same time it may be that his mother, finding that he had, through improvidence or misfortune, dissipated or lost the property which she had previously given to him, for that very reason wished to make some provision for his wife and children. But, whatever may be the facts in this respect, such considerations have nothing to do with our present inquiry. If the property belonged to Leannah Kennedy, as has heretofore been determined, she had the right to dispose of it as she might see fit; and if she saw proper to give one-fourth of it to the wife and children of her son, without requiring them to account for what she had previously given to her son, as we think she did, under a proper construction of the will, as well as of the former decree in this case, she had a perfect right to do so, and her wishes in this respect must be carried into effect." It is the judgment of this court that the order appealed from be reversed.

McIVER, C. J., and POPE, J., concur.

(42 S. C. 311)

TINMAN v. McMEEKIN.

(Supreme Court of South Carolina. Sept. 12, 1894.)

LIEN FOR RENT—PROCEEDINGS TO ENFORCE—SATISFACTION OF LIEN.

1. Where an affidavit before a justice to enforce a lien on crops for rent fails to state when the crops were raised, or that the land

rented was in the county of the justice, but the affidavit of defense states these facts, such defects are cured.

2. Where the lien for rent is once satisfied by delivery of the agreed portion of the crops, it cannot be revived by an agreement that the proceeds of the crops should be applied on a different account.

Appeal from common pleas circuit court of Fairfield county; Q. D. Witherspoon, Judge.

Action by Nicholas Tinman against Warren T. McMeekin to enforce a lien for rent. There was a judgment for plaintiff, and defendant appeals. Reversed.

McDonald, Douglass & Obeare, for appellant. Buchanan & Hanahan, for respondent.

POPE, J. The plaintiff rented to the defendant, for the year 1892, a parcel of land situate in Fairfield county, in this state, for 625 pounds of lint cotton, to be delivered on or before the 31st December, 1892. On the 1st of November and 18th of December of that year the defendant delivered the entire rent cotton to the plaintiff. On the 18th of January, 1893, an agreement was made between the parties as to the proceeds of the cotton. (It having been sold for \$70, a sum greater than the value of the rent,—the 625 pounds of lint cotton,—which was \$56), by which the rent was left unpaid, and the amount paid as rent was applied to an unsecured account held by plaintiff against the defendant. Thereafter, on the 9th February, 1893, the plaintiff sued out before a trial justice a warrant, which was levied upon other crops of defendant, to recover the rent. Defendant denied plaintiff's right to this process, contending—First, that there was a technical failure in the proceedings before the trial justice, in that there were certain jurisdictional facts omitted; and, secondly, that there was no lien existing at the date of the proceedings. The trial justice held with the defendant, and dismissed the proceedings; but upon appeal to the circuit court, which came on to be heard by Judge Witherspoon, he reversed the judgment of the trial justice. The defendant brings this appeal from that judgment.

As to the first question presented, namely, the defect in the proceedings in the trial justice court, in that the plaintiff failed to show in his affidavit that the land rented was situated in Fairfield county, and that the crop seized was grown therein during the year 1892, we cannot agree with the appellant, for he elected himself to cure these defects by embodying these allegations in the very affidavit upon which he based his right to these technical defenses. Having done so, the papers themselves showed jurisdiction in the trial justice to hear and determine this matter.

But, as to the second ground of appeal, we are inclined to think the circuit judge was in error, upon the admitted facts. Whenever the contract between the landlord and his tenant for rent (for which the law of this



state gives a statutory lien upon all the crops grown by the tenant on the rented lands, as a security for such rent) has been once settled in full, it is not in the power of the landlord and tenant, after such a settlement, to renew such statutory lien. If the parties wished to create a lien, it was in their power to do so by way of mortgage; but they could not cause the lien under the statutes of this state, which had been once satisfied, to be renewed. The judgment of this court is that the judgment of the circuit court be reversed, and the judgment of the trial justice affirmed.

McIVER, C. J., concurs.

(93 Ga. 572)

**CITY OF GREENSBOROUGH v. McGIBBONY.**

(Supreme Court of Georgia. April 9, 1894.)

**MUNICIPAL CORPORATION — DEFECTIVE BRIDGE — LIABILITY FOR PERSONAL INJURIES — LOSS OF TIME — NOMINAL DAMAGES.**

1. Although the charter of a city may not, in express terms, confer the power or impose the duty of keeping the streets and bridges within the corporate limits in proper condition and repair, yet where the charter grants to the corporate authorities the power to "impose such taxes upon all the real and personal estate within the corporate limits of said city as they shall deem necessary for the support of the government of said city, or for other purposes, and \* \* \* enforce the collection of the same," and where these authorities have assumed and exercised corporate functions over the streets and bridges, and have negligently constructed or failed to keep in repair a bridge upon one of the public streets, whereby a traveler crossing the same sustains a personal injury, the corporation is liable to make compensation in damages, though no right of action be given by the charter or any statute. The right to redress for an injury occasioned by a defective structure erected and maintained by the corporation upon the public highway within the city is a right derived from the common law, and may be recognized and enforced under the circumstances of the present case.

2. Where one is tortiously disabled by a personal injury, and prevented from attending to his ordinary business for several weeks, he may be allowed nominal damages, at least, for his loss of time, although no definite evidence of the value of his time be submitted to the jury.

(Syllabus by the Court.)

Error from superior court, Greene county; C. L. Bartlett, Judge.

Action by J. A. McGibbony against the city of Greensborough for personal injuries caused by a defective bridge on one of defendant's streets. There was a judgment for plaintiff, and defendant brings error. Affirmed.

H. T. Lewis, for plaintiff in error. John C. Hart, for defendant in error.

LUMPKIN, J. 1. The plaintiff below recovered damages from the city of Greensborough because of personal injuries sustained by reason of a defective bridge in

one of its streets. The defendant contended that it was not liable, because there was nothing in its charter imposing any duty whatever upon the municipal corporation with reference to keeping its streets or highways in repair, and that in a case of this kind the city could not be held responsible, because it is not made so, either expressly or impliedly, by its charter, or by any general law. Under the facts disclosed by the record, we think the city was liable. We have carefully examined the act of March 5, 1856, incorporating the city of Greensborough (Acts 1855-56, p. 342). That act confers upon the mayor and aldermen the power to remove all nuisances and obstructions in or upon the streets, and also "all the rights, powers and authorities that are now vested in the commissioners of the town of Greensboro." Accordingly, we took the pains to examine all the acts of the legislature, relating to Greensborough, passed before the act last mentioned. The act of December 16, 1815, provided "that the commissioners of the town, shall have the entire control over all the citizens and hands who actually reside within the limits of the corporation, that are liable to work on the roads, for the express purpose of keeping all the streets of said town in good repair." With the exceptions above indicated, we find nothing in any of the several acts relating to Greensborough, including also those amendatory of the act of 1856, conferring upon its municipal authorities any power, or imposing upon them any duty, with reference to the streets of the city. The mere power to remove nuisances and obstructions from the streets hardly imposes a plain and unequivocal general duty of keeping the streets in repair; and we do not think the provisions quoted from the act of 1815 conferred any power or imposed any duty upon the commissioners of Greensborough, in their corporate capacity, with reference to the streets. This provision amounted only to a modification of the state's system of working the public roads, so far as this town was concerned, by making the town commissioners road commissioners, in place of the road commissioners appointed in the usual manner. It cannot, therefore, be fairly said that the charter of Greensborough, in express terms, confers upon the municipal authorities the power, or imposes upon them any corresponding duty, of keeping the streets and bridges within the corporate limits in proper condition and repair. Inasmuch, however, as the charter does grant to the corporate authorities the power to "impose such taxes upon all the real and personal estate within the corporate limits of said city as they shall deem necessary for the support of the government of said city, or for other purposes, and \* \* \* [to] enforce the collection of the same," we do not think, viewing this in connection with the other provisions of the charter, there was any

undue assumption of authority by the mayor and aldermen in taking and exercising corporate functions over the streets and bridges of the city, as the evidence shows they undoubtedly did. Indeed, usually one of the main purposes of incorporating a city is to secure safe, convenient, and well-kept streets and sidewalks; and to this end their charters generally, in express terms, invest the municipal authorities with some control over the streets, and impose upon these authorities the duty of keeping the same in repair. We cannot well doubt that, in procuring a charter for the city of Greensborough, these things were in contemplation, though the language of the charter contains so little with reference to these matters. It is clear, however, that the mayor and aldermen, as evinced by their conduct, acted upon the idea that they had the power to exercise corporate functions over the streets, and the taxing power conferred upon them is broad enough to afford the means of carrying this power into effect. Dealing with them from their own standpoint, assuming that they usurped no authority in the premises, and bearing in mind that they actually did assume and exercise control over the streets, we are of the opinion that the municipal government should be treated as if the power above mentioned was expressly conferred upon it by its charter. At any rate, it does not lie in the mouth of these authorities to claim that the city is not liable because what they did was ultra vires.

Upon the assumption that they were properly exercising corporate control over the streets and bridges, we will now endeavor to show that negligence on their part in constructing or failing to keep in repair a bridge upon one of the public streets, whereby a traveler sustained a personal injury, would render the corporation liable to make compensation in damages. "In so far \* \* \* as they exercised powers \* \* \* voluntarily assumed,—powers intended for the private advantage of the locality and its inhabitants,—there seems to be no sufficient reason why they should be relieved from that liability to suit and measure of actual damage to which an individual or private corporation exercising the same powers for purposes essentially private would be liable." 15 Am. & Eng. Enc. Law, p. 1141. "Persons or corporations that voluntarily assume and undertake the performance of a work, even though it be quasi public in its nature, ought to be held to impliedly contract that they will exercise due care in its performance, and for a neglect in this respect should be liable for the resulting damage." *City of Galveston v. Posnainsky*, 62 Tex. 118. In *Parker v. Mayor, etc.*, 39 Ga. 725, Brown, C. J., said: "As the charter of the city of Macon confers upon the mayor and council full power and authority to keep the streets, lanes, alleys, sidewalks, and public squares of the city in good order, and to

remove any buildings, posts, steps, fences, or other obstructions or nuisances, which is a power conferred upon public officers for the public good, it is their duty to exercise it, and to keep the streets, lanes, alleys, and sidewalks in such condition that persons passing over or along them may do so with safety and convenience. To this end it is the duty of the city authorities to remove any nuisance from the streets or sidewalks, and anything that endangers the life of any person passing along the sidewalk is a nuisance which they are bound to abate." The principle deducible from this language is that a power conferred upon the municipal authorities for the public good carries with it the corresponding duty of exercising that power for the public welfare. It has already been shown, we think, that a power voluntarily assumed and exercised carries the same consequences as a power expressly conferred. "Municipal corporations, such as cities, towns, and incorporated villages, are generally held to be under a duty to construct bridges built by them so that they shall be reasonably safe for passage, and to so maintain such bridges, and those under their dominion, no matter by whom they were originally constructed, as that they shall be reasonably safe for travel by one who uses ordinary prudence and care. By 'bridges under the dominion of municipal corporations,' we mean such as they have full control over, and for the maintenance of which they may rightly use the corporate funds. It results that if there is a legal duty the negligent breach of it renders the wrong-doing corporation liable to an action by one who sustains a special injury. In those jurisdictions which do not recognize the New England rule, there can be no question that, if there is a liability respecting streets, so also must there be a liability for defective bridges. The basis of municipal liability for defective bridges is essentially the same as that respecting streets. The corporate responsibility is commensurate with the corporate duty and power." Elliott, *Roads & S.* p. 44. See, also, *Bish. Noncont. Law*, §§ 757, 758. From the latter section it will be seen that the authority to raise the money required to keep the public streets in repair has much to do with the question of determining the liability of the municipality. And, to the same effect, note the language of Judge Cooley, quoted by Slayton, J., in *City of Galveston v. Posnainsky*, supra, on pages 128 and 129. It matters not, we think, that for such an injury as that sustained by the plaintiff in the present case no right of action is given by the charter of the city, or by any statute of this state. The right to redress for an injury thus occasioned is derived from the common law. The existence of this common-law liability is now recognized in Alabama, Colorado, Dakota, Delaware, District of Columbia, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana,

Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Utah, Virginia, Washington, and West Virginia. Jones, Neg. Mun. Corp. § 53, and cases cited.

2. It appeared that the plaintiff, by reason of the injury received, was disabled and prevented from attending to his ordinary business for several weeks. The court, among other things, charged the jury, "In the event you find the plaintiff is entitled to recover at all, he is entitled to recover damages for loss of time, if he lost any." It is alleged that this charge was erroneous, because the evidence showed that the plaintiff's time was worth nothing. We think there was evidence that the plaintiff's time was of some value, though upon this point the evidence was not very definite. At any rate, the plaintiff was entitled to at least nominal damages for his loss of time; and the jury, in estimating the damages, very probably, did not allow him any considerable sum on this account, the verdict, in view of the entire evidence, being quite reasonable in amount. Judgment affirmed.

(93 Ga. 160)

#### HART v. STATE.<sup>1</sup>

(Supreme Court of Georgia. Oct. 9, 1893.)

#### CRIMINAL LAW—INSTRUCTIONS AS TO CREDIBILITY OF WITNESS.

Where the sole witness for the state is impeached, not only by evidence of bad character, and by contradictory statements with reference to the substance of his testimony, but by testimony tending to disprove the main fact on which guilt depends, the court should not charge the jury upon sustaining the witness by proof of good character, unless there is some evidence on which to base such a charge. In this particular case the error is cause for a new trial, as the jury may have understood that the court had reference to certain evidence tending to show that the witness was industrious and reliable as a work hand, and meant to treat this as evidence on which to base the charge.

(Syllabus by the Court.)

Error from city court of Monroe; J. B. Williamson, Judge.

Orange Hart was convicted of selling intoxicating liquors unlawfully, and, a motion for a new trial having been denied, he brings error. Reversed.

The following is the official report:

The defendant was convicted of selling liquor in Monroe county. He moved for a new trial, which was denied, and he excepted. The first special ground of the motion is that the court erred in charging the jury in the language of section 3875 of the Code, there being no evidence to warrant such a charge, and the court not explaining what was meant by proof of general good

character. According to the brief of evidence, the only witness for the state was Charley Waller, who testified that on the first Sunday in May, 1892, at a church near Montpelier Springs, in Monroe county, he saw the defendant sell Bob Davis 10 cents' worth of rye whisky, for which he saw Bob pay him 10 cents. Knew it was rye whisky because he (witness) drank some of it. Several witnesses were introduced by the defendant to impeach Waller, and they gave testimony tending to prove contradictory statements made by Waller. One of them testified that his general character was bad, and from a knowledge of it the witness would not believe him on oath, though as a work hand the witness had found him satisfactory. Another testified that he was a very good hand, but his morals were bad, and from a knowledge of his character the witness would not believe him on oath if he swore on any question alone. Never knew him on the stand to swear to a lie. As a work hand he was very good and reliable, but his moral character was very bad. Would not swear that he would not believe him on oath. The indictment charged that the defendant, "not being a practicing physician, did then and there sell a quantity of spirituous and intoxicating liquor, the same not being domestic wine," etc. The court charged the jury that if they believed from the evidence beyond a reasonable doubt that the defendant, in Monroe county, at any time within two years prior to the finding of the indictment, did sell, directly or indirectly, any quantity of alcoholic, spirituous, or malt liquors, or intoxicating biters, this would be a violation of the local prohibition law of that county, and the jury would be authorized to convict him. This instruction is assigned as erroneous, because the indictment charged the sale of spirituous or intoxicating liquor only. The motion also alleges that the verdict is contrary to law and evidence, and that it was obtained on perjured testimony, as shown by an affidavit of Robert Davis, attached to the motion, stating that he never bought any whisky from the defendant on the first Sunday in May, 1892.

Berner & Bloodworth and Harrison & Peebles, for plaintiff in error. B. S. Willingham and M. W. Beck, Sol. Gen., for the State.

BLECKLEY, C. J. The state's case depended wholly upon the testimony of a single witness. He was impeached by evidence of bad character, by previous contradictory statements with reference to the substance of his evidence, and by evidence in behalf of the defense tending to disprove the main fact involved in the alleged guilt of the accused. There was no attempt to sustain him by evidence of his good character, and yet the court charged the jury that a witness sought to be impeached could be thus sus-

<sup>1</sup> This case, published in 18 S. E. 550, is republished, an opinion having been filed September 8, 1894.

tained. This charge was irrelevant, and consequently erroneous. Generally, no doubt, it might be treated as harmless; but in this particular case it may have done harm, for there was evidence tending to show that the witness was industrious and reliable as a work hand. Such evidence is no substitute for the usual supporting evidence touching good character. The jury may have referred the charge to this evidence, for there was no other to which they could possibly have applied it. Inasmuch as this part of the charge was delivered from the bench as instruction in the case, they would naturally suppose that the presiding judge considered it pertinent to something in the facts submitted to them. If they took this natural view of the matter, there is a strong probability that they treated industry and reliability as a work hand as equivalent to that general good repute which the law recognizes as a basis, when proved, for reposing confidence in the veracity of a witness. There was a triple attack upon this witness, and he stood alone and wholly unsupported. This being so, the charge of the court should neither expressly nor by implication have suggested to the jury that he was or could be sustained by evidence favorable to his general character. There ought to be a new trial. Judgment reversed.

(93 Ga. 158)

**TOLBERT v. STATE.<sup>1</sup>**

(Supreme Court of Georgia. Oct. 9, 1893.)  
**ASSAULT WITH INTENT TO RAPE—IDENTIFICATION OF DEFENDANT.**

In view of the evidence, there is ground for grave apprehension that the little girl who was assaulted may have been mistaken in identifying the accused as the guilty person. But this was a question for the jury, and, the presiding judge having approved the finding, this court is constrained by law to recognize the doubt as having been rightly solved against the prisoner.

(Syllabus by the Court.)

Error from superior court, Fulton county; R. H. Clark, Judge.

Tom Tolbert was convicted of assault with intent to rape, and brings error. Affirmed.

The following is the official report:

The plaintiff in error was convicted of assault with intent to commit rape on Nannie Perry, nine years old. He moved on the general grounds for a new trial, which was denied, and he excepted. The testimony of the girl is to the effect that the crime was committed by the defendant between 2 and 3 o'clock in the day. He introduced four witnesses whose testimony tends to prove an alibi. It also appears that on the second day after the commission of the offense the defendant went twice to the house of the girl's mother, and told her he had heard he

was accused of the crime, and that he could prove where he was that day. The girl was absent at his first visit, but was present at the second, and identified him as the man who assaulted her. One witness testified that he saw the defendant about a block below the house where the assault was said to have occurred, going in the direction of the place where he was located by the proof of alibi, about 1 o'clock on the same day.

F. R. Walker, for plaintiff in error. C. D. Hill, Sol. Gen., for the State.

**BLECKLEY, C. J.** There is a painful conflict between what we would do as men and what we must do as magistrates. No doubt can exist that a crime was committed, and that the guilty person ought to be punished. The sole uncertainty relates to the identity of the offender. There was evidence tending to establish an alibi, and if this evidence was true the little girl was probably mistaken in identifying the accused as the person who assaulted her. The record discloses some conflict between herself and her mother as to whether the mother did or did not make a certain remark to her, calculated to shape and influence her testimony at the trial. If the mother did this, the reliability and value of the child's evidence would naturally be considerably impaired. The mother testified she did not make the remark, and the child testified she did make it. As the child, if truthful, must have believed she made it, this belief ought perhaps to count for as much against the general weight of the child's evidence as would the remark itself, were there no difference between the witnesses concerning it. Taking all the evidence together, we feel, as men, grave apprehension of mistake on the part of the little girl in this matter of identity. But the question was one exclusively for the jury, and, their finding having been approved by the presiding judge, we cannot, as a reviewing court, allow any mere doubts of our own to supersede the verdict. The law, as we understand it, constrains us to recognize the verdict as having solved rightly against the accused all reasonable doubt as to matters of fact involved in his guilt or innocence. There was no error in denying a new trial. Judgment affirmed.

(93 Ga. 602)

**BRISCOE et al. v. MONTGOMERY et al.**  
 (Supreme Court of Georgia. March 19, 1894.)  
**GARNISHMENT—EXEMPTION OF WAGES—"DAY LABORER."**

A "commercial traveler," whose business it is to travel and sell goods for his employer, though employed and paid for his services by the day, is not a "day laborer," in the sense in which these words are used in section 3554 of the Code, and his wages are not exempt from the process of garnishment.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

<sup>1</sup> This case, published in 18 S. E. 979, is republished, an opinion having been filed September 8, 1894.

Action by Montgomery & Co. against J. D. Briscoe. To a judgment sustaining an attachment issued by plaintiffs, said Briscoe and garnishees bring error. Affirmed.

Harper Hamilton and J. B. F. Lumpkin, for plaintiffs in error. Dean & Smith and A. G. Ewing, for defendant in error.

**LUMPKIN, J.** It was held in *Cleghorn v. Saussy*, 51 Ga. 576, that the monthly wages of a forwarding clerk in the employment of a railroad company were not subject to the process of garnishment. An examination of the evidence in that case will show that the services of this clerk in the performance of his duties were such as to require at his hands, if not actual "manual labor," in the common acceptation of the term, certainly labor somewhat of that character. In *Hightower v. Slaton*, 54 Ga. 108, it was held that the monthly salary of a teacher employed in a public school could not be reached by garnishment. This decision seems to rest upon the ground that to allow this to be done would be contrary to public policy, because it would tend to deprive the public of the benefit of the teacher's valuable services; and, besides, it would also be against public policy to allow the secretary and treasurer of the board of education, by whom, in his official capacity, the wages of the teacher were paid, to be subjected to the process of garnishment. *Lamar v. Ohisholm*, 77 Ga. 306, rules that the wages of a clerk and bookkeeper are not subject to garnishment. This decision was made on the authority of *Smith v. Johnston*, 71 Ga. 748, and the cases there cited. It is obvious that in the discharge of his duties a clerk and bookkeeper must necessarily perform a considerable amount of manual labor. On the same line is the case of *Abrahams v. Anderson*, 80 Ga. 570, 5 S. E. 778, which cites, in addition to the above cases, other decisions by this court in which section 3554 of the Code has been held applicable. We are not disposed to extend further the doctrine of these cases. In the case at bar it did not affirmatively appear that Briscoe performed any manual labor in the conduct of his business as a traveling salesman for the company he represented. He was employed as a commercial traveler, to sell goods for this company, and his business called him anywhere in the United States the company might require him to go. In point of fact, he traveled for it and sold goods in Georgia, Alabama, Mississippi, Arkansas, and Texas. Under these facts, we hardly think he properly falls within the class designated as "day laborers" in section 3554 of the Code, although, by his contract with the company, he was paid by the day. Indeed, a gentleman of his profession occupies a much higher station, socially and commercially, than that of a mere "day laborer," as that term is commonly understood. Judgment affirmed.

(33 Ga. 582)

# JONES et al. v. NAPIER.

(Supreme Court of Georgia. March 19, 1894.)

## PARTITION—WHO MAY MAINTAIN—PARTIES.

The holder of several bonds for titles from various persons binding them to convey to him certain undivided interests in land, with parts of the purchase money paid, is not entitled to institute proceedings for a partition of the premises by sale; nor does he, after instituting such proceedings, obtain a right to such partition by obtaining from one only of his vendors a deed conveying to him an undivided interest in the land, none of his other vendors being parties to the proceedings.

(Syllabus by the Court.)

Error from superior court, Walker county; John W. Maddox, Judge.

Action by N. O. Napier against Mrs. M. E. Jones and others for partition of land. There was a judgment for plaintiff, and defendants bring error. Reversed.

John D. Taylor and J. M. Bellah, for plaintiffs in error. Lumpkin & Shattuck, for defendants in error.

**LUMPKIN, J.** The land involved in the present case was once owned by W. H. D. Inman, who died December 18, 1858, leaving a will, executed on the preceding day, which, after devising the land to his wife, contained in the same item a provision that: "At my wife's death, I will all my property to my children, to be equally divided between them, and at their death the property is then to go to their children. In the event that my wife should marry, the property is then to be equally divided between her and my children, she drawing a child's part." Properly construed, this will conveyed only a life estate in the property to the wife, in the event she should not again marry. Mrs. Inman died May 7, 1881, having never again married. There were four children of the testator and his wife, who survived him,—Mrs. Taylor, Mrs. Barry, Mrs. Agnew, and a son, who died without issue before his mother. The youngest child was 12 or 13 years old when the testator died. In 1882 the executor of the will, under an order from the court of ordinary, advertised and sold the land. It was bid off by Mrs. Taylor, Mrs. Barry, and a Mrs. Jones. The last paid cash for her portion. The other two paid no money, but, by an agreement with the executor, the undivided one-third interest to which each was entitled was conveyed severally to her, "and considered as so much money paid in." The money which the executor received from Mrs. Jones was paid over by him to the duly-appointed guardian of a minor child, who was the sole heir of his mother, Mrs. Agnew, who had previously died. Mrs. Taylor married in May, 1886. After the executor's sale, already mentioned, she died leaving four children,—Charles, Carrie (who married one Chandler), Eddie, and John Taylor, Jr. At the time of the trial, Mrs. Barry was still in life, and had four minor children, all residing in Ala-

bama. Napier bargained with Mrs. Barry for an undivided one-third interest in the land, taking from her a bond for titles to the same. He also bargained with Charles Taylor and Mrs. Chandler for their respective interests in the land, taking bonds for titles from them. It seems, though it does not unequivocally appear, that Napier had paid a part of the purchase money to each of those from whom he held bonds for titles. He had never, however, had possession of the land, or any part of the same. In 1890 he filed a petition for a partition of the land, alleging that, on account of the location of a millsite upon the same, it could not be equitably divided in kind, and therefore praying a partition by sale. Mrs. Jones and Eddie and John Taylor, Jr., were made parties to this proceeding; and, the last two being minors, a guardian ad litem was appointed for them, who duly accepted the appointment. Neither Mrs. Barry, Charles Taylor, nor Mrs. Chandler was made a party, nor were the children of Mrs. Barry residing in Alabama, nor the child of Mrs. Agnew, already mentioned. Mrs. Jones filed objections, alleging, among other things, that the persons just mentioned were necessary parties, and that Napier, having no title to the land, was not entitled to a partition. After the proceedings for a partition were begun, Mrs. Chandler conveyed to Napier an undivided one-twelfth interest in the land. Upon an agreed statement of facts, which was substantially as above stated, the case was submitted to the judge for decision without a jury, and he passed an order appointing commissioners to sell the property, and make a return of the same, to which order Mrs. Jones excepted.

Under the facts thus appearing, we think the judge below erred. Conceding, for the purposes of this case (though we do not so decide), that the executor's sale passed to Mrs. Barry a good title to one undivided third of the land, we have no doubt that she was a necessary party to the case; and so were Charles Taylor and Mrs. Chandler when the proceedings were instituted. It may be, by reason of the fact that Mrs. Chandler, pending the proceedings, had conveyed to Napier her interest in the land, that she would not have been a necessary party at the hearing, but we are at a loss to perceive how any partition by sale could be made without having Mrs. Barry and Charles Taylor before the court. They still retained the title to their respective interests in the land, and the commissioners could not, by virtue of an order which was binding upon neither of these parties, make any sale which would divest their title, no provision whatever having been made for applying to their claims for unpaid purchase money any portion of the proceeds of such sale. It seems to us that an attempted sale under these circumstances would necessarily result in sacrificing the property, which would, of course, be unjust to all the parties at interest. At any

rate, we hold that, without making Mrs. Barry and Charles Taylor parties, the order in question was improperly granted. The fact that Mrs. Barry was a nonresident did not dispense with the necessity of making her a party. In *Childs v. Hayman*, 72 Ga. 791, it was decided that a nonresident, having an interest in land for the partition of which proceedings were instituted, but who was not made a party to such proceedings, nor served with a notice of the same, was not bound or estopped by the judgment rendered therein. If, therefore, a sale of the property in question should be made by the commissioners, the rights of Mrs. Barry would not be affected thereby, and the sale, as to her, so long as she holds the title to her present interest in the property, would be a mere nullity, and would only result in making her a cotenant with the purchaser at the sale. For this very reason the sale should not be had. Not only would the property fall, as already stated, to bring a fair value, but at last there would be no complete partition. The remarks applicable to the interest of Mrs. Barry, of course, apply also to that of Charles Taylor. Under the ruling in the case just cited,—he not being a party, and not, therefore, being called upon to answer,—the entire proceedings, as to him, would be *res inter alios acta*. This case is clearly distinguishable in principle from that of *Fulton Co. v. Amorous*, 89 Ga. 614, 16 S. E. 201, in which it was held that one in possession of land under a bond for titles from the true owner, with the purchase money partly paid, was entitled to full possession, and consequently had a cause of action against the county, where a portion of the premises had been taken or damaged for public purposes; especially, where the acquiescence of his vendor was affirmatively shown by producing a conveyance from the latter, made pending the action, passing the absolute title in fee simple. To allow one holding land under a bond for titles, and in possession thereof, to protect the same from waste and destruction, where the rights of his vendor will not be thereby affected, is quite a different thing from allowing such a person to cause an absolute sale of the property, which might result in loss either to his vendor, to the purchaser at the sale, or to others having an interest in the property sought to be partitioned.

There may be another difficulty about the case, which we will merely suggest, without discussing it. Under the will of Inman, his children, it would seem, took, after the death of his wife unmarried, a life estate only in the property, with remainder over to their children. If the sale by the executor, already mentioned, did not legally vest a fee in Mrs. Barry to an undivided third in the land, she could convey to Napier nothing more than her life estate. Therefore, even if Napier held deeds from her and Charles Taylor, could he, as the owner of a life estate in an undivided portion of the land, and of the fee

in another undivided portion of the same, have a partition by sale affecting the entire title in fee, as against owners in fee of other undivided interests, and as against Mrs. Jones, who claims, by virtue of the executor's sale, to own an undivided one-third of the land? If a partition by a sale disposing of the property in fee could, under these circumstances, be had at his instance, it is certain, at least, that the children of Mrs. Barry would be necessary parties. We shall not, however, attempt at this time to answer the question above suggested, because, irrespective of the same, and for reasons already stated, Napier's petition for a partition should have been disallowed. Judgment reversed.

(93 Ga. 645)

**HODNETT v. STONE.**

(Supreme Court of Georgia. March 26, 1894.)

**COURT—ADJOURNED TERM—ATTACHMENT—DISMISSAL OF LEVY—EFFECT—DISMISSAL OF DECLARATION—WHEN PROPER.**

1. A term of the superior court not held at the time appointed by law, but legally adjourned over to a later time, is, when held according to the adjournment, the same term, with reference to process and pleading, as it would have been had it been held at the time fixed by statute.

2. Where a declaration in attachment is filed at the first term, and written notice of the attachment and of the proceedings therein is afterwards served personally on the defendant at least 10 days before final judgment, as provided for by section 3309 of the Code, the right of the plaintiff to judgment on his declaration, as in other cases at common law upon the merits of the case, is not affected by a dismissal of the levy during the pendency of the declaration, whether that dismissal was the act of the levying officer, by reason of an order of the magistrate who issued the attachment requiring the plaintiff to give further security on the attachment bond and failure of the plaintiff to comply with that requirement, or the act of the court in which the attachment was pending, and whether the dismissal took place before or after the service of the notice on the defendant. It was consequently error to dismiss the declaration because the levy had been dismissed by the levying officer on the magistrate's order, made after the declaration was filed, although the order was made and the levy was dismissed before the defendant was served personally with notice. Dismissal of the levy, without more, left the attachment and the declaration founded thereon pending in court, to be disposed of by some proper judgment, final in its nature, terminating the proceeding.

(Syllabus by the Court.)

Error from superior court, Douglas county; C. G. Janes, Judge.

Action in attachment by W. O. Hodnett against J. W. Stone. There was a judgment dismissing the declaration, and plaintiff brings error. Reversed.

J. S. James, for plaintiff in error. Thos. W. Latham and J. H. McLarty, for defendant in error.

LUMPKIN, J. 1. This was an attachment case, which was dismissed on motion of the defendant. One ground of the motion was

that the declaration in attachment was not filed at the first term, as required by law. The attachment was returnable to the February term, 1892, of Douglas superior court. That court was not held in February, but, on account of the physical inability of the judge to attend, was adjourned by his order to the 11th day of April, at which time the court convened. On the day last named, the declaration was filed. The session of the court in April was still the February term. Had the court remained in session a single day in February, and then, by proper order, have been adjourned over until April, there could scarcely be a doubt that the February term was carried over to the month of April. It makes no difference that the court did not convene at all during the month of February, the order of the judge adjourning it over having been made in conformity to law. Certainly there can be no April term of Douglas superior court, and the sitting in that month was neither more nor less than an adjourned sitting of the regular February term. So there was no merit in this ground of the motion to dismiss the case, and the court was right in so holding.

2. The attachment was sued out January 19, 1892, made returnable as above stated, and levied on January 23d. Defendant's attorney made an affidavit denying the sufficiency of the attachment bond. The magistrate who issued the attachment held that the bond was insufficient, and ordered additional security to be given. There was no compliance with this order of the magistrate, and accordingly the levying officer dismissed the levy. At this time, however, the case was still pending in the superior court. After the levy was dismissed, as above stated, the defendant was served personally with a notice in writing of the pendency of the attachment and of the proceedings thereon. After the overruling of his first motion to dismiss the case, the defendant made another motion to dismiss the same, on the ground that the levy had been dismissed before the defendant was served with the notice above mentioned; the defendant's contention being that the act of the sheriff in dismissing the levy before the service of that notice amounted to a dismissal of the attachment, the declaration thereon, and all other proceedings in the case. This motion was sustained, and the plaintiff excepted. The court erred in dismissing the declaration on the ground stated. The notice was served upon the defendant more than 10 days (in fact, several months) before final judgment. Section 3309 of the Code distinctly declares that, when such notice has been served on the defendant, the judgment rendered upon such attachment shall have the same force and effect as judgments rendered at common law, and that "no declaration shall be dismissed because the attachment may have been dismissed or discontinued, but the plaintiff shall be entitled to judgment on the

declaration filed, as in other cases at common law, upon the merits of the case." It does not, in principle, make a particle of difference whether the dismissal of the levy during the pendency of the declaration was made by the levying officer upon the order of the magistrate because of the plaintiff's failure to give the additional security required, or was dismissed by the order of the court in which the attachment was pending. It is also immaterial whether the dismissal took place before or after the service of notice on the defendant. After the filing of the declaration and the service of the notice, there was a valid action existing against the defendant, entirely independent of the attachment. Inasmuch as the section of the Code above cited declares that the dismissal or discontinuance of the attachment itself shall not prevent the plaintiff from proceeding to final judgment on the declaration filed, the mere dismissal of the levy certainly could not take the case out of court. Notwithstanding this dismissal, the attachment and the declaration founded thereon were still pending, and should have been disposed of by a proper judgment, final in its nature and terminating the case. See *Lockett v. De Neufville*, 55 Ga. 454; *Perry v. Mulligan*, 58 Ga. 479. Judgment reversed.

(88 Ga. 594)

**TUMLIN v. BASS FURNACE CO.**

(Supreme Court of Georgia. March 19, 1894.)

APPEAL—RECORD—BILL OF EXCEPTIONS—ACTION ON ACCOUNT—DECLARATION—AMENDMENT—EVIDENCE.

1. Where a bill of exceptions assigning as error the granting of a nonsuit, and setting out the evidence introduced upon the trial (there being no brief of evidence approved and filed as a part of the record), has been signed and certified, and counsel for defendant in error afterwards presents to the judge a petition alleging that certain oral evidence, specifying it, was omitted from the bill of exceptions, which petition the judge certifies to be true, and directs the clerk to send up such oral evidence as a part of the record, but which the clerk fails to do, for the reason that there is nothing of file in his office which he can certify and send up in obedience to this order, the oral evidence set out in such petition is no part of the record, and cannot be considered by the supreme court.

2. It appearing, upon the trial of an action on an open account for goods sold and delivered, that there was a written contract between the parties as to what was to be the quantity, quality, and price of the goods, it was competent for the plaintiff to amend his declaration by setting forth the existence and contents of the written contract, not for the purpose of counting upon it as a distinct cause of action, but to disclose and allege the pertinent facts and circumstances under which the sale and delivery were made.

3. Upon the trial of such action, it was error, with or without the amendment, to reject the written contract when offered in evidence by the plaintiff for the purpose of showing that his proposed oral evidence as to the quality of the goods delivered was in conformity to the description of them contained in the contract.

(Syllabus by the Court.)

Error from city court, Floyd county; W. T. Turnbull, Judge.

Action by Albert N. Tumlin against the Bass Furnace Company on an account for charcoal sold and delivered by plaintiff to defendant. There was a judgment for defendant, and plaintiff brings error. Reversed.

H. M. Wright and Nat. Harris, for plaintiff in error. R. T. Fouchi, for defendant in error.

LUMPKIN, J. 1. The bill of exceptions, which was duly signed and certified, assigned as error the granting of a nonsuit, and set out what purported to be the evidence adduced upon the trial. There was no brief of evidence approved and filed by the presiding judge, and thus made a part of the record. After the bill of exceptions was served upon counsel for the defendant in error, he presented to the judge a petition alleging that the plaintiff, while testifying as a witness at the trial, had made a certain admission (specifying it), which admission had been omitted from the report of the evidence as incorporated in the bill of exceptions; and counsel prayed the granting of an order by the judge directing the clerk to certify and send up, "as a part of the record, the evidence contained in this petition." Attached to the petition was a certificate by the judge in the following words: "I certify that the evidence, as set forth in the foregoing petition, was introduced as stated; and the clerk is hereby ordered and directed to certify and send up the same as a part of the record of the case." The clerk, of course, failed to comply with this order, for the simple reason that there was nothing of file in his office which he could certify and send up in obedience thereto. Consequently, the oral evidence set out in the petition is no part of the record, and cannot be considered by this court. Section 5 of the supreme court practice act of 1889 provides for bringing to this court, at the instance of the defendant in error, certified copies of papers constituting a part of the record, and not specified by the plaintiff in error. When it says that if the defendant in error "shall desire more of the evidence or other parts of the record, or all of the evidence or all of the record, sent up," it refers to evidence incorporated in a brief which has been approved by the judge and filed with the clerk, and thus made a part of the record. The effort in the present case to get before this court the alleged admission of the plaintiff in the court below was, in effect, neither more nor less than an attempt by the judge, at the instance of counsel, to amend and alter the bill of exceptions, after he had certified it and it had passed finally beyond his control. Whatever may be authorized by the words, "and it is also expressly enacted that the bill of exceptions in any case, or the certificate thereto, may be



amended at any time before the final argument thereon in the supreme court, so as to make such bill of exceptions or certificate conform to the truth of the case and the forms of law," used in the third section of the act of December 18, 1893, to regulate the practice before the supreme court, etc. (Acts 1893, p. 52), there was certainly no law in March, 1893 (the time when the petition above referred to was presented), conferring upon the judge any power to amend or in any manner change or alter a bill of exceptions after it had once passed out of his hands.

2. This was an action upon an open account for charcoal sold and delivered by the plaintiff to the defendant. It appeared from the plaintiff's testimony, while he was upon the stand as a witness, that one Stillwell had made a written contract with the defendant to furnish to it a considerable quantity of charcoal; that plaintiff had succeeded Stillwell in that contract, and had shipped under it all of the charcoal for which he was suing. That contract was in the following words: "This agreement, made this 15th day of May, 1891, between Bass Furnace Company, of one part, and John E. Stillwell, of the other part, witnesseth that said Stillwell hereby agrees to furnish everything and do everything necessary in the premises, and make and deliver to said company at its Rock Run furnace not less than two hundred thousand bushels of first-class charcoal between this date and June 1, 1892. The coal is to be made from the timber on land owned by Minhinnett, and the price of the coal, delivered at the furnace, is to be .06 $\frac{1}{4}$  cts. per bushel of 2,750 cubic inches, for good coal without brands, as received by the estimates as to value of bushels of each load made by the company's stock receiver at the time the coal is dropped, and his decision as to that is to be final on both parties hereto. The payments by said company for the coal made under this contract shall be in cash and such merchandise as said Stillwell may purchase of Bass Furnace Company at regular prices; and times of payments of balances in favor of Stillwell shall not be postponed more than twenty days from the close of the month in which this credit occurs. It is understood and agreed under this contract that the charcoal is to be well manufactured, and delivered in good condition, free from dirt, bralse, and brands. Witness our hands and seals, this day and date above written. Bass Furnace Company, [signed] by J. M. Garvin, Supt. John E. Stillwell." The plaintiff was asked by his counsel what was the quality of a designated car load of coal he had shipped. Upon objection, the court ruled that, inasmuch as there was a written contract between the parties, the witness would not be permitted to answer the question. The plaintiff then offered in evidence the written contract itself, but it was rejected by the court; and thereupon the plaintiff offered to amend his declaration by setting forth the contract, and

making it a part of the same, and by alleging that the words "value of bushels," occurring in the contract, were ambiguous, and meant only that the quantity, and not the quality, of coal should be passed on by the company's stock receiver; and, further, that, by mistake, the stock receiver "charged the plaintiff with \$300 in sorry coal, when there was no sorry coal in any shipment." The action not having been brought upon the written contract itself, or for a breach of the same, we do not think the amendment was allowable so far as the allegation relating to the alleged ambiguity in the contract and those allegations immediately following it are concerned. But we see no reason why it was not permissible to amend the declaration by setting forth the existence and contents of the written contract. This could not be done for the purpose of counting upon it as a distinct cause of action, but might be done for the purpose of disclosing and alleging the pertinent facts and circumstances under which the sale and delivery were made. In this view, the amendment would not vary or change the original cause of action, or set out a new and distinct cause of action, but would simply enable the plaintiff to more clearly allege the particulars as to the quantity, quality, and price of coal, the delivery of which he claimed in his original action to have made, and for the price of which the action was brought. In *Kennedy v. Vandiver*, 55 Ga. 171, it was decided that where a suit was brought upon an open account for coal, and a special contract in writing, embracing the same subject-matter as the account, was tendered in evidence and rejected, the plaintiff should have been allowed to amend his declaration by setting out the special contract. See, also, *Railroad Co. v. Varnedoe*, 81 Ga. 175, 7 S. E. 129. There are other decisions of this court to the same effect, but, as those just mentioned cover exactly the point in issue, further citations are unnecessary.

3. Those cases also bear somewhat upon the question of the admissibility of the written contract in evidence, which will now be briefly discussed; for if the court had allowed the amendment, as should have been done, the contract would have been admissible beyond question. But the court ought to have allowed the written contract to be introduced in evidence even after rejecting the amendment. In *Hancock v. Ross*, 18 Ga. 364, it was held that where a special agreement has been fully performed on one side, and nothing is to be done on the other except to make a money payment, such payment may be enforced by *indebitatus assumpsit*; not "that the plaintiff can ground his claim, when his action is in general *assumpsit*, upon the special agreement, but that such agreement may be taken as evidence of value." See, also, *Johnson v. Quinn*, 52 Ga. 485; *Friermuth v. Friermuth*, 46 Cal. 42; notes to *Cutter v. Powell*, 2 Smith, Lead. Cas. (9th Am. Ed.) \*p. 1220; 2 Greenl. Ev. (15th Ed.) § 104, and

cases there cited. Again, in *Schmidt v. Wambacker*, 62 Ga. 321, it was held that, under section 3393 of the Code, suit may be brought and recovery had on an open account for merchandise furnished, although there was a special contract in writing to pay for all or a part of the same. In that case there was no objection to the introduction of the written contract, but its admissibility was clearly recognized. In this connection, see, also, *Roberts v. Harris*, 32 Ga. 542. *Dobbins v. Manganese Co.*, 75 Ga. 450, a case somewhat similar to *Hancock v. Ross*, supra, cites that case approvingly, and rules that the written contract then in question was proper evidence of the debt. And see *Hill v. Balkcom*, 79 Ga. 444, 5 S. E. 200. The case of *Blue v. Ford*, 12 Ga. 45, is distinguishable from those above cited and others to the same effect, because in that case there was not a full performance by the plaintiff of the written contract, and accordingly this court sustained the court below in holding that "where there is a contract, either verbal or written, and where the contract has been broken by either of the parties or by providential causes, neither of the parties can treat the contract as null, and sue on a quantum meruit, but must sue on the contract, and set out in the pleadings the facts as they exist." We think the court, in the present case, ought to have allowed the written contract, under which the coal was alleged to have been furnished, to have gone in evidence, to show, among other things, the kind and quality of the coal to be delivered; and, in the same connection, the oral evidence of the plaintiff, tending to show that the coal actually delivered was of such quality as that stipulated for in the contract, should also have been received. Judgment reversed.

(83 Ga. 662)

**MAYOR, ETC., OF JACKSON v. BOONE.**

(Supreme Court of Georgia. April 2, 1894.)

**EVIDENCE—OPINION OF MEDICAL EXPERT—MUNICIPAL CORPORATION—ACTION FOR PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY—NEW TRIAL.**

1. It was competent for a medical expert to testify that, in his opinion, a given disease "may be cured by a surgical operation, but it is very rarely the case that this can be done," though the witness further testified he had no experience in treating that disease, but derived all his knowledge on the subject from reading medical authorities.

2. Where, in consequence of the falling in of a gate forming a part of a railing protecting an excavation in and along the margin of a public sidewalk in a town, the excavation being used to afford access to a private cellar, the plaintiff was precipitated into the excavation and injured, there was no error in declining to charge the jury that, if the plaintiff intentionally leaned upon the gate, he could not recover from the municipal corporation, or in instructing the jury that it was a question for them whether or not, under all the circumstances, the plaintiff was making a proper and legitimate use of the gate in question.

3. It appearing by undisputed evidence that, at the instance of the municipal authorities, the

gate had been made secure two days before the plaintiff was injured, and that it was safe on the evening before the injury occurred, and there being no evidence tending to show that these authorities had ascertained, or by ordinary care might have ascertained, that it had become insecure at the time of the injury, the plaintiff was not entitled to a verdict against the municipal corporation, and it was error to refuse a new trial.

(Syllabus by the Court.)

Error from superior court, Butts county; J. J. Hunt, Judge.

Action by J. F. Boone against the mayor and city council of the city of Jackson, Ga., for personal injuries caused by defendant's negligence. There was a judgment for plaintiff, and defendant brings error. Reversed.

W. W. Anderson, for plaintiff in error. Hall & Hammond, Wright & Beck, and J. S. Boynton, for defendant in error.

LUMPKIN, J. 1. One ground of the motion for a new trial assigned error upon admitting in evidence the testimony of a practicing physician "that the disease of varicocele may be cured by a surgical operation, but it is very rarely the case that this can be done;" the physician further stating that he had never had any medical experience in treating this disease, and derived all the knowledge he had upon the subject from reading medical authorities. Taking, as a whole, the testimony of the witness as it appears in the brief of evidence, it amounted simply to a statement by him that, in his opinion, the disease in question could, in rare instances only, be cured by a surgical operation, and that this opinion was based entirely upon his reading medical works recognized as authorities. We think the evidence was properly received. The opinion of an expert as to what conclusions may be properly drawn from statements in scientific works pertaining to his profession amounts to something more than mere hearsay, and may be very valuable in elucidating a given scientific inquiry. An opinion thus formed and given to the jury is quite a different thing from reading to them mere extracts from the books themselves. The latter might not be intelligible to the nonprofessional mind, while the opinion of an expert, expressed in language adapted to their comprehension, might be easily understood by the jury, and is, moreover, not only the result of study and deliberation, but an exercise by the witness himself of his own trained mental faculties upon the question involved. The doctrine is thus broadly stated in *Lawson on Expert and Opinion Evidence* (pages 176, 177): "An expert may testify to an opinion of his own derived from books,"—and the authorities there cited seem to sustain the text. We find the following pertinent note at the bottom of the latter page: "Said Dr. Crell, on the trial of *Spencer Cowper*, in answer to an objection by the court: 'My lord, it

must be by reading, as well as a man's own experience, that will make any one a physician, for, without the reading of books in the art, the art itself cannot be attained to. I humbly conceive that in such a difficult case as this we ought to have a great deference for the reports and opinions of learned men; neither do I see any reason why I should not quote the fathers of my profession in this case, as well as you gentlemen of the long robe quote Coke upon Littleton in yours; and upon this answer the doctor was permitted to proceed with the quotation. Beck, Med. Jur. 918, 919, and notes." See, also, as somewhat pertinent, *Central Railroad v. Mitchell*, 63 Ga. 173.

2. An excavation which had been made in and along the margin of a public sidewalk in the town of Jackson, for the purpose of affording access to a private cellar, was protected by a railing of which a gate formed a part. The plaintiff leaned upon this gate. It gave way. He, in consequence, fell into the cellar, and was seriously injured. The defendant's counsel requested the court to charge the jury that, if the plaintiff intentionally leaned on the gate, he was not entitled to recover anything from the town of Jackson for the injury thereby sustained. The court refused to give this charge, but, on the contrary, instructed the jury, in substance, that it was a question for them whether or not, under all the circumstances, the plaintiff was making a proper and legitimate use of the gate in question. We think the court was right in refusing the request and in charging as stated. Under our system, the question of negligence is generally one for the jury. We cannot accept as the correct law of the case at bar the doctrine laid down in the case of *Stickney v. City of Salem*, 3 Allen, 374, relied on by counsel for the plaintiff in error, that "a town is not liable in damages to one who, while stopping in the highway for the purpose of conversation, leans against a defective railing, and is injured by reason of its insufficiency." Under the facts of that case, the question whether or not the plaintiff's injury resulted from his own negligence might well have been left to the jury. "A person standing on the street, or leaning on a bridge railing, is not precluded by so doing from insisting that the municipality has neglected to exercise reasonable care to keep its highway in a fit condition for use." *Jones, Neg. Mun. Corp.* § 90. In our Southern clime, it is almost "human nature" for a pedestrian passing leisurely along the sidewalks of a town or city, and stopping casually to engage in conversation with a friend or acquaintance, to sit or lean upon whatever may happen to be convenient for the purpose. We do not, of course, mean to assert that in so doing a person may, in any given instance, be observing that degree of care and diligence with reference to his own safety which it would be reasonable and

proper to expect of him under the circumstances. A distinction is to be drawn between objects which seem to invite a passerby to sit upon or lean against them, and such as, from their nature or position relatively to the street, would negative the idea that they could with convenience or safety be used for any other purpose than that for which they were especially designed. A neat, smooth, substantial water plug, for instance, at a corner, where a weary traveler was waiting for a belated car, would very naturally suggest the idea of taking a seat; while a pedestrian, however weary, would hardly feel any natural impulse or temptation to lean against a barbed-wire fence. The illustration is homely, but serves to express our meaning. The law recognizes the natural instincts and impulses of children, and holds a person strictly accountable for the consequences resulting from placing tempting, though dangerous, agencies within their reach. Man has been said to be "a child of but an older growth." Certain it is that to a great measure he is controlled by impulse and natural inclinations; and, in passing upon his conduct in any given instance, the laws of nature governing human action cannot properly be entirely overlooked. The better and safer rule is to allow each case to be decided on its own merits, and to permit the jury to determine whether or not, in any particular instance, the plaintiff observed the proper degree of prudence. As the present case is to be tried again, we express no opinion upon its merits.

3. The undisputed evidence shows that the municipal authorities of Jackson had, only two days before the plaintiff was injured, required and caused one Watkins, the owner of the premises in front of which the excavation existed, to have the gate made perfectly secure, and that it was in a safe condition on the evening before the injury occurred. How it became insecure the evidence fails to disclose, but a reasonable inference would be that the fastenings attached to the gate by Watkins had been removed by some thoughtless or mischievous person. There was no evidence whatever tending to show that the municipal authorities had ascertained, or by ordinary care might have ascertained, before the time of the injury, that the gate had again become insecure. It is undoubtedly the duty of municipal corporations to exercise reasonable care over sidewalks, and the law imposes upon them the duty of reasonable inspection to guard against danger that should be expected. Cellar ways, constructed for the purpose of descending from sidewalks to the basements of buildings, are necessities in a city or town; but the corporation should not allow them to become traps for pedestrians. Sidewalks should be kept reasonably safe, and openings in the same should be guarded; but whether or not defects in the

means provided for guarding them will make the municipality liable is usually a question of fact, to be determined with reference to the surrounding circumstances. An impracticable or unreasonable amount of inspection should not be required of the corporation, but only such as prudence, good sense, and reason make necessary. Jones, Neg. Mun. Corp. §§ 94, 95, and cases cited. Where a defect which might lead to danger exists in a cellar way opening upon a sidewalk, it is the duty of the municipal authorities to ascertain this defect, and have it remedied, but a reasonable time should be allowed for this purpose. If the defect had been in existence for only a short time, and the agents or officers of the city had no knowledge of it, or a sufficient length of time had not elapsed so that they ought to have known of it in the exercise of ordinary care and diligence, the corporation should not be held liable for an injury resulting because of the defect. This, in substance, was decided in *Lewis v. City of Atlanta*, 77 Ga. 756. In view of the undisputed facts disclosed by the record in this case, the plaintiff was not entitled to recover. The only fair conclusion from the evidence as a whole is that the municipal authorities exercised the proper diligence in having the gate made secure, and it does not appear that there was any negligence on the part of the "city fathers," after the gate again became insecure, in failing to ascertain that fact. We think a new trial should be had, and we grant it the more readily because it also appears that the plaintiff had, only a short time before the injury, been plainly and distinctly warned by Watkins not to lean upon this gate, but, either forgetting or disregarding the warning, persisted in so doing. Judgment reversed.

(93 Ga. 604)

## JONES v. GILBERT.

(Supreme Court of Georgia. March 26, 1894.)

INSURANCE—OFFER TO RETURN POLICY—REASONABLE TIME—ACTION ON PREMIUM NOTE—EVIDENCE—NEW TRIAL.

1. The issue being whether the plaintiff delivered to the defendant the kind of policy of insurance for which the latter had stipulated, and which the plaintiff had agreed to deliver, evidence of the value of the policy actually delivered was irrelevant, and therefore inadmissible.

2. One who orders a policy of insurance, of a particular class, and gives his note for the amount of the premium, which the agent of the company had advanced, has a reasonable time within which to discover that a policy sent to him by mail is not of the class ordered, and to object to and return the same. If his offer to return, made in due time, be rejected, his retention of the policy thereafter, without appropriating it or making any use of it, will not subject him to pay the note.

3. Although the evidence was decidedly conflicting, and seemingly predominated in favor of the plaintiff, yet, the jury being the sole judges of credibility, and the court be-

low having approved the finding, the judgment denying a new trial will not be reversed.

(Syllabus by the Court.)

Error from city court of Cartersville; Shelby Attaway, Judge.

Action by T. R. Jones against W. A. Gilbert on a promissory note. There was a judgment for defendant, and plaintiff brings error. Affirmed.

John W. Akin, for plaintiff in error. A. S. Johnson, for defendant in error.

LUMPKIN, J. Gilbert applied, through one Cade, for a policy of insurance in the Mutual Life Insurance Company of Kentucky, and received what was known as a "twenty-payment life policy." Being dissatisfied with it, he requested Jones, general agent of the company for the states of Georgia and Alabama, to substitute for it another policy, of a different kind. This Jones agreed to do, and accordingly took up the policy held by Gilbert, who at the same time made and delivered to Jones a promissory note for \$92.04, which was the amount of the first annual premium upon the new policy Gilbert was to receive. This note was made payable to the order of Jones, and it was understood that Jones was to advance to the company the money for the premium, it being a rule of the company to require payment in cash of the first premium upon every policy issued by it. Jones procured a 10-payment life policy, and forwarded it by mail to Gilbert, who, after keeping it several weeks, brought it back to Jones, stating that it was not the kind of policy he had applied for, offering to return it, and demanding the surrender of his note. Jones refused to take the policy, or to give up the note. He afterwards brought suit upon the note against Gilbert, and the defense to the action was, in substance, that Jones had agreed to obtain for Gilbert a 10-year endowment policy, and had failed to do so, but, on the contrary, had obtained and forwarded to Gilbert the 10-payment life policy above referred to. The controlling issue on the trial, therefore, was whether the plaintiff had delivered to the defendant the kind of policy of insurance for which the latter had contracted, or a policy of a different kind.

It does not appear that at the trial in the court below the plaintiff insisted that the defendant was estopped from returning the policy by reason of the fact that he had retained possession of it for some time before offering to surrender it. The main contention of the plaintiff was that the defendant had no right to return the policy at all, for the reason that it was exactly the kind of policy the defendant had ordered, and which the plaintiff had, in consequence, procured for him. The plaintiff's theory was that, even if the defendant had offered to surrender the policy within an hour after he received it, he would have had no right to do so, because the delivery to him of this

Identical policy was an exact, full, and complete compliance by the plaintiff with his contract. On the other hand, the contention of defendant was that he did have a right to return the policy, because it was not of the kind for which he had contracted; that, promptly upon discovering it was of a different kind, he had endeavored to see the plaintiff for the purpose of returning it; had been to his office for this purpose two or three times, and found the plaintiff absent; and that finally, upon finding the plaintiff in his office, he had offered to surrender the policy for the reason already stated, and for this reason alone, but that the plaintiff had declined this offer, and had refused to surrender to defendant his note, for which demand was duly made.

1. The court was right in rejecting evidence as to the value of the policy delivered to the defendant, because, in view of the controlling issue above stated, this evidence was clearly irrelevant. If the policy received by the defendant was in fact of the kind for which he had contracted, he was bound to pay the note; otherwise, he would not be bound to take the policy, no matter what its value. It was therefore entirely immaterial what was the precise value of the policy, the fact that it had some value not being denied.

2. There was no real contest in this case upon the question as to whether or not Gilbert had, by the lapse of time, lost his right to return the policy which Jones had sent to him by mail. We do not think it necessary to cite authority to show that Gilbert had a reasonable time within which to discover that the policy was not of the kind he had ordered, to object to it, and to offer to return the same; and it can scarcely be doubted that a period of about six weeks would not, as matter of law, be an unreasonable time for these purposes, under the circumstances of this case. Assuming, then, that the offer to return was made within a reasonable time, we do not think that the mere retention of the policy by Gilbert, after the rejection by Jones of his offer to return the same, would render Gilbert liable to pay the note for the amount of the premium which Jones had advanced to the company. After the latter had declined to take back the policy and give up Gilbert's note, we do not see how keeping the policy in his possession should injuriously affect Gilbert's rights in the premises. There was really nothing else he could properly do with it. He was under no obligation to return it to the company, and leave his note outstanding against him. He made no use of the policy, nor did he derive any benefit from it. His holding of it was simply for the benefit of Jones, and subject to his order, though Gilbert was under no obligation to return it without a surrender of his note. It was insisted for the plaintiff, in this connection, that the policy was a binding contract upon

the company, and that if Gilbert had died with the policy in his possession his wife, to whom the policy was payable, could have compelled payment to her by the company of its face value. Whether this be so or not, nothing of the kind actually happened, and it does not appear that either Gilbert or his wife derived any benefit whatever from the policy. Of course, if either of them had collected anything on the policy, pledged it as security, or made any use of it at all, the question would be entirely different. What might have been the equities between Mrs. Gilbert, Jones, and the company, in the event Gilbert had died while retaining possession of the policy, it is not now necessary to inquire. Simply because a possible opportunity may have been afforded Mrs. Gilbert, innocently or otherwise, to make a wrongful claim under the policy in case of her husband's death, it will not be gratuitously assumed that she would have done so, or that Gilbert contemplated such possible use of the policy, and sanctioned it in advance. Upon the facts as found by the jury, Gilbert was simply holding in his possession a paper belonging to Jones, to the possession of which Jones would have become entitled by returning Gilbert's note. As Jones, however, refused to thus obtain possession, he cannot compel a payment of the note simply because, by reason of such conduct on his part, a benefit might possibly have accrued from the policy to Gilbert's wife, to which, in strict justice and equity, she would not have been entitled. It would be a somewhat analogous case if one should order goods of any kind, give a note in advance for their value, and when the goods were received they should not be of the kind ordered. In such a case it would be the right of the purchaser to return the goods and get back his note; and, if the seller refused to take back the goods and surrender the note, then the purchaser could lawfully retain possession of the goods, for his own protection, and for the seller's use. Simply doing this would not render the purchaser liable to pay the note, but, if he consumed or in any way used the goods as his own, he would be liable at least for their value. In principle the case at bar is a case of this kind.

3. All of the foregoing has been written upon the theory that the jury correctly found the disputed issue in favor of the defendant. In point of fact, this appears to be an exceedingly hard case. The following, quoted literally from the defendant's testimony while on the stand as a witness, covers about all he testified which was material as bearing upon the vital issue involved in the case. "I knew that the premium would be higher on the last policy than on the first policy. Of course, I knew what the premiums were, and that one was \$57 and some cents, and the other \$92.04. Plaintiff said that I would get the whole face of the policy, \$2,900, back at the end of ten years on this last policy

which I took, and that is the kind of policy I told him I wanted. I was to get this. Plaintiff and I did have some talk about different kinds of policies. I do not know what all we said. I signed the note sued on, and plaintiff said he would get the kind of policy I wanted, and send it to me. I soon afterwards received by mail this policy" (indicating the 10-payment life policy produced by himself). The plaintiff's version of what occurred between himself and Gilbert was as follows: "I had no personal knowledge of the application of defendant to Cade. My first personal connection with the matter was when defendant came to my office, and brought back the twenty-payment life policy which had been issued him on his application given to Mr. Cade. He said he was dissatisfied with it, and wanted to change it; that he would have to pay money too long; that his family would be growing up before the policy was paid up, and he would be needing the money to send his children to school. I got my rate book,—the same I now have in my hand,—and explained to him the different kind of policies we issued,—the rates, etc. There were four policies which we talked about, and which he considered. One was the ten-year endowment, wherein premiums are paid annually for ten years, and at the end of that time the face of the policy is paid. Another was the twenty-year endowment,—just the same as the other, except premiums continue for, and payment is made at the end of, twenty years. Another was the twenty-payment life, on which premiums are paid for twenty years, and at the end of that time premiums cease, and the policy is paid up in full, and the beneficiary gets the full amount at the death of the insured. The other was the ten-payment life, the same as the last named, except the premiums continue for, and the policy is paid up at the end of, ten years. On the two latter, dividends are payable after the maturity of the policy, although no premiums are then to be paid. On all, dividends are payable from the date of the policy. The dividends cannot be determined exactly, but will approximate, for ten years, twenty-five to thirty per cent. on the aggregated amount of the premiums. On all these policies the face of the policy would be payable at the death of the insured, if it occurred before the policy was paid up. At defendant's age when the policy in controversy was issued, the four following policies for \$2,000 each would be worth the following annual premiums, respectively: On ten-year endowment, \$208.86; on the twenty-year endowment, \$96.66; on the twenty-payment life, \$59.42; on the ten-payment life, \$92.04. I explained all this to Mr. Gilbert, and told him the difference in the policies, about as I have testified. He first said he wanted a ten-year endowment; that is, where he could get the whole amount of the face of the policy, payable in ten years. But

the premium on that was so heavy that he concluded he would take the ten-payment life. I explained to him that, in both the ten-year endowment and the ten-payment life, premiums would have to be paid only for ten years; that in the former the premiums would be over twice as much as in the latter; that in both cases the policies would be paid up at the end of ten years; that in the ten-year endowment he would get his money at the end of ten years, but that his premiums would aggregate more than the face of the policy, while in the ten-payment life his premiums would aggregate less than half the face of the policy, and he would not get the face of the policy until dead, though I told him that he could, at the end of ten years, if he desired, sell his policy back to the company for between seven and eight hundred dollars, if he withdrew his dividends, or about eleven hundred dollars, if he let his dividends stay in. I explained to him that if he would agree not to withdraw his dividends, and make this election on taking out the policy, then the guaranteed value of the policy at the end of ten years would be about eleven hundred dollars. But he said he wanted to use his dividends in reducing the premiums, and consequently the paid-up value could not be guaranteed; but it would have some guaranteed value, which, according to the experience of the company in past years, would be between seven and eight hundred dollars. All this I told him and explained to him, and he finally concluded to take the ten-payment life policy. He expressed his satisfaction, and I did not hear any complaint, and I never heard of any complaint until about six weeks or two months afterwards,—possibly a little longer,—when he came to my office, bringing back the policy, and said he was dissatisfied with it, and wanted his note back." The above account of the conversation between the plaintiff and the defendant was fully corroborated by another witness, named Quillian; but it is fair to say the defendant testified that Quillian was not present at the interview between Jones and himself when the change of policies was requested. There is no real conflict between the testimony of Gilbert and that of Jones and Quillian, except upon the one question as to whether Gilbert was to have a "ten-year endowment" or a "ten-payment life" policy. Upon this question there is undoubtedly an irreconcilable conflict, but it will be readily perceived that the version of this matter given by the plaintiff and Quillian is far more likely to be accurate and correct than that of Gilbert. It would therefore seem that the jury ought to have found for the plaintiff, and we would have been much better satisfied had they done so. Indeed, we were tempted to grant a new trial on the ground that the verdict was contrary to the evidence; but, after anxious and careful study and deliberation, we find it is impossible for

us to do so without invading the province of the jury, and this we are not permitted to do. This case must inevitably turn upon the credibility of the witnesses,—a matter over which the jury are vested with absolute and exclusive control. Hard cases often result in the making of bad law. This we wish conscientiously to avoid, even though, in a particular case, injustice results. As long as our system of jury trial exists, it is our duty to uphold and maintain it, and this we feel constrained to do, regardless of consequences. The trial judge could, with the utmost propriety, have granted a new trial in this case. He had a discretion to exercise. We have none. Had he granted a new trial, it would have met our full approbation. As he declined to do so, it is not the province of this court to disturb his judgment. Judgment affirmed.

(42 S. C. 200)

**DONLY et al. v. FORT.**

(Supreme Court of South Carolina. Sept. 17, 1894.)

**MOTION FOR NEW TRIAL—POWERS OF JUDGE AT CHAMBERS.**

Since a judge at chambers has no jurisdiction to hear a motion for a new trial on the ground of newly-discovered evidence, an order by him transferring the hearing to another judge is of no effect.

Appeal from common pleas circuit court of Lexington county; I. D. Witherspoon and Ernest Gary, Judges.

Action by Donly & Sease against J. O. Fort on an account. The case was submitted to a jury, who found for the plaintiffs. Defendant moved for a new trial before the presiding judge at chambers, who transferred it to be heard at the court of common pleas. Defendant appeals from an order declaring that the judge at chambers had no jurisdiction to entertain or transfer the hearing of the motion. Affirmed.

G. T. Graham, for appellant. Meetze & Muller, for respondents.

GARY, J. This was an action by plaintiffs against defendant on an open account. The case was submitted to a jury, who found for plaintiffs. Some time after the court of common pleas for Lexington county had adjourned, the defendant gave notice that he would move before the Honorable I. D. Witherspoon, presiding judge, in Columbia, for a new trial, on after-discovered evidence, which was based on affidavit served upon counsel for plaintiffs. Judge Witherspoon was unable to hear the motion, for the reasons set forth in his order, which is as follows: "It appearing that the defendant gave notice to plaintiffs in the above-entitled action that he would move before me, at Columbia, S. C., on the 17th day of April last, for a new trial, on after-discovered evidence, and the hearing of said motion was postponed from day to day, by consent

of counsel, until to-day, and as the plaintiffs' counsel is not present, and as the court of common pleas for Richland county is about to adjourn, and the presiding judge is about to leave the circuit: Now, on motion of G. T. Graham, Esq., attorney for the defendant, it is ordered that the hearing of said motion be transferred to be heard by the Honorable Ernest Gary, presiding judge of the court of common pleas at Lexington C. H., S. C., on the 14th day of June next, or as soon thereafter as counsel can be heard. Let a copy of this order be served upon Messrs. Meetze & Muller, plaintiffs' attorneys." The following is the order made by Judge Gary: "This is a motion for a new trial on grounds of after-discovered testimony. The motion was originally made before Judge Witherspoon, at chambers, in the city of Columbia, S. C.; and his honor, on the 2d day of May, 1893, passed an order transferring the motion to be heard by me at this present term of court for Lexington county. Messrs. Meetze & Muller interpose an objection to the jurisdiction of this court in hearing the motion, and cite the case of Clawson v. Hutchinson, 14 S. C. 517, in support of their position. After hearing argument, it is the opinion of this court—First, that Judge Witherspoon had no jurisdiction to hear this motion at chambers; second, Judge Witherspoon not having jurisdiction to hear the matter at chambers, he could not delegate to me a power which he did not have himself. It is therefore ordered that the motion be dismissed for want of jurisdiction to hear and pass upon the same."

The appellant's exceptions are as follows: (1) "Because the presiding judge erred in holding that Judge Witherspoon had no jurisdiction to hear this motion at chambers." (2) "Because the presiding judge erred in holding that, 'Judge Witherspoon not having jurisdiction to hear the motion at chambers, he could not delegate to me a power which he did not have himself.'" (3) "Because, even if Judge Witherspoon did not have jurisdiction to hear this motion at chambers, as he had transferred the hearing of it to the presiding judge in open court, and as the motion came up in open court upon the affidavits which had long been served upon plaintiffs' attorney, the court should have heard the motion upon the affidavits; and it is respectfully submitted that the court erred in dismissing the motion for 'want of jurisdiction to hear and pass upon the same.'"

The case of Clawson v. Hutchinson, 14 S. C. 517, shows conclusively that Judge Witherspoon did not have jurisdiction of the motion made before him at chambers. As Judge Witherspoon did not have jurisdiction to hear the motion at chambers, it follows, as a matter of course, that he could not pass an order upon such hearing that would have any binding efficacy. We agree with Judge Gary that Judge Witherspoon "could not

delegate to him a power which he did not have himself." The motion before Judge Gary was not presented as an original proposition, but came before him under Judge Witherspoon's order. It does not appear that notice was served that a motion would be made before Judge Gary for a new trial on the ground of after-discovered evidence. No doubt, the appellant expected that the order of Judge Witherspoon would render further notice of motion unnecessary; but, as we have shown that Judge Witherspoon's order was a nullity, it could not have such effect. Appellant had the right to make a motion before Judge Gary upon proper notice, accompanied by affidavits, regardless of the order of Judge Witherspoon, but this he failed to do. It is the judgment of this court that the appeal be dismissed, and the order appealed from affirmed, but without prejudice to the right of defendant to make a motion for a new trial on the ground of after-discovered evidence, in the manner provided by law.

McIVER, C. J., and POPE, J., concur.

(42 S. C. 128)

**HESTER v. BARKER et al.**

(Supreme Court of South Carolina. July 27, 1894.)

**MORTGAGE BY MARRIED WOMAN—CHARGE ON SEPARATE ESTATE.**

1. Act 1887 (19 St. at Large, p. 819) provides that any mortgage, etc., executed by a married woman, affecting her separate estate, shall be a charge thereon, whenever the intention to do so is declared in the instrument. *Held*, that her note and mortgage, in which it is stated that it is her express intention to charge her separate estate, is binding thereon, though the debt secured was the debt of her husband.

2. Where the note was given partly for her own debt, the expression of her intention to bind her separate estate will not be so construed as to limit such intention to that part only.

Appeal from common pleas circuit court of Pickens county; James Aldrich, Judge.

Action by R. A. Hester against Evaline Barker and the Geiser Manufacturing Company. From a judgment for defendant Barker, plaintiff and defendant Geiser Manufacturing Company appeal. Reversed.

Julius E. Boggs, for appellants. J. P. Carey, for respondent.

McIVER, C. J. The plaintiff brought this action to foreclose a mortgage on real estate executed by the defendant Evaline Barker to the plaintiff, and the Geiser Manufacturing Company was made a party defendant, as the holder of a junior mortgage on the same real estate. Both of these mortgages were executed after the passage of the act of 1887, and prior to the passage of the act of 1891. The defendant Evaline Barker, in her answer, sets up as her main defense the fact that she was at the time of the execution of the mortgages above re-

ferred to a married woman, and that the debts which such mortgages were intended to secure arose out of contracts which she, as a married woman, had no power to make, inasmuch as they were not contracts as to her separate estate, except the sum of \$50, embraced in the note to the plaintiff. By an order of the court it was referred to a referee to hear and determine the issues of law and fact, and to report the amount due on plaintiff's note and mortgage, as well as the amount due on any other lien set up against the land described in the complaint. In pursuance of this order a reference was held, at which, against the objection of the counsel for the plaintiff, as well as for the Geiser Manufacturing Company, testimony was received tending to show that all of the debt secured by plaintiff's mortgage, except the sum of \$50, was the debt of the husband of Evaline Barker, and in no way connected with or related to her separate estate, and that the note secured by the mortgage in favor of the Geiser Manufacturing Company was signed by the said Evaline Barker as the surety of her husband. It appeared, however, from the notes and mortgages, copies of which are set out in the case, that the note intended to be secured by the mortgage in favor of the plaintiff contained these words: "And I hereby express my intention to bind and charge my separate estate;" and that the mortgage signed by Evaline Barker, securing that note, contained these words: "And I do hereby express my intention by this instrument to bind, charge, and convey my separate estate;" and that the note intended to be secured by the mortgage in favor of the Geiser Manufacturing Company contained these words: "And I, Evaline Barker, hereby intend to bind and charge my separate estate, and express my intention hereby to bind it;" while the mortgage to secure that note contained this language: "And I, Evaline Barker, hereby express my intention to charge, bind, and convey my separate estate, and do hereby convey the same." The referee made his report, setting out the facts found by him in detail, and concluded, as matter of law, that both the notes and both of the mortgages were legal and valid instruments, and bound the separate estate of the defendant Evaline Barker for the payment of the amounts found due thereon. To this report the defendant Evaline Barker excepted, and the case came before his honor, Judge Aldrich, for a hearing upon the report and exceptions, who held that the defendant Evaline Barker was liable only for the sum of \$50, with interest thereon, embraced in the note to the plaintiff, and was not liable at all on the note and mortgage in favor of the Geiser Manufacturing Company, upon the ground that, except as to the \$50, these debts not arising out of contracts as to her separate estate, the defendant, being a married woman, could not be held liable therefor,



and he rendered judgment accordingly. From that judgment the plaintiff, as well as the defendant the Gelser Manufacturing Company, appeals upon the several grounds set out in the record, which need not be repeated here, as the single question is whether the circuit judge erred in holding that the married woman was not liable, notwithstanding her explicit declarations, contained in both of the notes and both of the mortgages, of her intention to make herself and her separate estate liable.

Inasmuch as the circuit judge, in his decree, makes no allusion to the act of 1887, or to the effect of the declarations of the mortgagor's intention contained in both of the mortgages, we must suppose that that act escaped attention. At all events he could not have known of the construction which this court has placed upon that act in the case of *Mortgage Co. v. Mixson*, 38 S. C. 432, 17 S. E. 244, as the opinion in that case was not filed until the 16th of March, 1893, and the circuit decree bears date 12th October, 1892. It seems to us that the terms of the act of 1887 (19 St. at Large, p. 819), especially as construed in the case just cited, place the question beyond dispute. In that case this court said, in speaking of the act of 1887: "This act, having been adopted in full view of the previous law upon the subject, was manifestly designed to effect a radical change in such previous law, not only by making it a question of intention, instead of a question of power, but declaring how the intention should be conclusively manifested."

\* \* \* Whenever, therefore, we find a case in which a married woman has executed a mortgage of her separate estate, and has declared in such mortgage her intention to charge such separate estate, we are bound to make it, as the legislature declared it should be, effectual to charge her separate estate, and we have no right to inquire further into the matter." Hence, the testimony offered in this case tending to show that, except as to the \$50, the contracts designed to be secured by the mortgages were not contracts as to the separate estate of the married woman, was wholly irrelevant to the issue, and should have been rejected when objected to, and, if received, could not be allowed any effect, as the legislature had seen fit to declare how the intention of a married woman to charge her separate estate should be conclusively manifested. When, therefore, as in this case, the married woman had conclusively manifested her intention to charge her separate estate, by inserting in both mortgages, as well as in the notes intended to be secured thereby, her explicit declaration to that effect, the court had no right to inquire further into the matter. Of course, these remarks apply only to contracts under the act of 1887, and are not applicable to cases arising under the act of 1891. We are of opinion, therefore, that the circuit judge erred in the view which he

took, and that, on the contrary, the conclusions of law reached by the referee should have been affirmed.

Counsel for respondent, in his argument here, has ingeniously attempted to argue that the expression of intention on the part of the defendant to bind her separate estate should be so construed as to limit her intention to the \$50, which was confessedly her own debt, but we see no ground for so limiting the expression. The words used are general, and apply as well to one portion of the amount mentioned in the note as to any other,—in fact, must be regarded as intended to cover the whole amount, in the absence of any words indicating an intention that it was to be confined to any particular part of such amount. So, as to the claim of the Gelser Manufacturing Company, if the words used both in the note and in the mortgage cannot be construed as applying to the whole amount mentioned in the note and mortgage, then they are meaningless, and yet under the rules of construction they must, if possible, be given some meaning. But really we do not see how there can be a doubt about it. Where a person, even though she be a married woman, by her note promises to pay a specified sum of money, and then adds the language found in this note and in this mortgage; we do not see how there can be a doubt that her intention was to bind her separate estate for the payment of the sum of money specified. The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to that court for such further proceedings as may be necessary to carry out the views herein announced.

McGOWAN and POPE, JJ., concur.

(43 S. C. 313)

BEATTIE v. LATIMER et al.

(Supreme Court of South Carolina. Sept. 12, 1894.)

JUDGMENT FOR DEFENDANT—RELIEF AGAINST CO-DEFENDANT—CONTRACT BY EXECUTORS—PERSONAL LIABILITY—REVIEW ON APPEAL.

1. Under Code, § 296, providing that judgment may be given for or against one or more of several plaintiffs, or for or against one or more of several defendants, and that the court may grant defendant affirmative relief, the court may give judgment for one of the defendants as against another, if it can be done without injury to plaintiff.

2. Where the executors of one of the makers of a note, by agreement under seal with the other maker, assume as executors all liability on the note, but it is especially stipulated that they shall not be held liable individually, a judgment on such agreement against the executors individually is erroneous.

3. The sufficiency of service of summons cannot be considered on appeal in the absence of exceptions thereto.

Appeal from common pleas circuit court of Greenville county; J. J. Norton, Judge.

Action by Hamlin Beattie against Joseph P. Latimer and John H. Latimer, as execu

tors, and others. From the judgment, defendants Latimer appeal. Modified.

Perry & Heyward and J. A. McCullough, for appellants. Cotheau, Wells, Ansel & Cotheau and John R. Bellenger, for respondent.

McIVER, C. J. The plaintiff brought this action to recover the amount due on a promissory note for \$1,000, payable one day after date, bearing date the 22d of March, 1887, and signed by Irvine & Mooney, and by Hewlett Sullivan. It appears that in the title of the summons, as well as in the complaint, the word "as" was omitted in designating the defendants Joseph P. and J. H. Latimer, who are simply designated "executors of the will of Hewlett Sullivan, deceased." These defendants, through their attorneys, on the 4th of April, 1893, filed a demurrer in writing, on the ground that the complaint does not state facts sufficient to constitute a cause of action against said defendants, based, as we presume, upon the omission of the word "as;" and, on the same day on which the demurrer was served, the plaintiff, before any action was taken by the court upon said demurrer (indeed, so far as appears, no such action was ever taken), "served upon the Latimers and upon W. H. Irvine and J. A. Mooney," the persons composing the firm of the other defendants, Irvine & Mooney, an amended complaint, supplying the omission of the word "as" in the title of the original complaint, service of a copy of which amended complaint was duly acknowledged by the attorneys for the Latimers, and by Messrs. Irvine and Mooney individually. On the 24th of April, 1893, the attorneys for the Latimers served a notice on the plaintiff of a motion to set aside the amended complaint, "upon the ground that said amended complaint is at variance with the summons and irregular;" but, so far as appears, no further action was taken under said notice. On the same day of the service of said notice, to wit, on the 24th April, 1893, the plaintiff served a notice on the attorneys for the Latimers of a motion to amend the summons by supplying the omission of the word "as" in the title of that paper. At the time appointed for the hearing of this last-mentioned motion, "the Latimers put in no appearance," and his honor, Judge Norton, granted an order reciting that no one appeared to oppose the motion for the amendment of the original summons by supplying the omission of the word "as," and further ordering "that the plaintiff serve forthwith two copies of said summons so amended upon defendants' counsel, and that they have twenty days thereafter for serving their answer thereto." Thereupon a copy of the summons as amended was served on one of the attorneys for the Latimers, who accepted service in the following words: "Due and legal personal service of a copy of each of the amended summons, and of the order

of amendment of Judge Norton, dated May 2, 1893, is hereby acknowledged, at Greenville, S. C., May 4, 1893, without prejudice." In the meantime the answer of Irvine & Mooney was filed, "a copy of which was served upon each of the appellants within twenty days after the service of the summons," in which, while not contesting the right of the plaintiff to recover, they set up an agreement in writing, signed by the Latimers, as executors of Hewlett Sullivan, under seal, whereby, for value received, they "agree to assume and have assumed all liabilities on the \$1,000 note which constitutes the basis of the plaintiff's action; and on the same day, to wit, 1st June, 1889, the said Irvine & Mooney signed an agreement in writing "that we will under no circumstances hold J. P. Latimer and John H. Latimer responsible individually by virtue of any liability assumed by them as executors of the will of Hewlett Sullivan" upon the note above referred to; and these defendants claim "that, under the facts and circumstances above set forth, the plaintiff should be required to obtain his judgment against the estate of Hewlett Sullivan, and to exhaust his remedy against said estate before interfering in any manner with the property of said Irvine & Mooney. They further allege that the estate of Hewlett Sullivan is solvent at this time." No answer having been filed by the Latimers, either individually or as executors, the case was placed on calendar 3, as against them; and on the 26th of July, 1893, judgment was rendered against them, as executors of the will of Hewlett Sullivan, in favor of the plaintiff, for the amount of the note and costs, and the same was directed to be levied of the property of the said defendants in case the same cannot be made from the property of said Hewlett Sullivan. The case as to the other defendants, Irvine & Mooney, who had answered, was docketed on calendar 1; and upon the call of the cause the plaintiff interposed an oral demurrer to the answer of Irvine & Mooney, upon the ground that it did not state facts sufficient to constitute a defense to plaintiff's cause of action; and, although the judge stated that he would sustain the demurrer, it does not appear that any formal order was granted or any formal judgment rendered to that effect. "Thereupon the attorneys for Irvine & Mooney moved the court that he would, in passing the order sustaining the demurrer and allowing the plaintiff to take judgment against Irvine & Mooney, adjudicate the rights of the defendants as among themselves; that the answer of Irvine & Mooney raised an equitable issue between themselves and the executors. Plaintiff's attorney stated that he did not move for such an order, but that he had no objection to the court deciding it, provided it did not prejudice his rights. The attorneys for the Latimers, who were present in court, announced that they objected to

such an order; that they appeared specially for the purpose of entering their objection; that they did not appear generally. The agreement and receipt set up in the answer of Irvine & Mooney was neither formally admitted nor denied by appellants." The circuit judge reserved his decision, and thereafter filed the following order (omitting the caption and title of the case): "The defendants Irvine & Mooney making no defense as against the plaintiff, but setting up agreement between them and their codefendants, by which their said codefendants assume the payment of the note sued on, and asking judgment that the equities between the parties be enforced, and, the said codefendants not having answered, and judgment having been taken against them by default, in favor of plaintiff, and they having been served with copies of the answer of said Irvine & Mooney, and not having themselves answered, their counsel stating in open court that they appeared solely for the purpose of opposing this order, it is ordered that the plaintiff have judgment against the said W. H. Irvine and J. A. Mooney, as copartners, as aforesaid, for sixteen hundred and thirty-six and ten one-hundredths dollars; but this judgment shall not be enforced until after the expiration of ninety days from the entry thereof. If, within that time, the judgment against the said J. P. and J. H. Latimer, as executors, as aforesaid, hereinbefore referred to, shall be paid, then the judgment against the said Irvine & Mooney shall be satisfied; otherwise the plaintiff may then proceed to enforce the same by execution, or as he may be advised. It is further ordered that the said Irvine & Mooney have judgment and execution against the said Latimers, as executors, as aforesaid, for such sum as they may be compelled to pay in this action, to be levied of their individual property, if not realized from the property of their testator, and that for such sum they be subrogated to the rights of the plaintiff under the judgment against them heretofore granted and hereinbefore mentioned. \* \* \* August 4, 1893." From this order, the Latimers, by their attorneys, gave due notice to the plaintiff's attorneys and to Messrs. W. H. Irvine and J. A. Mooney of their intention to appeal, and for this purpose served the following exceptions: "(1) His honor erred in requiring the plaintiff to exhaust J. P. Latimer and John H. Latimer, as executors, before issuing execution against the defendants Irvine & Mooney. (2) In ordering that the said Irvine & Mooney have judgment against the said Latimers, as executors, for such sum as they may be compelled to pay in this action. (3) In ordering that said judgment and execution be levied of the individual property of the said Joseph P. Latimer and John H. Latimer, if not realized from the property of their testator. (4) In ordering that the said Irvine & Mooney be subrogated to the rights of the plaintiff herein, under the judgment

heretofore granted, for such sum as they might be compelled to pay the said plaintiff in the said action."

We have been thus particular to set out fully the proceedings in the court below because, as it strikes us, the case, as presented here, exhibits some peculiar features. In the first place, it does not appear that there was any exception to or appeal from the judgment rendered on the 26th of July, 1893, in favor of the plaintiff, against "the defendants J. P. Latimer and J. H. Latimer, as executors of the will of Hewlett Sullivan, deceased," and therefore that judgment stands unimpeached, and we are precluded from any inquiry into the validity of that judgment. The appeal is only from the order or judgment of 4th of August, 1893, and the exceptions only impute errors to that order or judgment; and to that only must we confine our decision. It is true that, in the argument here, counsel for appellants have undertaken to raise a question which is not raised or even alluded to in any of the exceptions,—as to whether the appellants, as executors of the will of Hewlett Sullivan, were ever properly made parties defendant to this action; but, if this be so, it is somewhat difficult to understand how the appellants can have any standing in this court. If the court never acquired jurisdiction of these appellants, no order made or judgment rendered in the case could affect their rights or interests; and it is not easy to perceive how they could appeal from an order or judgment which could in no way affect them. The point seems to be that, although these appellants were properly made parties in their individual capacity, yet, when the form of the summons and complaint was so changed as to make it an action against them in their representative capacity, they should have been personally served with copies of the amended summons and complaint, and that the acceptance of service by their counsel was not sufficient to bring them before the court in their representative capacity. Granting this to be so, though we do not deem it necessary, under the view which we take of this appeal, either to affirm or deny the proposition, as it may be that, after the appellants had been properly served with the original summons and complaint, service of amendments thereto upon their counsel would be sufficient, yet, when the appellants, by their counsel, who had accepted service for them of the amended papers, gave notice of a motion to set aside the amended complaint, and when such counsel appeared specially for the purpose of entering their objection to the order appealed from, which involved the merits, notwithstanding their statement that they did not appear generally, we are very much inclined to think it amounted to a voluntary appearance; for it will be observed that the appearance was not for the purpose of making a preliminary motion, preceding the hearing of the case, such as a motion to set aside an alleged service, or to dismiss the action for

want of jurisdiction, but was an appearance for the purpose of contesting the merits, which could only be done under a general appearance. But waiving all this, inasmuch as the question of proper service is not presented by any of the exceptions for the purpose of this appeal, we will proceed to the consideration of the questions presented by the exceptions.

The first, second, and fourth exceptions make, substantially, the question whether there was any error on the part of the circuit judge in undertaking to adjudicate the rights of the defendants, as between themselves, in this action. Section 296 of the Code provides that "judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may determine the ultimate rights of the parties on each side, as between themselves. (2) And it may grant the defendant any affirmative relief to which he may be entitled." Under this section, we see no reason why the court, having all the parties before it, may not proceed to adjudicate the rights of one codefendant against his codefendants, provided the same can be done without prejudice to the rights of the plaintiff, and provided the pleadings and evidence furnish a proper basis for such adjudication. Such seems to be the construction adopted by the New York courts, as shown by the authorities cited by respondent's counsel in his argument; and such seems to be in accordance with the rule prevailing in the old court of equity in this state. See *Motte v. Schult*, 1 Hill, Eq. 146, and *Moss v. Bratton*, 5 Rich. Eq. 1. Here, defendants Irvine & Mooney, by their answer, a copy of which was served on appellants, while not contesting the claim of plaintiff, set up an agreement under seal, for a valuable consideration, by the appellants, to assume all liability on the note sued upon to the relief of said Irvine & Mooney; and this claim, not being denied, entitled the defendants Irvine & Mooney to the relief asked for by them, against their codefendants, the appellants, provided the same could be accorded without prejudice to the plaintiff, whose rights seem to have been carefully guarded, and who, therefore, interposed no objection to the order appealed from. We do not think that these exceptions can be sustained.

The third exception, however, imputes error to the circuit judge in directing that the judgment and execution rendered in favor of Irvine & Mooney against the Latimers should be levied of the individual property of the said Joseph P. Latimer and John H. Latimer, if not realized from the property of their testator. This exception must be sustained, because so much of the order appealed from as authorizes the judgment in favor of Irvine & Mooney against the Latimers to be levied of their individual property is in violation of the express terms of the agreement signed by said Irvine & Mooney, as the consideration

upon which the Latimers assumed all liability on the note to the plaintiff. The order or judgment appealed from must therefore be modified accordingly.

The judgment of this court is that the judgment of the circuit court be affirmed, except in so far as modified by the view taken of the third exception.

(43 S. C. 184)

# CITY COUNCIL OF CHARLESTON v. BROWN.

(Supreme Court of South Carolina. Sept. 12, 1894.)

## CONVICTION BEFORE CITY RECORDER—RIGHT OF APPEAL.

Const. art. 1, § 19, provides for trial before a justice court of all offenses, less than felony, in which the punishment does not exceed a fine of \$100, "saving to the defendant the right of appeal." Act 1878 (16 St. 467), § 1, provides that "it shall be the duty of the recorder of the city of Charleston to hold the police court of said city," and vests him with "all the powers and jurisdiction of a trial justice in criminal matters and cases." *Held*, that one convicted before the city recorder, in the police court of said city, of the violation of a city ordinance, was entitled to an appeal.

Appeal from common pleas circuit court of Charleston county; J. J. Norton, Judge.

Emma Brown was convicted of violating a city ordinance of Charleston, and appeals from an order denying a rule to show cause why the city recorder should not make return on notice of appeal. Order reversed.

E. B. Hollings and S. J. Lee, for appellant. Charles Inglesby, for respondent.

GARY, J. The facts out of which this case arose are set forth in the order of the presiding judge, which is as follows: "This case was heard, and defendant convicted and fined, in the police court of the city of Charleston, for violating a city ordinance with reference to disorderly houses. A notice of appeal was served in five days upon the city recorder, who is the presiding officer and judge of the said court, and a similar notice was served upon the corporation counsel. No report having been filed in this court by the recorder, a rule was taken out by defendant's attorneys, requiring the recorder to show cause why the said return should not be compelled by attachment. In response to this rule the corporation counsel appeared before me, and moved to dismiss the rule upon the ground that there is no appeal provided by law from the police court of the city of Charleston. After hearing full argument of counsel for the defendant, as well as the corporation counsel, I am of opinion that the police court of the city of Charleston, established many years ago, both by state statute and city ordinance, and recognized from time to time since by the statutes of the state, is a different court from a trial justice court, or from the court contemplated in the cases of *Town Council of Beaufort v.*

Ohlandt, 24 S. C. 158, and Town of Lexington v. Wise, 24 S. C. 163. It is such a court as is referred to in Ex parte Schmidt, 24 S. C. 363. And, there being no appeal provided by law from that court, it is ordered that the motion to discharge the rule to show cause, above referred to, be granted, and that the rule be dismissed." From this order the defendant appealed, on the following grounds: (1) "Because his honor erred in deciding that there was no appeal from the judgment and sentence of the recorder of Charleston, while presiding at the police court. (2) Because his honor erred in deciding that a person carried before the police court of Charleston county, charged with a violation of a city ordinance, has no right to have the case transferred to the city court or a trial justice for trial by jury, and has no right to appeal from the judgment of said court. (3) Because the defendant has the right of appeal from any sentence from any court in South Carolina affecting her rights, and his honor erred in not so holding. (4) Because his honor erred in dismissing the rule requiring the recorder to make his return. (5) Because the city recorder, when he presides at the police court, is vested with the powers of a trial justice of this state, and is under the same restrictions and limitations of such justices, and his honor erred in not so holding."

The history of the police court is as follows: (1) It was established by a city ordinance ratified August 25, 1836. Section 111 of the ordinance enacts that "it shall be the duty of the intendant to hold a police court daily at 9 a. m. or at such other hour as may be specially appointed by him for that purpose, either at the main guard house or at the city hall for the examination of all slaves or other persons committed to the guard house or otherwise lawfully brought before him to be disposed of according to law," etc. (2) In 1838 (7 St. 148) an act was passed "To alter and amend the charter of the city of Charleston and for other purposes therein mentioned," the fourth section of which is as follows: "That the said mayor of the city of Charleston shall have power to issue warrants and cause all offenders against the law to be brought before him at the police court established under the ordinances of the city council of Charleston, or at such other time and place as he may direct, and either to release, admit to bail, if the offense be bailable, or commit to the custody of the sheriff of Charleston district, who is hereby commanded and required to receive the same and keep in safe custody until discharged by due course of law. And the said mayor shall, within the corporate limits of the city, have and exercise all the powers of a justice of the quorum. And the said mayor shall, and may, by compulsory process, enforce the attendance of witnesses who may be required to give testimony before the said police court, and shall and may punish as for contempt

all persons who may in the presence of said court be guilty of any riotous or disorderly conduct, or who may willfully in any other manner interrupt the proceedings of the said police court." (3) In 1878 (16 St. 467) an act was passed, the title of which was "An act to define and regulate the jurisdiction of the police court of Charleston." Section 1 of said act is as follows: "That from and after the ratification of this act it shall be the duty of the recorder of the city of Charleston, to hold the police court of the city of Charleston, heretofore held by the mayor of Charleston, and that in addition to the authority heretofore vested in the recorder, he shall be invested with all the power and authority heretofore vested in the mayor as the presiding officer of the police court, and with all the powers, authority, and jurisdiction of a trial justice of this state in criminal matters and cases, except that the recorder shall not be allowed to charge or receive any of the fees allowed by law to a trial justice."

Section 1 of article 4 of the constitution provides that: "The judicial power of this state shall be vested in a supreme court, in two circuit courts, to wit, a court of common pleas having civil jurisdiction, and a court of general sessions, with criminal jurisdiction only, in probate courts, and in justices of the peace. The general assembly may also establish such municipal and other inferior courts as may be deemed necessary." In the case of City Council v. Ashley Phosphate Co., 83 S. C. 25, 11 S. E. 386, it is decided that the city court of Charleston was created under that provision of the constitution empowering the general assembly to "establish such municipal and other inferior courts as may be deemed necessary." The court uses the following language: "So that we conclude that the creation of the city court of Charleston was authorized by that provision of the constitution empowering the general assembly to create municipal and other inferior courts." The police court owes its creation to the same provision of the constitution. If we strike out the words "he shall be invested \* \* \* with all the powers, authority, and jurisdiction of a trial justice in this state in criminal matters and cases," in section 1 of the act defining the jurisdiction of the police court of Charleston, the jurisdiction of that court will be left in a very uncertain and indefinite state, with no well-defined limits. Not only is the act of 1878, supra, dependent upon these words to define the jurisdiction of the police court, but the act of 1836, when the mayor was the presiding officer of said court, was likewise dependent upon the following provision so as to define the jurisdiction of said court, to wit: "And the said mayor shall within the corporate limits of the city, have and exercise all the powers of a justice of the quorum." The principle announced in Ex parte Schmidt, 24 S. C. 363, and City Council of Anderson v. O'Donnell,

29 S. C. 355, 7 S. E. 523, is not applicable to this case, because the powers and jurisdiction of a trial justice were not conferred upon the municipal courts in which those cases were tried. This case comes within the rule laid down in *Town Council of Beaufort v. Ohlandt*, 24 S. C. 158, in which Chief Justice McIver, speaking for the court, says: "Now, as it is quite clear that a municipal corporation has no powers except such as are conferred by its charter, and as it does not appear that any power to imprison for a violation of any of its ordinances has been conferred upon the town council, or even to impose a fine beyond a prescribed limit, it would seem to follow that the powers conferred upon the intendant of the town of Beaufort by the act of 1874 could only be exercised as a trial justice, with his jurisdiction so enlarged as to enable him to try all offenders against the ordinances of the town, and to impose either fines or imprisonments, or both, within the limits prescribed to trial justices. This is the necessary construction of the act, in order to make it harmonize with well-settled principles, and preserve the right of trial by jury and the right of appeal, so carefully guarded by the provisions of the constitution. Section 19 of article 1 of the constitution provides that 'all offenses less than felony, and in which the punishment does not exceed a fine of one hundred dollars, or imprisonment for thirty days, shall be tried summarily before a justice of the peace, or other officer authorized by law, on information under oath, without indictment or intervention of a grand jury, saving to the defendant the right of appeal.' Besides this general provision securing the right of appeal from all inferior courts, it seems that, in every instance where such a court is specially provided for, the framers of the constitution again provided in express terms for the right of appeal." Also: "Now, if the act of 1874 should be regarded as conferring upon the intendant of the town of Beaufort all the powers of a trial justice, and, in addition thereto, constituting the intendant an independent municipal court for the trial of all offenders against the ordinances of said town, then the act fails to define or limit the jurisdiction of such municipal court, as it is necessary to do; for it is quite clear that a municipal court can only enforce such ordinances as are passed in accordance with law, and, as we have seen, there does not appear to be any act conferring authority on the town council of Beaufort to impose, as a penalty for the violation of any of its ordinances, anything more than a fine of thirty dollars, and yet the act under consideration purports to give, to what is claimed to be a municipal court, the power to impose fine or imprisonment, at its discretion, or both. But if the act of 1874 be construed, as we think it should be, to confer upon the intendant all the powers and jurisdiction of a trial justice, with the

additional power of trying all violations of the ordinances of the town of Beaufort, then, no such difficulty can arise; for if, as trial justice, he tries offenders against the ordinances of the town, he may, as such, impose fine or imprisonment to the extent of the jurisdiction of a trial justice. It seems to us, therefore, that there was no error on the part of the circuit judge in entertaining the appeal from the judgment of the intendant's court, and no error in holding that the respondent would be entitled to a trial by jury if demanded."

The recorder tried the case by reason of the fact that he was "invested with all the powers, authority, and jurisdiction of a trial justice of this state in criminal matters and cases." As the recorder tried the case under the powers of a trial justice conferred upon him, it follows necessarily that the defendant had the right of appeal, which is incidental to such trial. It is the judgment of this court that the order appealed from be reversed, and that the case be remanded to the court of general sessions for Charleston county for such further proceedings as may be necessary to carry out the views herein announced.

McIVER, C. J., and POPE, J., concur.

(42 S. C. 74)

#### STATE v. SEABROOK et al.

(Supreme Court of South Carolina. July 27, 1894.)

PHOSPHATE MINING LEASE — BREACH OF BOND — COMPLAINT — EVIDENCE — SUFFICIENCY — ESTOPPEL.

1. In an action by the state on a bond given by a licensee to dig and mine phosphate rock, etc., the complaint set out the bond, which binds such licensee to make true returns to the comptroller general each month of the amount of rock dug and sent to market, and to pay the royalty provided by law at the end of each quarter to the state treasurer. The complaint alleged that such licensee dug and shipped to market during October, 1885, the number of tons specified in his return to the comptroller general, and did not pay the royalty thereon. *Held*, that the complaint showed a breach of the condition of the bond.

2. Where such bond recites that a license had been issued to the principal therein, it sufficiently appears that a license was issued to him to mine as alleged in the complaint.

3. Where a person receives a license from the state, and acts upon it, neither he nor his bondsmen can dispute its validity.

4. The return of such licensee to the comptroller general tended to show that on October 10, 1885, the amount of rock charged for was shipped by him to a certain company at a specified place, and the name of the vessel carrying it, the name of the vessel's captain, and its destination. *Held*, that there was evidence that such licensee removed the rock, and that he owed the sum claimed as royalty.

5. The fact that the column in such return designed to show the amount of royalty due the state was left blank was immaterial, since the royalty is fixed by statute.

6. Nor does the fact that there is some confusion arising from the manner in which the figures are set down in the return destroy the re-

turn as evidence, where it appears that there is enough in it to show that such licensee shipped the number of tons he is charged with in October.

Appeal from common pleas circuit court of Beaufort county; I. D. Witherspoon, Judge.

Action by the state of North Carolina against Joseph W. Seabrook, N. Christensen, and William H. McLeod on a bond given the state by defendant Seabrook as a licensee to mine phosphate rock, etc. From a judgment for plaintiff, defendants appeal. Affirmed.

The return of defendant Seabrook to the comptroller general, referred to in the opinion, is as follows:

## EXHIBIT B.

| STATE OF SOUTH CAROLINA.   |  |                 |                        |                    |                                       |                |
|--|--|-----------------|------------------------|--------------------|---------------------------------------|----------------|
| Return of Phosphate Rock Mined or Removed from the Beds of Navigable Streams within the Jurisdiction of the State of South Carolina, during the Month of October, 1885, by Joseph W. Seabrook. |  |                 |                        |                    |                                       |                |
| Number of Tons.  | Date.                                      | Number of Tons. | By What Conveyance.    | Captain of Vessel. | Consignee or Purchaser.               | Destination.   |
| 510  | On hand on the first day of month—Est..... | 510             | Schooner A. D. Samson. | C. Smith.          | Zell Gasano Company of Baltimore, Md. | Baltimore, Md. |
| 15   | Mined during the month.....                | 525             |                        |                    |                                       |                |
| 525  | On hand the last day of the month.....     | 2540            |                        |                    |                                       |                |
| NOTE—Actual weight of rock removed must be given. Other quantities may be estimated.   |  |                 |                        |                    |                                       |                |
| Seabrook Landing—Morgan River.   |  |                 |                        |                    |                                       |                |
| MORGAN RIVER.  |  |                 |                        |                    |                                       |                |
| Personally appeared before me, on this 7th day of November, 1885, Joseph W. Seabrook, who, on oath, says that the facts stated in the foregoing return are true.                               |  |                 |                        |                    |                                       |                |
| THOMAS G. WHITE, Trial Justice. [L. S.]  |  |                 |                        |                    |                                       |                |
| I certify that the above return is true. JOSEPH W. SEABROOK.   |  |                 |                        |                    |                                       |                |

W. J. Verdier, for appellants. G. Duncan Bellinger, for the State.

McIVER, C. J. The object of this action is to recover damages for the breach of the

condition of a bond given by the defendants to the plaintiff, a copy of which was filed with the complaint as an exhibit thereto, and is set out in the case. The bond bears date the 1st of May, 1885; and, after reciting that a license has been issued to the defendant Seabrook, granting a general right to dig and mine phosphate rock and phosphatic deposits, agreeably to an act of the general assembly entitled "An act to establish a system of general rights to dig and mine phosphate rock and phosphatic deposits in the navigable streams and waters of the state, and to provide a mode of ascertaining and of protecting the interests of the state therein," approved 24th of December, 1878, binds the said Seabrook to make true returns to the comptroller general of the number of tons of phosphate rock "dug, mined, and removed, and shipped or otherwise sent to market" by said Seabrook, at the end of every month, and also to pay to the state treasurer, at the end of every quarter or three months (the quarters beginning to run on the 1st of January in each year), the royalty provided by law to be paid thereon, to wit, one dollar upon each and every ton which has not been steamed or kiln dried. The breach alleged in the complaint of the condition of this bond is that the said Seabrook did not pay to the plaintiff the royalty due on 522 413-2240 tons of phosphate rock, alleged to have been dug, mined, removed, and shipped to market by said Seabrook during the month of October, 1885, "as will appear by reference to the return of the said Joseph W. Seabrook made to the comptroller general, a copy of which is hereto annexed, marked 'B,' as part of the complaint." (This return, precisely as set out in the case, should be incorporated in the report of this case.) The only defense set up by the answer was a general denial. By consent, the issues in the action were referred to the master for trial; and at the first reference, after the execution of the bond had been proved by one of the subscribing witnesses, counsel for defendants interposed an oral demurrer, upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The master overruled the demurrer, and defendants gave notice of appeal from that ruling. "After discussion, the reference was adjourned to await result of the appeal. Mr. Verdier [counsel for defendants] abandoning his appeal to the supreme court," the reference was subsequently resumed, when the testimony set out in the case on behalf of the plaintiff was taken, and, the defendants offering no testimony, the reference was closed. The master subsequently made his report, in which he found, as matter of fact, that the bond set out in the complaint was duly executed by the defendants; that the said Seabrook, under the license recited in the bond, did dig, mine, remove, and ship to market 522 413-2240 tons of phosphate rock and deposits, taken during the month

of October, 1885, from the navigable waters of the state; that said Seabrook has not paid the royalty due thereon; and that said royalty amounts to \$522.19, no part of which has been paid,—and he found, as matter of law, that the plaintiff was entitled to judgment against defendants for the said sum of \$522.19, with interest thereon from the 1st of January, 1886, and for the costs of this action. To this report the exceptions set out in the case were filed by the defendants; and, upon this report and exceptions, the case came before his honor, Judge Witherspoon, for hearing, who, without going into any detailed consideration of the facts or law of the case, overruled all of the exceptions to the master's report, confirmed the same, and rendered judgment for the plaintiff, as recommended by the master. From this judgment defendant appeals, upon the following grounds: "(1) Because the circuit judge erred in overruling defendants' exceptions to the master's report and decision, and in sustaining said report and decision. (2) Because the complaint herein does not state facts sufficient to constitute a cause of action. (a) It does not state any facts showing royalty to be due, or that any royalty was due from defendant Seabrook, but leaves it to be inferred. (b) It does not state any fact showing breach of the condition of the bond made by defendants. (3) Because there was no evidence that a license had been issued to Joseph W. Seabrook to mine, as alleged in the complaint. (4) Because there was no evidence that Joseph W. Seabrook mined or removed any rock from the navigable waters of the state under a license so to do. (5) Because there was no evidence that Joseph W. Seabrook owed any sum as royalty to the state. (6) Because the return of Joseph W. Seabrook, put in evidence, showed he had mined during the month of October only fifteen tons of rock, and there was no other evidence of any mining done. (7) Because all the evidence in the case showed that Joseph W. Seabrook had only mined fifteen tons of rock after the giving of the bond sued on, and it was error to hold the sureties on said bond liable for more. (8) Because there is no evidence to support the judgment." These exceptions will be considered in their order.

The first exception, failing to conform to the requirements of rule 5, presents no point for the consideration of this court. *Covar v. Sallat*, 22 S. C. 270; *Connor v. Edwards*, 36 S. C. 568, 15 S. E. 706. As far back as *Chapman v. Lipscomb*, 18 S. C. 230, the late Chief Justice Simpson took occasion to call the attention of the bar to the confusion likely to result from a failure to observe the requirements of rule 5, and to express the hope that the rule would not escape the attention of the profession in the preparation of appeals in future, although in that case the rule could not be applied, by reason of the fact that the appeal there had been

taken before the amendment to rule 5 had been adopted. We must therefore apply the rule here, and we do so with less reluctance for the reason that we think it very doubtful whether the objections to the competency of certain parts of the testimony which this exception seems designed to raise could avail the defendants in this case.

In regard to the second exception, while there is some doubt in our minds (arising from the fact that it is stated in the case that, when the master overruled the demurrer, notice of appeal was given, and the reference was suspended "to await the result of such appeal," which was afterwards abandoned) whether the question is now open for consideration, yet, as defendants afterwards formally excepted to the master's ruling, which was sustained by the circuit judge, to which exception has been formally taken, we will not decline to consider the question whether the complaint fails to state facts sufficient to constitute a cause of action. Two defects are alleged: (1) That no facts are stated showing any royalty to be due by Seabrook; (2) that no fact is stated showing a breach of the condition of the bond. These two supposed defects, though stated separately, may be considered together. The action being based upon the bond, it was necessary to allege some breach of the condition of the bond. Now, the condition of the bond was not only that Seabrook should make a return to the comptroller general at the end of each month of the amount of rock dug, mined, and removed, and shipped or otherwise sent to market, but should also pay the royalty provided by law to be paid thereon, at the end of each quarter, to the state treasurer; and as the complaint alleges that Seabrook did dig, mine, and remove and ship to market during the month of October, 1885, the number of tons specified in his return to the comptroller general, and did not pay the royalty thereon, it seems to us clear that the facts alleged are sufficient to show a breach of the condition of the bond, and therefore sufficient to constitute a cause of action. This exception must therefore be overruled.

The third exception alleges that there was no evidence that a license has been issued to mine, as alleged in the complaint. It seems to us that the recitals in the bond, signed by all of the defendants, are amply sufficient to dispose of this exception. The point raised by appellants' counsel that these recitals show that the license was issued to Seabrook under an act which had been repealed three years before cannot be sustained. After Seabrook had received the license, and acted upon it, enjoying its benefits, it does not lie in the mouth of either Seabrook or his sureties to dispute the validity of the license. See *Scott v. Rutherford*, 92 U. S. 110, and especially the case of *Lawes v. Purser*, 6 El. & Bl. 932, cited by respondent's counsel.



The fourth and fifth exceptions may be considered together. In view of the return made to the comptroller general by Seabrook, which we would hold to be competent evidence against both Seabrook and his sureties, even if the question of its competency were properly before us, we do not see how either of these exceptions can be sustained. That return certainly tends to show that on the 10th of October, 1886, the amount of rock charged for was shipped by Seabrook to the Zell Guano Company of Baltimore, Md., giving the name of the vessel by which such shipment was made, together with the name of the captain of such vessel, as well as its destination. The fact that the column designed to show the amount of royalty due the state was left blank is of no consequence, for the amount of the royalty is fixed by statute; and, when the number of tons shipped is ascertained, the amount of royalty due thereon is a mere matter of calculation.

The sixth and seventh exceptions may be considered together. While it may be true that there is some confusion arising from the manner in which the figures are set down in the return, yet it must be remembered that the return was the work of Seabrook himself, and he can derive no advantage from a confusion caused by his own carelessness, provided there is enough in the return to show that he has shipped, during the month of October, the number of tons with which he has been charged, as found both by the master and circuit judge, which finding we cannot say is erroneous. As we understand it, the royalty is charged only on the amount of phosphate rock shipped to market, without reference to the amount left on hand at the end of the month during which such shipment was made. Hence, while there may be an error in the figures as set down in the first column of the return, as we think it probable there is, that cannot affect the figures set down in the second and third columns, showing that on the 10th of October the number of tons charged for was shipped to market.

The eighth exception is too general to require any consideration.

The judgment of this court is that the judgment of the circuit court be affirmed.

MCGOWAN and POPE, JJ., concur.

(43 S. C. 321)

#### AULL v. NEWBERRY COUNTY.

(Supreme Court of South Carolina. Sept. 12, 1894.)

CLAIM AGAINST COUNTY—DISALLOWANCE BY COMMISSIONERS—REVERSAL BY CIRCUIT JUDGE.

Where the county commissioners disallow a claim because the work was not properly advertised, without any evidence being heard to disprove the testimony in support of the claim,

the circuit court, on reversal of such conclusion of the commissioners on exceptions thereto, should render judgment for the claimant, though the return of the commissioners, made after the rendition of their judgment, sets out facts at variance with those testified to by plaintiff, as such return cannot be considered.

Appeal from common pleas circuit court of Newberry county; I. D. Witherspoon, Judge.

Appeal by Jacob L. Aull from a decision of board of county commissioners disallowing his claim. From the decision of the circuit judge, plaintiff appeals. Reversed.

Johnstone & Cromer, for appellant. W. H. Hunt, Jr., and Thos. S. Lease, for respondents.

POPE, J. Jacob L. Aull presented a verified account against Newberry county to the board of county commissioners thereof. Afterwards he testified fully in regard to such claim. Without any testimony other than that of Aull, the said board of commissioners, in writing, disallowed said claim—First, because the extra work (the basis of the claim) had not been properly advertised; second, because the chairman of the Edgefield county commissioners acted outside his authority. To this conclusion, and the facts upon which it was based, Aull excepted. His exceptions came on to be heard by Judge Witherspoon, who reversed the conclusion reached by the board of county commissioners, and yet ordered a new trial of the claim by such board. Now the said Aull appeals to this court, alleging error in the decision of the circuit judge allowing a new trial, and alleging that such circuit judge should have given plaintiff judgment for his claim. The circuit judge was influenced in that part of his order wherein he directed a new trial by a return of the board of county commissioners, which was made by them after their judgment had been rendered, which return set up a state of facts at variance with those testified to by Aull. In *Tinsley v. Union Co.*, 18 S. E. 794, this court decided such a return could not be considered by the circuit judge. This court also held in *Redfearn v. Douglass*, 35 S. C. 569, 15 S. E. 244, that it was competent for the circuit judge to pass upon the facts excepted to. Hence, the circuit judge erred when he was influenced by said return, and ordered a new trial. Under the provisions of our Code, he should have given plaintiff judgment for his claim. There should be an end put to useless litigation. If the respondents had testimony to rebut this claim, they should have produced it. This case has had its day in court. The judgment of this court is that so much of the circuit judgment as was appealed from be reversed, and that the cause be remanded to the circuit court, with directions to enter a judgment for \$190 for plaintiff against the defendant.

McIVER, C. J., concurs.

(42 S. C. 328)

**YOUNG v. COHEN.**

(Supreme Court of South Carolina. Sept. 12, 1894.)

**ACTION ON CONTRACT—ISSUE AS TO ALTERATION—ADMISSIBILITY OF DUPLICATE.**

In an action on a written contract, apparently containing erasures and interlineations, it was error to exclude a duplicate of the contract which had been left with the defendant, and which he offered in order to show that the plaintiff had altered the original in such manner as to increase the defendant's liability thereon.

Appeal from common pleas circuit court of Union county; I. D. Witherspoon, Judge.

Action by John L. Young against Philip M. Cohen to recover on a written contract. Judgment for plaintiff, and defendant appeals. Reversed.

William Munro and Munro & Munro, for appellant. Thomas S. Moorman, for respondent.

POPE, J. John L. Young brought his action against Philip M. Cohen to recover \$723.63, with interest thereon from January 1, 1890, under a contract in writing. Cohen, in his answer, admitted the contract, but denied that the work performed for him under the contract was reasonably worth the sum sued for. The cause came on for trial before Judge Witherspoon and a jury. The verdict was for plaintiff in the sum of \$540. After entry of judgment, defendant appealed. The grounds are three in number, but, when analyzed, may be found to relate to one matter; namely, the refusal of the circuit judge to allow defendant to show by the duplicate of the contract with plaintiff, which plaintiff had placed in defendant's hands, that the original of said contract had been altered while in plaintiff's hands, to defendant's injury, to wit, in making defendant liable for \$139.75, for plats of all the subdivisions of the four tracts of lands made by plaintiff as a surveyor under the contract with plaintiff. The original and duplicate of the contract, as exhibited before the circuit court at the trial, have been brought to the attention of this court, at the hearing before us. Certainly, alterations have been made, or, to state it mildly, the original does not agree with the duplicate, and there are erasures and interlineations in the original. The original was exhibited at the trial, having been introduced by the plaintiff himself. Defendant then asked leave to introduce the duplicate. This was at first allowed by the circuit judge, but he subsequently ruled out this testimony. When this was done, defendant asked leave to amend his answer, so as to set up the differences in the original and the duplicate, but this was denied by the circuit judge.

We wish to avoid saying anything harsh in this opinion touching these alterations in the "original" of the contract, because they may have to be explained and commented on in the court below in case we grant a new trial; but we unhesitatingly say it was the duty of

the circuit judge, under the circumstances of this case, to have admitted this "duplicate" in testimony. It was relevant to the issue being tried before the jury. Its being ruled out wrought an injury to the defendant to the extent of \$139.75. Unless this sum is entered as a credit upon the judgment, the defendant is entitled to a new trial. It is the judgment of this court that the judgment of the circuit court be reversed, and a new trial ordered, unless the plaintiff shall, within 10 days after notice of this judgment, enter a remittitur of \$139.75 on the said judgment; but, in the event said remittitur shall be so entered, then the judgment, so reduced, is affirmed.

McIVER, C. J., concur.

(42 S. C. 323)

**BAILEY et al. v. SEYMOUR.**

(Supreme Court of South Carolina. Sept. 12, 1894.)

**MORTGAGE BY MARRIED WOMAN—ESTOPPEL BY RECITALS.**

1. Where a married woman executes to her son a mortgage, which expressly states that the debt it secures is her debt, and that it is given for the benefit of her separate property, she is estopped, as against an innocent purchaser of the mortgage, to allege that it was executed to secure a debt due by her son, and hence was invalid, under 20 St. 1121, which provides that a married woman shall not be "liable on any promise to pay the debt or answer for the default or liability of any other person."

2. Where a married woman expressly states in a mortgage that it is given for the benefit of her separate estate, the burden of proof is on her to show that an assignee of the mortgage was not misled by such representation, and knew that the mortgage was made for the benefit of another.

Appeal from common pleas circuit court of Laurens county; I. D. Witherspoon, Judge.

Action by M. S. Bailey & Son against M. R. Seymour to foreclose a mortgage. Judgment for defendant, and plaintiffs appeal. Reversed.

F. P. McGowan, for appellants. O. J. Hunt and Johnson & Richey, for respondent.

McIVER, C. J. This was an action to foreclose a mortgage of real estate, executed on the 23d January, 1892, to secure the payment of a promissory note, bearing even date with said mortgage, for the sum of \$450. The note was made by the defendant, M. R. Seymour, payable to one J. E. Griffin or order on the 15th day of November, 1892, and was by him indorsed in blank, and contained these words: "And I, M. R. Seymour, hereby charge my separate estate with the payment of this note." The mortgage recited as follows: "Whereas, I, the said M. R. Seymour, am well and truly indebted unto J. E. Griffin in the sum of four hundred and fifty dollars by virtue of a promissory note," and, after describing the note above referred to, proceeded in the usual form to convey

the real estate in question to the said J. E. Griffin, to secure the payment of the said note, and contained the following declaration: "And I, the said M. R. Seymour, do charge my separate estate with the payment of said note, debt, mortgage, and all costs that may be incident to the collection of the same, if necessary; and I do declare that said debt is for the benefit of my separate estate." This mortgage contained the following words, indorsed thereon: "In consideration of four hundred and fifty dollars, paid me by M. S. Bailey & Son, bankers, I hereby sell, assign, transfer the within note and mortgage to M. S. Bailey & Son, without recourse, this January the 26th, 1892. [Signed] J. E. Griffin." The plaintiffs, having thus become the owners and holders of the said note and mortgage, instituted this action on the 5th of January, 1893, to foreclose said mortgage. The defendant answered, setting up sundry defenses, the main and only one passed upon by the circuit judge being that, inasmuch as the defendant was a married woman at the time, she had no power to make the contract evidenced by the note and mortgage upon which the action was based, because the said note was a mere accommodation note, made for the benefit of J. E. Griffin, who seems to be the son of the defendant, and used by him for the purpose of taking up a past-due note held by plaintiffs against said Griffin, upon which J. H. Wharton, Joseph Pearce, and F. D. Coleman were indorsers; and that defendant herself never received any benefit from the transaction. The testimony was taken by a referee, and the same is set out at length in the "case," together with sundry objections to the admissibility of portions thereof. The circuit judge, without passing directly upon the several objections to the testimony, sustained the defense above set out, and rendered judgment dismissing the complaint. From this judgment plaintiffs appeal upon the several grounds set out in the record, which, under the view we take of the case, need not be repeated here; for it seems to us that the controlling question is whether the circuit judge erred in holding that, under the facts as found by him, the defendant, being a married woman, had no power to make the contract sued upon.

We agree with the circuit judge that the case must be controlled by the provisions of the act of 1891 (20 St. 1121), which expressly invests a married woman with power "to bind herself by contract, in the same manner, and to the same extent, as though she were unmarried," except that she shall not have the power "to become an accommodation indorser, guarantor, or surety, nor shall she be liable on any promise to pay the debt or answer for the default or liability of any other person." The question, therefore, is whether the facts as found by the circuit judge, viewed in the light of the settled rules of law, are sufficient to show that the

contract in question falls within any one of the excepted class of contracts which a married woman is denied the power to make. The finding of the circuit judge upon this point is expressed in these words: "That defendant executed said note and mortgage to secure a past-due debt of J. E. Griffin, payable at plaintiffs' bank, signed [indorsed] by J. H. Wharton, Joseph Pearce, and F. D. Coleman;" and "that the defendant did not receive any portion of the money realized by the discount of her note and mortgage by plaintiffs." Now, while it may be true that in a contest between J. E. Griffin and the defendant such a finding of fact might be sufficient to protect the defendant, yet the question here presented, where the contest is between an innocent indorsee and assignee of Griffin and the defendant, is very different. It will be observed that the note was a negotiable paper, transferred before maturity, and carried with it the same protection to the mortgage, its accessory, as such paper is entitled to (*Carpenter v. Longan*, 16 Wall. 271; *Kenicott v. Supervisors*, Id. 469; *Dearman v. Trimmer*, 26 S. C. 506, 2 S. E. 501; *Patterson v. Rabb*, 38 S. C. 138, 17 S. E. 463); and, where neither the note nor the mortgage contained anything whatever to show that the contract evidenced thereby was a contract for the benefit of another, but, on the contrary, where the mortgage expressly showed by its recital, above copied, and by its explicit declaration to that effect, that the debt secured thereby was the debt of the defendant herself, and not the debt of any one else, it seems to us that upon the plainest principles of equity the defendant should be estopped from averring to the contrary, unless she could show that plaintiffs were not misled thereby, but that they knew, or ought to have known, that the contract evidenced by these papers, though purporting to be her own contract, was really made for the benefit of her son. To allow a married woman to execute a negotiable note, secured by a mortgage, bearing no evidence on its face that the contract evidenced thereby was for the benefit of another, and, on the contrary, the mortgage bearing evidence on its face that it was intended to secure a contract of the married woman, and to escape liability by offering evidence contradictory of her representations, and tending to show that such papers were really intended to secure the debt of another, would operate as a fraud upon the innocent holder of such papers, who had in good faith advanced money thereon, and hence the married woman is estopped from offering such evidence contradictory of her representations. If, however, she can show that such innocent holder, before advancing his money, knew, or ought to have known, that such representations were untrue, and that in fact the contract was made for the benefit of another, and not for the benefit of the married woman, then no estoppel would arise, as in such

case the person advancing the money would not have been misled by such false representations. This is in accordance with the well-settled rule, clearly established, and constantly recognized in cases arising under the married woman's act of 1882 (*Brown v. Thomson*, 31 S. C. 436, 10 S. E. 95, and many other cases, especially *Nott v. Thomson*, 35 S. C. 461, 14 S. E. 940); and the principle upon which that rule rested is clearly applicable here. Now here, as we have seen, neither the note nor the mortgage contained anything to show that the contract evidenced thereby was not the contract of the defendant, but, on the contrary, the recital in the mortgage that the defendant was "well and truly indebted unto J. E. Griffin in the sum of four hundred and fifty dollars by virtue of a promissory note," describing the same as the note intended to be secured by the mortgage, together with the positive declaration "that said debt is for the benefit of my separate estate," amounted to an explicit representation that the debt secured by these papers was the debt of the defendant herself, and not the debt of any other person; and the defendant is estopped from denying such representation, unless she had shown that the plaintiffs, at the time of advancing their money, either knew or ought to have known that such representations were not true. As was said in *Nott v. Thomson*, supra, a "creditor, when he sues a married woman, must show that the debt was contracted for the benefit of her separate estate [under the law as it then stood]; but, if she admits that in terms, this admission, under the doctrine of estoppel, stands for proof, and the plaintiff has proved his case; but, if the married woman contests the estoppel, the onus probandi shifts, and she must show that by such admission he was not misled." So here, the plaintiffs having shown that by the terms of the mortgage the defendant had admitted that the debt was her own, if she desired to contest the estoppel arising from such admission the burden of proof was upon her to show that the plaintiffs were not misled by such admission. But there is not only no finding of fact to that effect, but there is no evidence to sustain such a finding. On the contrary, one of the plaintiffs,—the one who seems to have negotiated the transaction,—when examined as a witness for defendant, expressly says: "We had no notice of any equity, offset, or counterclaim against the Seymour note and mortgage when we discounted them. We took the paper at what it expressed on its face, and had no reason to think that there was anything wrong as to the consideration. The paper expresses on its face to be for valuable consideration, and we took them relying on their own statements. I mean both the note and mortgage. We acted upon the representation contained in the note and mortgage." It seems to us that the circuit judge erred, either in over-

looking, or in not giving due weight to, the express representations contained in the mortgage. The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to that court for such further proceedings as may be necessary.

POPE, J., concurs.

HEYWARD v. FARMERS' MIN. CO. et al.  
(Supreme Court of South Carolina. Sept. 13, 1894.)

Petition for a rehearing. Dismissed.  
For original opinion, see 19 S. E. 963.

PER CURIAM. After a careful consideration of this petition, we are unable to perceive that any material fact or principle of law has either been overlooked or disregarded, and hence there is no ground for a rehearing. It is therefore ordered that this petition be dismissed, and that the stay of the remittitur heretofore granted be revoked.

(41 S. C. 423)  
ANDERSON et al. v. PILGRAM et al.  
(Supreme Court of South Carolina. Sept. 14, 1894.)

Petition for a rehearing. Dismissed.  
For original opinion, see 19 S. E. 1002.

PER CURIAM. A careful consideration of this petition does not lead us to the conclusion that the court in its decision heretofore filed (19 S. E. 1002) either overlooked or disregarded any material question of fact or principle of law, and there is therefore no ground for a rehearing. It is therefore ordered that this petition be dismissed, and that the stay of the remittitur heretofore granted be revoked.

(41 S. C. 457)  
BUERHAUSE v. DE SAUSSURE et al.  
(Supreme Court of South Carolina. Sept. 14, 1894.)

Petition for a rehearing. Dismissed.  
For original opinion, see 19 S. E. 928.

PER CURIAM. After a careful consideration of this petition, we are unable to perceive that any material question of fact or principle of law has either been overlooked or disregarded in the decision heretofore rendered (19 S. E. 928), and hence there is no ground for a rehearing. It is therefore ordered that this petition be dismissed, and that the stay of the remittitur heretofore granted be revoked.

(41 S. C. 440)

**MADDEN v. PORT ROYAL & W. C. RY. CO.**

(Supreme Court of South Carolina. Sept. 14, 1894.)

Petition for a rehearing. Dismissed.

For former opinion, see 19 S. E. 951.

**PER CURIAM.** After a careful consideration of this petition, we are unable to perceive that any material question of fact or principle of law has either been overlooked or disregarded, and hence there is no ground for a rehearing. It is therefore ordered that this petition be dismissed, and that the stay of the remittitur heretofore granted be revoked.

(42 S. C. 1)

**HARTSFIELD et al. v. CHAMBLIN et al.**  
(Supreme Court of South Carolina. Sept. 14, 1894.)

Petition for a rehearing. Granted.

For original opinion see 19 S. E. 959.

**PER CURIAM.** A careful consideration of this petition leads us to apprehend, at least, that there may have been some questions material to the appellants' case overlooked in the decision heretofore filed (19 S. E. 959), and therefore we think there should be a rehearing of the whole case. It is therefore ordered that this case be set down for a rehearing at the next term of this court, during the time assigned for the call of cases from the seventh circuit.

(33 Ga. 573)

**LEONARD v. OWEN.**

(Supreme Court of Georgia. April 9, 1894.)

**LIFE TENANT OF PERSONALTY—RIGHT TO INCREASE OF LIVE STOCK — CONVERSION OF PROPERTY — WAIVER OF TORT.**

1. Where a testator devised and bequeathed to his wife for life land, horses, mules, cattle, hogs, plantation tools, vehicles, and other personalty, without any restriction whatever upon the right or the use, save that his son was to have all the necessary expenses of his education, board, and clothing paid out of the proceeds of the farm and stock, and the will directed that, after the death of the widow, all the property thus given to her for life be sold by the executor, and the proceeds of the sale divided among the testator's children, the executor had no right to sell the natural increase of any of the animals so bequeathed, but did have the right to sell horses and mules received by the widow in exchange for horses and mules which the testator left to her, the executor electing to treat exchanges made by her as investments of the capital which would or might have come to him specifically for administration under the will in behalf of the remainder-men. Although her conversion of the remainder estate in the corpus was tortious, yet the executor could waive the tort, ratify the exchanges, and take the proceeds, if to do so would be beneficial to the estate which he represents.

2. As to the tools, vehicles, and other personalty found upon the land after the death of the widow, the executor would have the right

to sell such of them as were the identical articles disposed of by the will, or received in exchange therefor, or purchased with the proceeds of the sale thereof, but would have no right to sell such articles as were otherwise acquired by the widow or the person in possession after her death and claiming the same.

(Syllabus by the Court.)

Error from superior court, Talbot county; W. B. Butt, Judge.

Writ of error by John P. Leonard, executor, to a judgment in favor of Albert Owen. Reversed.

J. M. McGehee, J. H. Worrill, and Peabody, Brannon, Hatcher & Martin, for plaintiff in error. Willis & Persons, for defendant in error.

**LUMPKIN, J.** Certain mules and a horse, some cattle, hogs, wagons, and other personalty which need not be more particularly mentioned, were advertised for sale by Leonard, as the executor of James T. Owen, and a claim was interposed by Albert Owen, a son of the testator. Upon the trial of the issue thus made, a nonsuit was granted against the executor, and he excepted. By the third item of the will of James T. Owen, he devised to his wife, during her natural life, certain land, and also bequeathed to her his entire stock of horses, mules, cattle, and hogs, certain vehicles and harness, household and kitchen furniture, plantation tools, etc. These provisions were made for her in lieu of dower. It is evident from the eighth item of the will that the personalty covered by the above-mentioned bequest was given to the wife during her life only; this item, after providing that certain advancements to the testator's children should be accounted for, directed that, after her death, "all the property given to her in the 3rd item of this will be sold by my executor, and the proceeds of said sale be equally divided among all my children." In another item the testator directed that his son Albert should "have all his necessary expenses for education, board, and clothing paid out of the proceeds of the farm and stock mentioned above." It appears from the evidence that, after the testator's death, the executor delivered to the widow one mare, two horse colts, and certain mules, cattle, hogs, vehicles, plantation tools, and other personalty. She lived 11 years, during which time her son Albert, with her consent, traded off all the mules and horses delivered to her by the executor, except one. That one the executor sold without objection. It is probable that several successive exchanges were made between the time of the testator's death and that of Mrs. Owen, but all of them were made with her knowledge and approbation. After her death, the executor found certain cattle and hogs upon the place, but did not know whether any of them were the same he had delivered to the widow. His information was that they were the increase of those originally turned over to her. As to the other personal property in controversy, the rec

ord does not disclose whether it was the same originally delivered to Mrs. Owen, or had been otherwise acquired by her.

1. We think, in the first place, that the executor had no right to sell the natural increase of the cattle and hogs, but that they belonged absolutely to the widow, and passed at her death to her representatives. *Horry v. Glover*, 2 Hill, Eq. 515; *Dunbar's Ex'rs v. Woodcock's Ex'r*, 10 Leigh, 628. These cases, it is true, are authority also for the proposition that, where a life tenant takes the increase of animals, there is a corresponding obligation to keep up the stock to its original number; but, under section 2256 of our Code, the natural increase belonged to the life tenant, without such condition. See, also, *Saunders v. Haughton*, 8 Ired. Eq. 217. We think, however, the executor did have the right to sell the horses and mules received by the widow in exchange for similar animals which the testator had left to her. There can be no doubt that a life estate may be created in live stock, it being property not strictly consumable in the use. See the cases above cited, and, also, *Burnett v. Lester*, 53 Ill. 325; *Holman's Appeal*, 24 Pa. St. 178; and *Flowers v. Franklin*, 5 Watts, 265. If the widow had died shortly after the death of the testator, the executor could, and doubtless would, have sold the identical horses and mules he had delivered to her. She lived many years, however, and the exchanges above mentioned took place. Had the farm and the live stock been left to the widow by a will contemplating that the testator's estate should be kept together, used, managed, and improved by the widow for the benefit of herself and children, with remainder over to the children at the death of the widow,—that is, if a trust had been imposed upon her to maintain the farm as a going concern, as in the cases of *Flowers v. Franklin*, supra, and *Lynde v. Estabrook*, 7 Allen, 68,—it may be that the widow would have had a legal right to dispose of the live stock when the animals became impaired by age or use, and to replace them with others more suitable for the purposes intended; and in that event the animals on hand at the time of her death would, of course, form a part of the estate in remainder. We do not understand that the will in the present case is of this kind. It imposes upon the widow none of the duties above indicated. The provision that the testator's son Albert shall have his education, board, and clothing paid for out of the proceeds of the farm and stock is hardly sufficient to bring this will within the same class as those referred to in the two cases last cited. We think, therefore, that the conversion by the widow of the mules and horses was tortious, not in the sense of being morally wrong, but as being unauthorized under the law applicable to a will of the kind with which we are now dealing. It was, however, the right of the executor, if he considered it beneficial to the estate, to waive the tort, and to treat the exchanges made by

the widow as investments of the corpus which, but for such exchanges, would or might have come to him specifically for administration under the will in behalf of the remainder-men.

2. The evidence, as already stated, does not disclose how the tools, vehicles, etc., found upon the premises after the death of the widow were acquired, or to whom they belonged. If they were the identical articles disposed of by the will, or were received in exchange for such articles, or purchased with the proceeds of the sale of the same, the executor has unquestionably the right to sell them as a part of the testator's estate. If these articles were otherwise acquired by the widow, or if they belonged to her son Albert, who was in possession of the land after her death, and who claimed them, the executor has no right to sell the same. If these articles are of sufficient value to be worth litigating over, the question of title can be settled at the next trial. Judgment reversed.

(93 Ga. 667)

**HENRY et al. v. McALLISTER.**

(Supreme Court of Georgia. April 2, 1894.)

PROMISSORY NOTE—ABSOLUTE DEED AS SECURITY—TRANSFER BY INDORSEMENT—USURY.

1. Under the evidence in the record, the debt in controversy was apparently infected with usury. Without some explanation from the payee of the notes, either as to the value of services rendered or as to some agreement in respect to the amount of compensation therefor, the gross sum mentioned by him in his testimony as covering his charge for the services and for interest on the loan, together with his telling the borrower that she would have to pay a high rate of interest, and his naming 12 per cent. as the rate which others would charge him, would indicate that he intended to and did charge more than 8 per cent.

2. While the transfer of negotiable promissory notes secured by an absolute conveyance of land made under section 1969 et seq. of the Code, although the transfer be made by indorsement of the payee without recourse upon him, will not discharge the land from the incumbrance placed upon it by the deed, yet a mere written transfer, indorsed upon the deed, of the deed itself and the rights of the grantee therein (the payee of the note), will not pass title to the land out of him, and into the indorsee of the notes, so as to enable the latter to convey the land back to the debtor who executed the deed to secure the notes. Consequently, under such circumstances, a verdict in a suit upon the notes, and judgment thereon, should not find and declare unconditionally that the plaintiff has or shall have a special lien on the land for the payment of the judgment, but only that he shall have such lien provided he shall procure a proper conveyance to be made by the grantee in the security deed conformably to his bond for titles, and have the same duly filed and recorded, before causing the land to be levied upon. In the present case no bond for titles is either alleged or proved, and, consequently, it is uncertain whether the provisions of the Code were pursued in taking the security deed.

(Syllabus by the Court.)

Error from superior court, Morgan county; H. McWhorter, Judge.

Action by James McAllister against An-

Antoinette Henry and George Henry. Judgment for plaintiff, and defendants bring error. Reversed.

Calvin George, for plaintiffs in error. W. R. Mustin, for defendant in error.

LUMPKIN, J. Antoinette and George Henry made and delivered to Butler three promissory notes, payable to him or his order; and, to secure the same, Antoinette Henry made a deed, under section 1969 et seq. of the Code, conveying to Butler certain lands. Afterwards, Butler, in writing, transferred the notes and the deed, without recourse, to Hunter, who subsequently, in a similar manner, transferred the notes and the deed to the plaintiff, McAllister. The transfer upon the deed signed by Butler was in the following words: "For value received, I hereby sell, assign, and transfer the within deed to secure a debt, and also the debt to secure which the within deed was given, with all and singular the rights and privileges thereto belonging, to J. H. Hunter, without recourse on me in any manner." The transfer on the same deed signed by Hunter was in these words: "For value received, I hereby sell, assign, and transfer the within deed to Jas. McAllister, without recourse on me in any manner." McAllister brought an action on the notes against the two Henrys, and prayed therein, not only for a general judgment for the amount of the notes, but also for a special lien on the land described in the deed. Antoinette Henry pleaded, in addition to the general issue, that the notes were given for the debt of her husband, George Henry, and that she signed them as security for him; and, further, that the notes were infected with usury; alleging that, while they were given for the sum of \$200 in the aggregate, George Henry received only \$160 of that amount, and that Butler reserved the other \$40 as interest for one year. The jury found for the plaintiff the full amount of the notes, and also that the plaintiff was entitled to a special lien on the land, and judgment was entered accordingly. The motion for a new trial contains several grounds, but the case turns upon the propositions announced in the headnotes, in which we have endeavored to condense a fair statement of the law and the facts applicable.

1. According to the testimony of Butler himself, we think a *prima facie* case of usury was made out. He testified that he loaned \$200, but immediately received back \$40 of the amount. The \$40, he stated, went to pay for services he had rendered Antoinette Henry in behalf of one Luther Hester, who was in Atlanta under indictment for a crime; for investigating the title to the land given as security for the loan; and for interest on the money. The loan was for only one year, and Butler failed in his testimony to explain how much of the \$40 was in payment for his services, and how much for interest on the

loan. He did, however, state to Antoinette Henry that he would himself have to borrow the money to lend to her, and would have to pay 12 per cent. on it, and said she would have to pay him a high rate of interest. His statements would certainly indicate that he intended to and did charge more than 8 per cent. interest; and in the absence of any explanation to the contrary, either as to the value of the services he rendered or as to any agreement in respect to the amount of compensation he was to receive therefor, we think the jury ought to have found that the notes were infected with usury; and it would result as a consequence that the deed given to secure the payment of the same was void.

2. It was insisted for the defendants below that the transfer by Butler of the notes to Hunter discharged the land from the incumbrance placed upon it by the deed of Antoinette Henry, and that Hunter and his transferee, McAllister, simply occupied the position of an ordinary creditor without security. In support of this contention, counsel cited *Cade v. Jenkins*, 88 Ga. 791, 15 S. E. 292; but, in our judgment, that case is not applicable to the case at bar. There it was held that "where a vendor of land takes notes for the purchase money, securing their payment by reservation of title in himself, which notes he afterwards transfers, without recourse and without any transfer of the reserved title, to a third party, this operates as a payment of the purchase money, the vendee's equity becomes complete, and the vendor ceases to hold any interest in the land." The cases there cited support the doctrine announced. In the case now before us, however, the deed was given simply to secure the debt, and we are at a loss to perceive how a mere transfer of the debt itself would defeat the security. Indeed, in *Hunt v. Security Co.*, 92 Ga. —, 19 S. E. 27, it was held that where a deed was given under the provisions of section 1969 et seq. of the Code, to secure the payment of a promissory note, and the original payee afterwards transferred the note without recourse, at the same time conveying to the assignee the title to the land described in the security deed, the latter was entitled to all the rights of the original payee of the note, and all the remedies for enforcing the same. The principle of the latter case is applicable here, with the exception that the effort of Butler to pass the title to the land to Hunter, which doubtless was Butler's intention, was ineffectual. We are quite sure that neither the transfer indorsed upon the deed and signed by Butler, nor the transfer similarly indorsed and signed by Hunter, passed any title to the land. Whatever equity might have resulted from these transfers, the legal title still remains in Butler. Therefore, McAllister, not having the title, is unable to convey the land back to Antoinette Henry. Under these circumstances, the jury were not authorized to find, nor the court to adjudge unconditionally, that

the plaintiff was entitled to a special lien on the land for the payment of the judgment. If the plaintiff is entitled to recover at all against the defendant Antoinette Henry, and the debt is free from usury, the verdict and judgment should declare that he shall have a special lien on the land, upon condition that he shall procure a proper conveyance to be made by Butler to Antoinette Henry, in conformity to his bond for titles (If, in fact, Butler gave her a bond for titles), and that the plaintiff shall have this conveyance duly filed and recorded before causing the land to be levied on. As the deed recites that it was made under section 1969 et seq. of the Code, presumably a bond for titles was given, though the record now before us fails to disclose the truth in this regard. If such a bond was in fact given, the above outlines the proper course to be pursued by the plaintiff, if he establishes his right to a recovery from Antoinette Henry and his right to have a special lien upon the land. If no bond for titles was given, the provisions of section 1969 of the Code were not pursued in taking the security deed, and, in consequence, the special remedy provided by section 1970 would not be available. *Griggs v. Strippling*, 59 Ga. 500. Judgment reversed.

(33 Ga. 561)

**WESTERN & A. R. CO. v. COX.**

(Supreme Court of Georgia. March 9, 1894.)

**RAILROAD COMPANY—LIABILITIES AS LESSEE—CONTINUANCE OF NUISANCE.**

The present Western & Atlantic Railroad Company is liable, after notice to abate, for damages resulting from the continuance upon the right of way of the railroad of a nuisance placed there by the former company of the same name, while it had possession of the railroad, with the property appurtenant thereto, under lease from the state; and this is so although that company created the nuisance in question in making an effort to abate another nuisance, causing similar damages, of which complaint had been made by the plaintiff and others.

(Syllabus by the Court.)

Error from superior court, Whitfield county; I. W. Milner, Judge.

Action by Fred Cox against the Western & Atlantic Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The following is the official report:

The defendant demurred generally, and the demurrer was overruled. The declaration alleges as follows: At the time defendant took possession of its road and right of way, plaintiff was in possession of land, lot 98, in the thirteenth district and third section of Whitfield county, and the road runs through that lot for nearly three-fourths of a mile. Plaintiff had, and now has, on the south side of the road, 40 acres of bottom land, cleared and in cultivation, and of the value of \$50 per acre. About two years before defendant took possession of the road and its appurtenances, the former company operating and

running said road cut a ditch on the right of way entirely through said lot, and, instead of stopping the same at the northwest corner of his lot, it continued the ditch up its right of way until it intersected Swamp creek. The effect of the ditch so continued was, in high water, to bring that creek, or the larger part thereof, down to his lands, at which point, the ditch being too shallow and too narrow to carry off the large volume of water accumulated therein from the creek, it overflowed his land, washing and injuring his soil, carrying away his fences, and preventing his cultivating said 40 acres. While this state of affairs existed, defendant went into possession of the roadbed, right of way, and appurtenances, with knowledge of all the premises, and has kept the ditch open and continued said nuisance from the 1st of January, 1891, up to the bringing of this action; and during that time plaintiff has been prevented by said nuisance from making any crop on the 40 acres, to his damage \$400, and his land has been injured, by the washing away of the soil and the fencing, \$600. He has given defendant notice in writing to abate the nuisance, and it falls and refuses to do so. He prays that on the trial the court will grant him such order or decree as may compensate him for the injury already sustained, and will abate the nuisance by injunction or otherwise, and will protect him in the lawful enjoyment of his property. By amendment, he says that, before the cutting of the ditch, the culvert through which Swamp creek ran was too small to carry off the water in time of high tide, and the water dammed up, and ran down the high embankment of the railroad, and overflowed and injured his lands and those of others; and, on complaint by him and others, the ditch was dug, to prevent injury to his and other lands, and remove all cause of complaint. When first cut, the ditch was not cut to as low a level as the bottom of Swamp creek, but has, year after year, been deepened; and, when taken possession of by defendant, it was more injurious to plaintiff than when first cut.

R. J. & J. McCamy, for plaintiff in error.  
W. K. Moore, for defendant in error.

LUMPKIN, J. Cox brought against the Western & Atlantic Railroad Company an action for damages, and afterwards amended his declaration. The substance of the declaration and the amendment appear in the reporter's statement. The defendant moved orally to dismiss the case, on the ground that no cause of action was set forth, and the bill of exceptions assigns as error the overruling of this motion. According to the allegations of the declaration, the ditch complained of was undoubtedly a nuisance which had been created upon the right of way by the former lease company of this railroad, and the continuance of the nuisance by the present company, after notice to abate the same, is the tort complained of. Accord-



ing to the decided weight of authority, if a private person rents or leases to another premises upon which a nuisance is existing at the time, the tenant, after notice to remove the same, will be liable for damages resulting from its continuance, upon the idea that, by suffering it to remain, he is, in effect, keeping up and maintaining it, just as if he had originally caused it to exist. This would seem to be the law, irrespective of the question whether or not the landlord would also be liable.

The main contention of the plaintiff in error in the present case is that inasmuch as the ditch in question was in existence and on the right of way of the Western & Atlantic Railroad when the property was leased to the present company, and it has in no way changed or interfered with the same, it cannot be held responsible for the act of a former tenant, under whom it does not claim, and between which and itself there is no privity. It makes no difference how the nuisance came to be upon the property originally, and the real question is, can the defendant below be made liable for permitting it to remain, or, in other words, for maintaining it? In view of the law above announced, the question would be free from difficulty were it not for the fact that the lease company is holding under a sovereign state, and is merely allowing the ditch, except as to the operation of natural causes, to remain in the same condition as when the railroad was received from the state. As the state could not be made liable for maintaining a nuisance,—indeed, is not subject to suit for any cause, except by its own consent,—there is considerable plausibility in the proposition that the rights of its lessee are as great as those of the state itself, and, therefore, that the lessee should not be subjected to a liability which in no way attached to the sovereign lessor. The idea is that, as the state leased the property with the nuisance already upon it, a license was thereby conferred upon the lessee to keep the property in the same condition, and, consequently, to maintain the nuisance as it existed when the lease took effect. There can be no doubt that it was in the power of the state to grant to the present Western & Atlantic Railroad Company a license to keep and maintain the ditch on the property. By virtue of such license, it would cease, in a legal sense, to be a nuisance; but, in our opinion, a license of this kind, to be valid, would have to be granted unequivocally and in express terms; otherwise, it will not be presumed that the state intended to confer upon its lessee the authority to maintain an existing nuisance upon the property, which caused damage to a private citizen. It cannot be supposed that the legislature, in passing the lease act of November 12, 1889 (Acts 1889, p. 362), was aware of the existence of this particular nuisance, or legislated with reference to it, or to any others of similar

character. The terms of that act show that it was not contemplated that the railroad, the right of way, and the other property and appurtenances to be covered by the lease should remain in the same physical condition, and with no change or alteration, throughout the term of the lease. Such a thing would be both unreasonable and impossible. The act provided that all improvements, betterments, or ameliorations should be made at the expense of the lessee, and that all attachments to the realty should be considered as permanent; and it required the lessee at all times to keep the road in a first-class condition; thus showing plainly that it was expected that much work would have to be done, and that the physical condition of the property would be constantly varied. It is more than probable that, if the attention of the legislature had been called to such a matter as that now under consideration, it would have expressly required the lessee to abate nuisances then existing. At any rate, in the absence of clear and express authority in the act to maintain existing nuisances, we are unwilling to hold that the legislature intended to confer any right to do so upon any person or company to whom the railroad might be leased under the terms of the act.

Another contention of the plaintiff in error was that in no event should the defendant be held liable to the present plaintiff, because, according to the allegations of his amendment, he and others had complained to the former lease company of damage resulting from the overflowing of their lands by reason of the fact that a culvert under the railroad was too small to carry off the water in times of flood, and that, when this complaint was made to the old company, the ditch was dug by it, to prevent injury to the plaintiff, and remove all cause of complaint. The position of the learned counsel, in view of these allegations, was that the ditch was dug at the instance or request of the plaintiff below, and that, therefore, he has no right to complain of the consequences of an act which he himself procured to be done. We do not think this position is maintainable. The amendment does not allege that the plaintiff requested the old lease company to dig this ditch, but simply that he complained to that company of the injury being done to his property on account of the smallness of the culvert. He did not suggest to the company the remedy to be adopted. It chose of its own accord to dig the ditch, and there would be no justice, under these circumstances, in making the digging of the ditch in effect the act of the plaintiff, or an act for the consequences of which he should be held responsible.

If the plaintiff can establish by sufficient evidence the allegations of his declaration, he will be entitled to recover, and the court was therefore right in overruling the motion to dismiss. Judgment affirmed.

(93 Ga. 570)

**EAST TENNESSEE, V. & G. RY. CO. v. REYNOLDS.**(Supreme Court of Georgia. March 19, 1894.)  
**INJURY TO RAILROAD EMPLOYEE—SLIPPING ON DEFECTIVE CROSS-TIES—LIABILITY OF COMPANY.**

Although the coming apart of the train, and the running back of a portion of it, may have been the result of the engineer's negligence, and have made it necessary for the conductor to go back and flag an approaching train, yet, as the immediate and proximate cause of his injury was his slipping and falling upon a cross-tie forming a part of a trestle, the injury was a mere casualty incident to the business in which the plaintiff was engaged, and he was not entitled to recover. This is true, although there was upon the edge of the cross-tie a small bit of decayed sap, the breaking of which from the tie itself caused the plaintiff's fall. There was no negligence of the company, relatively to the plaintiff, in having a defective cross-tie, the purpose of having ties not being to make a way for employes to walk upon, but to make a safe roadbed for the running of trains.

(Syllabus by the Court.)

Error from superior court, Whitfield county; T. W. Milner, Judge.

Action by John W. Reynolds against the East Tennessee, Virginia & Georgia Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

McCutchen & Shumate, for plaintiff in error. R. J. & J. McCamy, for defendant in error.

**LUMPKIN, J.** In this case a new trial should have been granted, because, under the facts in evidence, the plaintiff was not entitled to a recovery. The freight train upon which the plaintiff was a conductor having stopped for some reason, he started forward to ascertain from the engineer the cause of the stop, at the same time sending a flagman back on the track with a red light for the purpose of warning a train which was following in his rear. Before the conductor reached the engineer, the latter started the train, when, by the breaking of a link, it came apart, and the rear portion, upon which the conductor then was, began to roll backward down the track, and, in so doing, passed the flagman already mentioned. The conductor, by applying the brakes, succeeded in stopping the detached portion of the train, and then undertook to go back on the track himself for the purpose of warning the approaching train in time to avoid a collision. That train was not then in sight. The track in the direction from which the train was approaching was perfectly straight for a mile or more, and the headlight of an approaching engine could, without difficulty, have been seen for a considerable distance, although it was a dark and rainy night. In going back to signal this train, the conductor started across a trestle in great haste, and, when about halfway across, he stepped on a cross-tie, on the top of which was a small bit of decayed sap, which slipped off or came loose from the tie, causing him to fall and to become seri-

ously injured. The flagman already mentioned was the only train hand the conductor had with him; another flagman who started on the trip having become injured at a station the train had passed before reaching the place of the accident, and being, in consequence, unable to continue upon the journey. This fact explains why the conductor himself went back to flag the train following his own. The above, in brief, sets forth the substantial facts of the case. The declaration alleged that the coming apart of the train resulted from the engineer's negligence, and that the company was also negligent in having a defective cross-tie in the trestle.

Granting that the engineer was negligent as charged, we do not think this negligence was, under the circumstances, the proximate cause of the plaintiff's injury. After the breaking of the link between two of the cars, the rolling back of those cars which were thus detached was a distinct and intervening cause, scarcely to have been foreseen, but which made it necessary for the conductor, after stopping these cars, to go down the track with his lantern to signal the coming train. Again, after he had gotten down from the cars upon the track, his hasty and rapid progress over the trestle was yet another cause which brought about the accident resulting in his injury; while the real and immediate cause of this accident was the slipping of his foot upon the cross-tie, because of the giving way of the little piece of decayed sap upon its edge. We, therefore, think the alleged negligence of the engineer, if it existed at all, was entirely too remote to be treated as the cause of the plaintiff's injury. This being so, he had no cause of action against the company, unless it was negligent in allowing the cross-tie in question to remain in the trestle with the bit of decayed sap upon it. Relatively to the plaintiff, we do not think this was negligence. It did not appear that this cross-tie was not otherwise sound and in all respects sufficient and suitable for the use for which it was intended. It certainly was not the purpose of the company, in having ties, to make a way for employes to walk upon, but to make a safe roadbed for the running of its trains. The simple truth is that the injury the plaintiff received was a mere casualty incident to the business in which he was engaged, and the ordinary risks of which he assumed in accepting his employment. This seems too plain for argument. Accidents will happen, not only in the best regulated families, but upon the best regulated railways as well, and to allow the recovery to stand in the present case would be holding the company liable for the consequences of a mere accident for which it is in no fair view responsible.

We have not stated or discussed the numerous grounds of the motion for a new trial, because the views above expressed cover the merits of the case, and render it unnecessary to go into further detail. The case mainly

relied on by counsel for the defendant in error was that of *Simmons v. Railway Co.* (decided last term) 18 S. E. 990. That case is distinguishable from the case at bar in several particulars. In the *Simmons* Case the trial court held that the declaration did not set forth a cause of action, and therefore, for the purpose of deciding the question thus raised, the allegations of the declarations were assumed to be true. According to those allegations, the negligence of the engineer was the direct and immediate cause of bringing about the situation requiring prompt action on the part of the plaintiff. In the present case the negligence of the engineer, if there was any, was the remote, and not proximate, cause which made it necessary for the plaintiff to adopt a certain line of conduct. Again, in the former case the negligence of the engineer occasioned a real emergency, which not only put in imminent danger the property of the company, but also the lives of *Simmons* and his fellow servants on the train upon which he was employed. In the case at bar there was nothing of this sort, for there was no imminent danger impending. The train following that of which *Reynolds* was in charge as conductor was not near, and there was no reason for apprehending a collision which might result in the destruction of *Reynolds'* train, or in injury or death to himself or others. Lastly, the position of peril brought about by the negligence of the engineer in the *Simmons* Case required prompt and immediate action on the part of *Simmons*. He had little or no time for reflection, and could not possibly be as careful and as circumspect as it might be reasonably expected he would be under ordinary circumstances. The company, being responsible for this perilous situation, had no right to expect from *Simmons* that degree of care and diligence which it would be incumbent upon him to exercise when there was no emergency, or when the emergency was brought about through his own fault. Besides he was acting under the express orders of the conductor, who was his superior officer, and had no opportunity, nor, under the circumstances, was bound at his peril, to determine whether obedience to such orders would be proper or not. While, ordinarily, it would have been his duty to disregard an order which it would be manifestly unsafe to obey, he had no time to consider this question, and, in the emergency which was then upon him, was not negligent in assuming that the orders of his superior were proper, or in acting upon them. Therefore, though his stumbling and falling while passing over the car of coal might, in a sense, be a casualty incident to the business in which he was engaged, it was one directly brought about in consequence of the company's negligence. In the case before us there was no pressing occasion for instant and hasty action on the part of *Reynolds*, who was himself the chief officer of the train, and acting under orders

from no one. He had ample time to cross the trestle slowly and carefully, and to go a sufficient distance to stop in time the expected train, without taking upon himself any unnecessary risk. By simply looking down the track and listening, he could easily have seen that there was no need of great haste on his part, and he had ample time to do with the proper care all that was necessary. There are other differences in the two cases, but those already pointed out will suffice to show that the decision in the present case is not at all in conflict with that made in the *Simmons* Case. Judgment reversed.

(93 Ga. 566)

# ADDINGTON v. WESTERN & A. R. CO.

(Supreme Court of Georgia. March 19, 1894.)

CONTRACT OF EMPLOYMENT—ACTION FOR BREACH  
—NOMINAL DAMAGES—REVERSAL ON APPEAL.

It was error for the court to direct a verdict for the defendant on the facts in evidence, the parol evidence having been admitted without objection, and the statute of frauds not being pleaded. It was not so clear that the plaintiff was not entitled to recover at least nominal damages as to exclude all reasonable inference to the contrary.

(Syllabus by the Court.)

Error from superior court, Whitfield county; T. W. Milner, Judge.

Action by Henry Addington against the Western & Atlantic Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

B. Z. Herndon and W. K. Moore, for plaintiff in error. Payne & Tye and R. J. & J. McCamy, for defendant in error.

LUMPKIN, J. Addington brought an action against the Western & Atlantic Railroad Company for the alleged breach of a contract, by the terms of which the defendant had agreed to give him permanent employment in its service, in consideration of his releasing the company from all claim for damages resulting from a personal injury inflicted upon him. In support of the declaration, he proved that he had been seriously injured while in the service of the company, and that the company's superintendent, J. L. McCollum, in consideration of his releasing the company as above mentioned, had agreed to give him "permanent employment on the road, at least so long as he held his position as superintendent;" that, before receiving the injury, plaintiff was earning about \$62 per month, on an average; that, in pursuance of the aforesaid agreement, he was employed for a while in the yard of the defendant to do some light work, and, in a month or two, was given a position as brakeman on the road, but shortly afterwards was discharged, without fault on his part. It also appeared from the plaintiff's evidence that, some time after his discharge, he had been able to earn a dollar a day at a sawmill, and, at the time of the trial, he was earning

eight dollars a month on a farm. There was, however, no proof as to what wages were paid the plaintiff for services rendered by him to the company after the injury, or as to what his services were worth at any time between the date of his injury and the date of his discharge. Neither was there any direct and positive proof introduced by the plaintiff to show that, at the date of his discharge from the defendant's service, J. L. McCollum was still the superintendent of the company. The defendant introduced in evidence a paper of which the following is a copy: "While employed by the Nashville, Chattanooga & St. Louis Railway, lessee of the Western & Atlantic Railroad Company, upon its road, I was injured on or about the 5th day of April, by getting knocked off of train at E. T., V. & G. crossing; and, the Nashville, Chattanooga & St. Louis Railway, lessee of the Western & Atlantic Railroad, having paid me one hundred and twenty-eight dollars and ninety-five cents, in full of all wages due me to date, and in full for all damages which I have sustained on account of said injury, I hereby acknowledge receipt of said sum, in full satisfaction, as aforesaid, and in full of all demands to this date. [Signed] H. W. Addington. Atlanta, Ga., May 13th, 1891." The plaintiff was then allowed, without objection, to testify that he signed the paper, and was fully aware of its contents when he did so, but that, nevertheless, the main consideration of his signing was not the money paid to him, but the promise and undertaking of the superintendent to give him permanent employment, as already testified, and that all this was well understood and agreed to by the superintendent, acting for the company.

Whether the plaintiff was estopped by the above written instrument from proving that the contract to employ him was the main consideration which induced him to sign this paper, or, if not, whether the case falls within the statute of frauds, are questions not before us for determination. As already stated, there was no objection to the proof indicated, nor was there any plea of the statute of frauds. The only question, therefore, is, was the plaintiff, upon the naked merits of the case, entitled to a recovery? We do not think it so clearly appeared that he was not entitled to at least nominal damages as to authorize the court to direct a verdict against him. He certainly proved the contract, and also a breach of it, unless the continuance of McCollum in his position as superintendent of the company up to the time of the plaintiff's discharge was an essential fact. If it was not, the proof of the breach was complete. If it was, then, though it was not affirmatively shown that McCollum was still in the service of the company as superintendent at the time of the plaintiff's discharge, we are not prepared to say there were no facts in evidence from which the jury might not have

reasonably so inferred. This being so, they would have been authorized by the evidence, aided by reasonable inference therefrom, to find that there was a breach of the contract, and this would have entitled the plaintiff to nominal damages. While the evidence does not seem to afford any basis for the computation of other and further damages, we think it was error, under the circumstances, for the court to direct a verdict. As the jury might have found the plaintiff was entitled to nominal damages, the court had no right to deprive him of his right to recover them. Had the case been submitted to the jury, and they had found against the plaintiff generally, it would have been proper to allow the verdict to stand; and even if it plainly appeared that he was entitled to nominal damages only, and the court had refused a new trial, we would not reverse the trial court because of such refusal, it having been repeatedly ruled by this court that a new trial will not be ordered simply to allow a plaintiff an opportunity to recover merely nominal damages. We are not, however, aware of any precedent authorizing the trial court to deprive a plaintiff of his right, in the first instance, to recover such damages. To so hold would put it within the power of trial judges to prevent, in any case, a recovery of nominal damages, and thus render the law authorizing a recovery of such damages practically inoperative. We quote, as appropriate in this connection, the following from *Marcy, J., in Herrick v. Stover*, 5 Wend. 587: "It is said by Ashurst, J., in *Edmonson v. Machell*, that 'an application for a new trial is an application to the discretion of the court, who exercise that discretion in such a manner as will best answer the ends of justice.' But where a record is brought into this court for revision, and error is found in it, is it a matter of discretion in us whether we will correct that error or not? I have always supposed that the party who has been affected by an error, be the extent of that injury ever so small, can require of us *ex debito justitiæ* to correct it." And in *Wilson v. Rastall*, 4 Term R. 758, Lord Kenyon said: "There is not a single instance where a new trial has been refused in a case where the verdict has proceeded on the mistake of the judge. Where, indeed, the jury have formed an opinion upon the whole case, no new trial in a penal action has been granted, though the jury have drawn a wrong conclusion. So, too, in ordinary, where the damages are small, and the question too inconsiderable to be retried, the court has frequently refused to send the case back to another jury. But wherever a mistake of the judge has crept in, and swayed the opinion of the jury, I do not recollect a single case in which the court has ever refused to grant a new trial." These cases are cited in a note in 3 *Grah. & W. New Trials*, p. 1170. While the case, as now presented, appears to have but little merit, we feel constrained, upon

principle, to order a new trial, so that the rights of the plaintiff, whatever they are, may be passed upon and determined by a jury. It is more important for the courts to uphold the great right of trial by jury than for any particular party to win or lose a given case. Judgment reversed.

(83 Ga. 575)

**STATE v. EVERETT et al.**

(Supreme Court of Georgia. March 19, 1894.)

**ORIGINAL LAW—FEES OF WITNESSES—EXECUTION AGAINST DEFENDANT—AFFIDAVIT OF ILLEGALITY—PROCEDURE.**

1. Where, by the judgment of the court, a person convicted of a misdemeanor is sentenced to pay a fine and the costs, including the fees of the witnesses, and the clerk issues an execution for such fees, based upon the judgment, section 3842 of the Code is not applicable. That section applies where a witness verifies his subpoena, and has it countersigned, and thus makes it, together with the affidavit, in effect an execution against the property of the party at whose instance he was subpoenaed.

2. Where the clerk of the superior court issues an execution for the costs due witnesses, and the defendant meets it with an affidavit of illegality, on the ground that the witnesses have claimed, and procured the execution to issue for, more fees than they are entitled to receive, specifying in the affidavit the alleged excess as to each witness, it is incumbent upon the defendant to pay the amounts appearing to be due, in order to authorize the levying officer to stay further proceedings. When the execution and the affidavit of illegality are returned to court, the issue thus made is in the nature of a motion by the defendant to have the costs retaxed, and upon the trial it is error to refuse to allow each witness to prove the whole number of days he had attended court upon his subpoena, and thus establish the correctness of the amount in his favor for which the execution was issued.

(Syllabus by the Court.)

Error from superior court, Gordon county; T. W. Milner, Judge.

J. Q. Everett was convicted of an assault. An execution was issued in the name of the state for the use of several witnesses for witnesses' fees. There was a judgment adverse to the execution plaintiffs, and the state brings error. Reversed.

W. R. Rankin and E. J. Kiker, for the State.  
R. J. & J. McCamy, for defendants in error.

**LUMPKIN, J.** At the February term, 1890, of the superior court of Gordon county, Everett, upon an indictment for assault with intent to murder, was convicted of an assault, and, by the judgment of the court, was sentenced to pay a fine of \$500 and the costs of the prosecution, including the fees of the witnesses. The clerk issued an execution, in the name of the state, for the use of several of the witnesses, stating their names in the body of the execution, and indorsing on the back of the same the amount to which each was entitled. The execution referred to the judgment already mentioned, and recited that it was issued in pursuance of the same. This execution was levied upon the property of Everett, who thereupon made and delivered

to the sheriff an affidavit of illegality, denying the correctness of the amounts stated to be due to some of the witnesses. It does not distinctly appear from the record how the clerk arrived at the amount of the fees due the witnesses, respectively, but it is inferable from the allegations of the affidavit of illegality that the witnesses went before the clerk, and made affidavits as to the number of days they had attended in obedience to their subpoenas. Copies of some or all of these affidavits, not verified by the clerk, were attached to the record sent to this court, together with an agreement of counsel that, if this court should determine they were properly parts of the record, they might be examined and treated as such without being certified. We find, upon examination, that they are not parts of the record of the present case, and therefore, even if material, they could not be considered in making up our judgment. They are, however, immaterial, and are mentioned only for the purpose of illustrating the position taken by counsel for the defendant in error in the argument here. Referring to these affidavits, he treated the case as though the witnesses, respectively, had verified their subpoenas under the provisions of section 3842 of the Code, for the purpose of making them, together with the affidavits as to attendance thereunder, executions against the property of Everett. Viewing the case in this light, the contention of defendant's counsel was that the evidence showed the witnesses had sworn falsely as to the number of days they attended at the February term, 1890, and therefore were entitled to no fees at all as witnesses in the case, but were liable to Everett, under section 3843 of the Code, for four times the amount of the fees unjustly claimed against him. Upon this assumption, counsel for the defendant further contended that although, in verifying their subpoenas, the witnesses had made mistakes against themselves as to the number of days they had attended at previous terms of the court, they were not entitled to prove this fact, even though as a result it would appear that the total number of days for which each claimed fees was correct. The answer to all this is that the witnesses had not undertaken to give the subpoenas themselves the force and effect of executions by complying with the provisions of section 3842 of the Code. The execution levied was issued by the clerk from a judgment of the superior court, and the presumption, without regard to the information derived from the statements of counsel or an inspection of the copy affidavits, would be that the clerk discharged his duty, and took the proper means of informing himself as to the amount due each witness before undertaking to issue the execution. Of course, if he made mistakes which operated unjustly against the defendant, they could, in the proper way, be corrected; but we are quite certain that the section of the Code last cited

has no application whatever to a case of this kind.

2. The affidavit of illegality was based, as already stated, on the ground that the witnesses claimed more fees than they were entitled to receive. It undertook to specify the number of days for which each witness claimed fees, the number of days he actually attended, and the excess of legal fees claimed by each. We think that, in order to authorize the levying officer to stay further proceedings, it was incumbent upon the defendant to pay the amount due each witness, according to the number of days the affidavit of illegality admitted he had attended. This, however, was not done, but the sheriff returned the execution and illegality to court, and the issue thus made was tried before a jury. Logically, it was a proceeding in the nature of a motion by the defendant to have the costs retaxed, which was proper enough; but upon the trial it was error to refuse to allow each witness to prove the number of days he had attended court upon his subpoena, and thus establish the correctness of the amount in his favor for which the execution was issued. It is quite probable that at the trial the judge was aware of the errors made by the witnesses in their affidavits as to the number of days they attended at the February term, 1890, and that he refused to allow them to make the proof above indicated because, in his opinion, they forfeited, by these mistakes, all right to prove the number of days they had attended at previous terms, and thus show that the errors they made against the defendant as to the time of their attendance at the last term were exactly counterbalanced by the errors against themselves as to their attendance at former terms. If this be so, the case was tried upon the wrong theory. In any event, however, our opinion is that, as to the issue made by the levy of an execution of the kind mentioned and an affidavit of illegality thereto, it was the right of the plaintiffs in execution to show, if they could, that the amounts in favor of each, as indorsed upon the execution, were fair and correct, and, to this end, to prove the total number of days they had attended during the entire pendency of the case. Judgment reversed.

(93 Ga. 612)

**HAHN et al. v. ALLEN et al.**

(Supreme Court of Georgia. March 26, 1894.)

**POWERS OF PARTNER—NOTE WAIVING EXEMPTIONS — PETITION AGAINST INSOLVENT FIRM — CLAIM BY ORDINARY.**

1. Where one member of a mercantile partnership, in due course of the partnership business, executes and delivers in the name of the firm a promissory note in which all rights of homestead and exemption are expressly waived, the waiver is binding on all the members of the firm, so far as the personal property belonging to the firm is concerned, and no member is entitled to an exemption out of the money arising from a sale of such property by a duly-appointed

receiver, as against a judgment or decree founded on such a note.

2. Where the ordinary is made a party to a pending petition filed under the "trader's act" against an insolvent partnership, and claims, by virtue of an exemption allowed one of the partners, and for the purpose of investment under the provisions of section 2016a of the Code, money in the receiver's hands, the same being some of the proceeds of personalty belonging to the partnership, such ordinary is not entitled to any of the fund before the payment of all the expenses of raising the cash, including the reasonable fees and clerk hire of the receiver, and the reasonable fees of the attorneys by whose services the fund was brought into court.

(Syllabus by the Court.)

Error from superior court, Floyd county; **W. M. Henry, Judge.**

Writ of error by **H. Hahn & Co. and others** to a judgment in favor of **R. V. Allen and others**. Reversed.

**Dean & Smith, O. A. Thornwell, and J. W. Ewing**, for plaintiffs in error. **McHenry, Nunnally & Neel and G. & W. Harris**, for defendants in error.

**LUMPKIN, J.** 1. In **Harris v. Visscher**, 57 Ga. 229, this court decided that each member of a partnership could take a homestead in partnership land, the same being assigned to them severally in separate parcels; and that a prior creditor of the partnership, on reducing his debt to judgment, could not enforce it over the homestead right. The correctness of this decision will readily appear when it is remembered that, under our system, the title to land owned by a partnership vests, not in the partnership itself, but in the partners individually as tenants in common. In **Blanchard v. Paschal**, 68 Ga. 32, this court went a step further, and decided that one partner was entitled to an exemption set apart out of the personal property belonging to the firm, the idea upon which the decision was based being that the assets of a partnership belonged to the individuals composing the firm. We are aware that this decision is not in harmony with the decisions of other courts upon this question, but we are content with the law as it has been settled by this court. After an elaborate discussion of the whole matter, Judge Thompson, in his work on Homesteads, upholds the view taken by our court. He says: "We have, then, in favor of the rule of allowing either to a partnership firm or to the individuals composing it the exemption fixed by statute out of the partnership assets in case there are not sufficient personal assets, a principle of construction which seems obvious and irrefutable; namely, that if the debtor has any interest in property, be it real or personal, which, under the general law, the creditor can subject to the satisfaction of his debt, the statute of exemptions will step in and secure a defined portion of it to the debtor. Against this plain principle, we have a rule of convenience merely, supported by a preponderance of authority, but confessedly based upon the idea that the exemption here under consideration

is several, personal, and individual, as well in regard to the property to which it applies as to the right conferred, and also upon the impracticability of giving it the application sought, growing out of the nature of partnership property and the relation of partners to each other and to creditors,—an impracticability which, in the belief of the writer, is more fanciful than real.” *Thomp. Homest. & Ex.* § 216. This court, however, has never yet decided that where one member of a mercantile partnership, in due course of the partnership business, executes and delivers in the name of the firm a promissory note, waiving therein all rights of homestead and exemption, such waiver is not binding on all the members of the firm, so far, at least, as the personal property belonging to the firm is concerned. We think such a waiver is binding on all the members, and that no one of them is entitled to an exemption out of the personal assets of the partnership, or the proceeds of the same, as against a judgment or decree founded on a note of this kind. Any member of a partnership, unless restricted by the terms of the partnership contract, has a right, for the purpose of securing a debt due by the partnership, to mortgage its goods, or to execute a bill of sale to the same; and it is also the right of any member to sell outright the goods of the firm, either to raise money to pay its indebtedness, or for any other purpose arising in due course of the partnership business. *Bank v. Cody* (last term) 19 S. E. 831. The authority of a partner to thus dispose of the personal property of the firm grows out of the doctrine of agency. Each active partner is necessarily an agent of his copartners for the transaction of the lawful business of the firm. The general rule on the law of agency, and the exceptions to it, are thus stated by Mechem: “It may be stated as a general rule that an agency may be created for the transaction of any lawful business, and that whatever a person might lawfully do, if acting in his own right and in his own behalf, he may lawfully delegate to an agent. In dealing with this general rule, two principles are important to be considered. One of them results as the direct and natural effect of the rule itself; the other is an exception to it. These are (1) that authority cannot be delegated to do an act which is illegal, immoral, or opposed to public policy; and (2) that the performance of an act which is personal in its nature cannot be delegated.” *Mechem, Ag.* §§ 18, 19. We see no reason why this general rule, which is often more tersely stated, “*qui facit per alium facit per se*,” may not, subject to the exceptions stated, be applicable in case of a partnership. Assuming it to be so, our question becomes free from much of the difficulty apparently involved in it. If an individual sells his property outright, it is absolutely certain that he has no longer any shade of right to an exemption out of the property sold; or, if he

executes a bill of sale to secure a debt, he cannot have an exemption out of the property covered by the bill of sale, as against that debt. If, then, a partner, by reason of his relations to the firm and of his agency for his copartners, may divest the partnership of its title to its personal assets, and thus defeat the rights of himself and his copartners to an exemption out of the same, why may he not do likewise by waiving the exemption right in that property, both of himself and them? The greater power necessarily includes the less. If he can put the property absolutely beyond the control of the partnership and all its members, we think he certainly has the right to bind each member of the firm by a contract made in its behalf not to claim the benefit of an exemption out of it. In making the waiver, he does nothing illegal, immoral, or opposed to public policy. Nor is the authority necessarily delegated to him by virtue of the partnership authority for the performance of an act personal in its nature. He has the right, within the scope of the partnership business, to deal with the personality just as if it were his own. He has a personal undivided interest in every item of which it consists, and, in dealing with it, may put it beyond the reach, not only of himself, but also of his copartners, so far as any right to exemption is concerned. In the present case, the goods of the firm having been properly sold by a duly-appointed receiver, neither member of the firm was entitled to an exemption out of the money in the receiver's hands, as against judgments founded on promissory notes of the firm containing waivers of the kind above described.

2. As against judgments not founded on debts of this kind, the exemption would be good. Whether, in the case at bar, after the satisfaction of the judgments based on “waiver notes,” and of all other claims entitled to priority as to the fund in the receiver's hands, anything would be left, we are unable to say. This will have to be determined by an administration of that fund in accordance with the rules laid down in this opinion. A claim for a portion of the money in the receiver's hands is made by the ordinary by virtue of an exemption allowed one of the partners, and the claim is made for the purpose of investment under the provisions of section 2016a of the Code. It must not be overlooked that the property itself from which this money resulted was never exempted, but the exemption specifically covers the money itself, after the receiver realized it from the sale of the partnership goods. We therefore entertain no doubt that, before any exemption could be allowed out of this fund, it is chargeable with all the expenses necessarily and properly incurred in raising the fund by converting the property into cash; and these expenses, in our opinion, include reasonable fees as clerk hire for the receiver, and also reasonable fees of the attorneys by whose services the fund was



brought into court. The fund itself having been created by the services of the receiver, his clerk and the attorneys, their claims upon it are of the highest dignity, and entitled to recognition in preference to the claim of the ordinary, based upon the exemption. Indeed, there is no fund upon which the exemption can take effect until these several charges shall have been satisfied. Judgment reversed.

(93 Ga. 621)

**KING et al. v. SULLIVAN et al.**  
(Supreme Court of Georgia. March 26, 1894.)  
**INSOLVENT CORPORATION — RIGHTS OF CREDITORS — UNPAID STOCK SUBSCRIPTIONS — CORPORATION AS PARTY — SERVICE BY PUBLICATION — PROCEEDINGS IN REM.**

1. While unpaid stock subscriptions are assets of an insolvent corporation for the benefit of its creditors, of which a court of equity will, by proper proceeding in personam, compel payment when the corporation fails or refuses to call for or collect the same, the corporation itself is a necessary party to such a proceeding, and jurisdiction for this purpose over a foreign corporation which has no office, officer, agent, or place of business in this state cannot be obtained by merely serving the corporation by publication.

2. In order to proceed by petition, whether at law or in equity, against specific assets of a foreign corporation, such as bonds or stocks, for the purpose of subjecting them to the satisfaction of a judgment against the corporation, where no service can be had upon it otherwise than by publication, the suit must be one quasi in rem, and the assets must be described so that they can be identified and seized, the jurisdiction to adjudicate or decree in such case depending upon an actual seizure, lawfully made before or pending the action. An allegation made on information and belief is insufficient which, in effect, charges that the foreign corporation had, without consideration, delivered to its codefendants (some of its stockholders resident in this state) bonds and stocks of a named railroad company, without further description of the property sought to be reached and appropriated.

3. The prayer that each of the defendants sued with the corporation be compelled to answer whether, at any time, he received from the corporation any bonds or stocks, and for the appointment of a receiver to sue for and realize their value for the benefit of the complaining creditors, will not aid the jurisdiction.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Writ of error by J. King and others to a judgment in favor of M. A. Sullivan and others.

Dabney & Fouché and W. W. Brookes, for plaintiffs in error. Dean & Smith and Geo. & Walter Harris, for defendants in error.

**LUMPKIN, J.** 1 It is well-settled law that unpaid stock subscriptions are assets of an insolvent corporation which, when properly reached, may be applied for the benefit of its creditors. It is primarily the duty of the proper officers of the corporation to compel, for this purpose, payment of such unpaid subscriptions; but, if they fail or refuse to call for and collect the same, a court of

equity, by an appropriate proceeding, will enforce such collection, and properly apply the proceeds thereof to the claims of the creditors. To such a proceeding, however, the corporation itself is a proper and necessary party. The above propositions are so obviously sound, and so generally recognized as correct, it is hardly necessary to support them with authority. We have before us, however, two cases directly in point, which we will cite: *Wetherbee v. Baker*, 35 N. J. Eq. 501; *Bank v. Smith* (Mass.) 6 Fed. 215. One reason, among others, why the corporation is a necessary party, is the fact that it has an undoubted right to be heard upon the question as to whether or not there is a necessity for collecting the unpaid stock subscriptions, and, if so, as to what disposition should be made of the same. The equities existing between the corporation and its stockholders who have not fully paid for their stock are involved, and these equities cannot be adjusted without having the corporation before the court, so that it can be precluded by the judgment or decree rendered. Otherwise, if the creditors of a corporation were to compel payment of unpaid subscriptions from its stockholders without making the corporation a party, there would be apparently nothing to prevent the corporation from again compelling payment to itself by these same stockholders, as it would not be bound by a judgment or decree rendered in a case in which it had not been heard. A proceeding of the kind above mentioned is, so far as the corporation is concerned, a proceeding in personam; and therefore, in order to give the court jurisdiction for the purpose indicated, actual service is essential. In the case of a foreign corporation which has no office, officer, agent, or place of business in this state, such jurisdiction cannot be obtained by merely serving the corporation by publication. This doctrine is supported by the principle announced in *Pennoyer v. Neff*, 95 U. S. 714, in which it was held that a personal judgment rendered by a state court against a nonresident of the state, in an action upon a money demand, was without validity where the defendant was served by publication, but upon whom no personal service of process within that state was made, and who did not appear.

2. Another object of the petition filed in the present case was to compel some of the stockholders of the corporation who resided in this state to surrender certain bonds and stocks of the Chattanooga, Rome & Columbus Railroad Company, without further description of the same, and which the petition, on mere information and belief, charged that the Rome & Carrollton Construction Company had, without consideration, delivered to these stockholders. The theory of the petition was that these securities really belonged to the latter company, and should be subjected to the payment of its debts. In so far as the relief thus sought is concerned,



the proceeding is one quasi in rem, there being, for the reasons already stated, no jurisdiction over the construction company giving the petition any standing in court as a proceeding in personam. Had the petitioners endeavored to reach these alleged assets of the construction company by attachment and levy, it would have been necessary to have the assets seized by the levying officer before the court would have jurisdiction to render a judgment; and, in order to have the levy made, it would be incumbent upon the plaintiffs to locate and identify the property, so that the same could be pointed out to the sheriff. This being an effort to proceed by petition against the stocks and bonds as specific assets of the foreign corporation, and it being in the nature of a proceeding in rem, we think the description given of the stocks and bonds entirely insufficient. It would be impossible, under such a description, to identify and seize them. We think the jurisdiction of the court to make any adjudication or decree as to these assets, in a case of this kind, depends upon an actual seizure lawfully made before or pending the action. Otherwise, the plaintiffs, by a mere fishing petition, might secure a substantial right, to obtain which the remedy by attachment and levy would seem to be amply sufficient if they could identify and point out the property sought to be reached and appropriated to their claims. The fact that they cannot do this may make the remedy by attachment and levy unavailable; but, even if this be so, it affords no reason for placing them upon better ground merely by going into equity. Had they begun by attachment, and caused garnishments to be served on the stockholders who, according to their allegations, were holding property really belonging to the corporation, the question presented would be different.

3. We do not think the prayer that each of the stockholders who was made a party defendant to the action might be compelled to answer whether, at any time, he received from the corporation any bonds or stocks, and for the appointment of a receiver to sue for and realize their value for the benefit of the complaining creditors, aided the jurisdiction. In order to authorize the granting of the relief sought by the petition, so far as these stocks and bonds are concerned, it was necessary for the corporation to have been served in such a way as to give the court jurisdiction over it in personam; and, as this could not be done by publication, we are at a loss to perceive how, by a mere prayer for discovery against some of the stockholders, the plaintiffs could be put on any better footing so far as the question of jurisdiction is concerned. The jurisdiction depends, not upon the prayers and allegations of the petition, but upon the fact of service. Besides, the prayer for discovery hardly amounted to a proper compliance with the requirements of section 4176 of the Code, which declares

that, when discovery is sought, not only shall it be specially prayed, but also that interrogatories regularly numbered shall be embodied in the petition as to every point on which discovery is sought, and the names of the defendants stated from whom answers under oath or affirmation are required. Judgment reversed.

(33 Ga. 631)

HUDSON et al. v. SULLIVAN et al.  
(Supreme Court of Georgia. March 26, 1894.)  
MILITIA DISTRICTS—CHANGE OF LINES—RIGHT OF APPEAL.

The determination by an ordinary or a board of county commissioners in proceedings for changing militia district lines, under section 484 et seq. of the Code, presents no judicial question, the same not being an adjudication between parties litigant. It follows that the judge of the superior court has no jurisdiction to review by certiorari the decision in such a matter, and the supreme court is also without jurisdiction, the judge of the superior court having declined to usurp any.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Petition by Hudson and Walker for certiorari to review the action of commissioners in changing the line between two militia districts. The petition was denied, and petitioners bring error. Dismissed.

Wright & Harper, for plaintiffs in error.  
Geo. & Walter Harris, for defendants in error.

LUMPKIN, J. Hudson and Walker sought to review by certiorari the action of the board of commissioners of roads and revenues of Floyd county in changing the line between two militia districts. The refusal of the judge of the superior court to sanction the petition for certiorari is the error assigned. In our opinion, the judge was right. The strong intimation of this court in *Hillman v. Harris*, 84 Ga. 436, 11 S. E. 400, that the action of the ordinary in changing district lines is final, and not subject to review by the writ of certiorari or otherwise, is now adopted as the correct law upon this question. Of course, it makes no difference in principle that in the present case the action complained of was taken by the board of county commissioners, instead of the ordinary, they having jurisdiction of the matter. The reasons given by Chief Justice Bleckley in the case cited are, we think, sufficient, and conclusive upon the question presented. The case of *Leathers v. Furr*, 62 Ga. 421, relied on by counsel for the plaintiffs in error, is not at all like the present case. That case involved litigation between two individuals concerning a private way, the one alleging a right to the use of the way, and seeking to have obstructions removed therefrom, and the other denying and contesting this right. Inasmuch as the judge of the superior court properly declined to as-

same jurisdiction of the petition presented to him, this court is also without jurisdiction in the matter; and, accordingly, we have ordered the writ of error to be dismissed, thus following the practice indicated in *Pope v. Jones*, 79 Ga. 487, 4 S. E. 860. Writ of error dismissed.

(93 Ga. 633)

**WHITE v. PARKS et al.**

(Supreme Court of Georgia. March 26, 1894.)

**LIBEL—BLACKLISTING ALLEGED DEBTOR — SUFFICIENCY OF COMPLAINT.**

To "blacklist" a person in writing, and thus publish of and concerning him that he is a delinquent debtor, when in fact he owes nothing, tends to injure his reputation, render him odious, and expose him to public contempt. Construing the declaration as alleging that the libelous matter which was falsely and maliciously published by the defendants of and concerning the plaintiff was that the latter was a delinquent debtor to the former in the sum of \$3.35, the declaration sets forth substantially a cause of action. Failure to copy the libel in the declaration, or to set forth its words according to their exact tenor, is only bad pleading in matter of form, and, in Georgia practice, will be disregarded on general demurrer. Such a defect is amendable, and should be pointed out by special demurrer.

(Syllabus by the Court.)

Error from superior court, Floyd county; *W. M. Henry*, Judge.

Action by Henry White against H. B. Parks & Co. Judgment for defendants, and plaintiff brings error. Reversed.

Geo. & Walter Harris and Reece & Denny, for plaintiff in error. McHenry, Nunnally & Neel and Seaborn & Moses Wright, for defendants in error.

**LUMPKIN, J.** The declaration, fairly construed, alleges in substance that the defendants, who were members of a certain merchants' association, published and caused to be published a false and malicious libel of and concerning the plaintiff, by writing and procuring to be written his name upon a list of delinquent debtors, thereby representing that he was indebted to the defendants in the sum of \$3.35, when in fact he owed the defendants nothing at all, which list, at the instance and procurement of the defendants, was exhibited to many persons. The declaration charges that the defendants did the acts mentioned for the purpose of blackening the plaintiff's honesty, integrity, and reputation; that by so placing his name upon that list, and having the same circulated, it was the intention of the defendants to publish the plaintiff as one able to pay his debts, but lacking the honesty to do so; and that this was understood to be the meaning and intention of the defendants by all persons to whom the list was exhibited. To this declaration the defendants demurred on the ground that the publication complained of was not actionable, and that no cause of action was set forth. Also, upon the further grounds that the declaration set forth "the under-

standing of persons as innuendo;" "that an innuendo must be pleaded as fact, and not as understanding;" and that the innuendo pleaded "points and enlarges the publication beyond its natural and common meaning in its usual acceptation, and has not the proper introductory averments to warrant the same."

Irrespective of the innuendo, and the objections to the same raised by the demurrer, we think the declaration sets forth a cause of action. Its allegations amount, at least, to a direct charge that the plaintiff was falsely and maliciously "blacklisted" in writing, and thus published to the world as a delinquent debtor, when in fact he owed nothing. Certainly, this tended, to some extent, to injure his reputation, render him in some degree odious, and expose him to public contempt. This, under the definition of libel contained in section 2974 of the Code, was sufficient to render the publication libelous, and actionable per se. We base our decision upon the plain language of the Code. Attention is called, however, to an interesting case, somewhat similar as to the facts, in which the subject now under consideration was dealt with at length. *Muetze v. Tuteur*, 77 Wis. 236, 46 N. W. 123.

It will be observed that the demurrer does not specially complain that the plaintiff failed to copy or set forth in the declaration the libel complained of. "The complaint should set out, and purport to set out, the very words published. The proper term by which to indicate that the very words are set forth is 'tenor.'" *Townsh. Sland. & L.* § 329, and notes. Good pleading would undoubtedly require that the libel itself, or at least so much of it as relates to or mentions the plaintiff, should be set forth in full; but under the practice prevailing in this state the omission to do so is only bad pleading in matter of form, advantage of which cannot be taken by general demurrer. The defect in the declaration is certainly amendable, and exception to it should have been taken by a special demurrer.

We have set forth, in substance, all of the demurrer, simply to show it did not specially complain of the defect mentioned. In so far as it deals with the innuendo laid in the declaration, it requires no notice at our hands, because, as already stated, in our opinion the declaration would be good in substance even if the innuendo were entirely omitted. Judgment reversed.

(93 Ga. 639)

**PHILLIPS et al. v. COOPER.**

(Supreme Court of Georgia. March 26, 1894.)

**PURCHASE-MONEY NOTE—FAILURE OF CONSIDERATION—EVICTION BY PARAMOUNT TITLE—COMPETENCY OF WITNESS—TRANSACTION WITH DECEDENT.**

1. A recovery in ejectment by the consent of the surviving defendant in the action is not sufficient evidence to establish failure of consideration of a promissory note previously made

by him to his codefendant in the action for the purchase money of the premises, although the latter, at the time of taking the note, conveyed to the former by deed with warranty of title, such codefendant (the warrantor) not having consented to the recovery, but having died pending the suit, and leaving undisposed of a plea to the merits.

2. Where the "real plaintiff" in an action of ejectment is not the grantee from the state, he cannot rightly recover on a demise from such grantee without showing some privity of title or estate, legal or equitable, with him, or some representation or agency in his behalf which would render such recovery allowable and proper, according to the true spirit of the law governing actions of ejectment.

3. In an action upon a promissory note given by the vendee to the vendor for the purchase money of land, paramount outstanding title relatively to the title of the vendor, whatever that may be, is not shown by producing in evidence a copy grant from the state and a deed of conveyance from one stranger to another stranger.

4. The plaintiffs below were competent as witnesses in their own behalf.

5. The evidence warranted the verdict, and the court erred in granting a second new trial. (Syllabus by the Court.)

Error from superior court, Paulding county; C. G. Janes, Judge.

Action by M. M. and C. C. Phillips against T. J. Cooper. Judgment for defendant, and plaintiffs bring error. Reversed.

J. J. Northcutt and W. B. Spinks, for plaintiffs in error. Roberts & McGregor, for defendant in error.

**LUMPKIN, J.** An action was brought by M. M. and C. C. Phillips against Cooper upon a nonnegotiable promissory note made and delivered by the latter to one Austin, who indorsed the same to the plaintiffs. Among other things, Cooper pleaded that the note sued on was assigned by Austin to the plaintiffs only as collateral security for a debt which Austin owed them, and which he had fully paid. So far as this defense was concerned, the evidence was conflicting, but was amply sufficient to authorize the jury to find that the debt of Austin to the plaintiffs secured by this note had not been paid. Cooper further pleaded that the consideration of the note had totally failed, because it was given by him to Austin, together with other notes, for the purchase of a lot of land, Austin making to Cooper a warranty deed thereto; that Cooper went into possession of the land under this deed, but had been in possession only a short time when an action of ejectment was brought against him and Austin by one Buchanan, after which the land trade between Cooper and Austin was rescinded, Cooper delivering up his deed and surrendering possession of the land to Austin, while the latter returned to Cooper all his notes except the one now sued on, which note he promised to get from the plaintiffs and surrender to Cooper, but had failed to do so; that afterwards Buchanan and others brought another action of ejectment against Austin, Cooper, and one Hosford, seeking to recover the land, to which action pleas of the general issue

and prescription were filed by all the defendants, including Austin, but, before the case was finally determined, Austin died insolvent, no parties were made in his stead, and the suit was then dismissed as to Austin, whereupon Cooper consented that a verdict for the land might be taken as against him. There was no evidence whatever to sustain the allegations in Cooper's plea that the land trade between himself and Austin was rescinded, or that the papers relating to that trade were mutually returned, and the land surrendered to Austin; nor does it distinctly appear what disposition was made of the first action of ejectment above mentioned, although it is really immaterial what did become of it. This branch of the defense, reduced to its last analysis, was that the consideration of the note had entirely failed, because Cooper was evicted from the land under a paramount title, and that, although the plaintiffs acquired title to the note before its maturity, and without actual notice of the equities existing between Cooper and Austin, this defense was available against them because the note in question was nonnegotiable. The jury found for the plaintiffs, this being the second verdict in their favor. Under the facts disclosed by the record, we think the court erred in setting this verdict aside.

1. Having consented to the verdict against him in the action of ejectment, the burden was upon Cooper to show affirmatively that the title under which he was evicted was paramount. *Haines v. Fort*, 93 Ga. —, 18 S. E. 994. Had Cooper been sued alone for the land, a verdict and judgment against him would certainly not have been conclusive upon Austin that the eviction was under paramount title, unless the latter had been notified of the suit, and had failed to defend it. We do not think it makes any difference in principle that Austin was a party to the action of ejectment, it appearing that he had filed a plea to the merits, but was cut off by death from any opportunity to sustain it; that the action was then dismissed as to him, and was never subsequently defended by any representative of his estate. What might have been the fate of Austin's plea had he lived and contested to the end the plaintiff's right to recover cannot now be known; but certainly it was incumbent upon Cooper to show that, notwithstanding the defense filed by Austin, in which he himself joined, a recovery for the plaintiff was inevitable.

2. The action of ejectment last above mentioned was brought on the several demises of Buchanan and others, including J. O. and D. C. Hawthorn. It appears from a recital in the bill of exceptions, however, that the Hawthorns were the real plaintiffs in the action. A copy grant from the state of the land in dispute to Buchanan was introduced in evidence. Conceding that Buchanan was the grantee from the state, we do not think the Hawthorns could have rightly recovered upon a demise to him, without showing some

privity of title or estate with him, or some right of representation or agency in his behalf, which would authorize the use of his name by them. If this view is not sound, any person, by merely producing a duly-certified copy grant, which any one could obtain by simply paying the requisite fee, could, without more, make out a prima facie case for the recovery of the land covered by the original grant, no matter by whom or under what title the same might then be held. This would be possible, although the action might be brought without the knowledge of the grantee, and by one who had no authority whatever to use his name. For this reason, the Code (section 413) provides that, on reasonable grounds, any attorney who assumes the right to appear in a cause may, on motion, be required to produce or prove the authority under which he appears, and to disclose, whenever pertinent to any issue, the name of the person who employed him. Hence we say that a recovery in ejectment should not be had, upon a demise to the grantee from the state, by another person, who shows neither title from the grantee, nor any right to sue or recover in his name. This, we think, is in accord with the true spirit of the law governing actions of ejectment.

3. While one who has given a promissory note for the purchase money of land need not, in order to defeat a recovery upon the note on the ground that its consideration had failed because of the existence of an outstanding title paramount to that of his vendor, be actually sued and evicted from the land, it is incumbent upon him to show that the alleged outstanding title was, in fact, paramount to that of his vendor, and that, consequently, an action by the holder of that title would necessarily prevail. If Cooper had not been sued in ejectment at all, he would have had the right to surrender the land anyhow, if the outstanding title, relatively to the title of his vendor, was paramount, and was held by another. It follows, of course, that Cooper's voluntary submission to a verdict against him in the ejectment suit would have been proper, provided he had shown on the trial of the present case that the real plaintiffs in the ejectment suit (the Hawthorns) held such title. This, however, he did not show. He merely introduced in evidence the copy grant to Buchanan above mentioned, a deed of gift from one Plumer to the Hawthorns, and the warranty deed from Austin to himself, all covering the land in question. He did not even show that these papers were exhibited in the ejectment suit which he voluntarily refused to defend. They certainly would not have justified him in submitting to a verdict had they then been exhibited to him. The copy grant to Buchanan and the deed from Plumer to the Hawthorns would not, without more, have authorized a recovery in favor of the latter.

4. The plaintiffs below were competent as witnesses in their own behalf as to transac-

tions between themselves and the deceased, Austin, the action not being one to which a personal representative of his estate was a party. In construing the evidence act of 1889 (Acts 1889, p. 85), we find it the safer course to adhere to the plain letter of its terms, and thus avoid the confusion which arose from attempted liberal constructions of its predecessor, the evidence act of 1868.

5. We think the court erred in granting a second new trial. We are quite certain it could not have been granted upon the idea that the plea alleging payment of the debt of Austin to the plaintiffs, to secure which the defendant's note had been assigned to them, was sustained. The evidence, as already stated, was amply sufficient to uphold a verdict to the contrary; and the trial judge could hardly, under the circumstances, have set aside a second finding for the plaintiffs upon this issue. So the new trial must have been granted upon the idea that the defendant sustained his plea of failure of consideration. We have endeavored to show he utterly failed to do this, and therefore there was no cause for a new trial in this respect. Neither was there anything in the ground of the motion as to newly-discovered evidence which would authorize the judge to set aside the verdict. Judgment reversed.

(33 Ga. 587)

#### NAPIER v. UNION COTTON MILLS.

(Supreme Court of Georgia. March 19, 1894.)  
BILL FOR SPECIFIC PERFORMANCE — SUFFICIENCY  
ON GENERAL DEMURRER.

The contract, a specific performance of which is prayed, embracing several distinct matters, and being on its face severable, and the demurrer going to the petition as a whole, and not separately to any particular part of it, and there being equity in the petition, at least as to the prayer for a conveyance of the 10 acres of land upon which the plaintiffs' mills have been erected, there was no error in overruling the demurrer, nothing being now decided as to the other relief prayed for in the petition.

(Syllabus by the Court.)

Error from superior court, Walker county; W. M. Henry, Judge.

Petition by the Union Cotton Mills against N. C. Napier. A demurrer to the petition was overruled, and defendant brings error. Affirmed.

The following is the official report:

The Union Cotton Mills brought its petition against N. C. Napier for specific performance. Defendant's demurrer thereto was overruled, and he excepted. The petition alleges that, soon after the organization of plaintiff under its charter, defendant made to it the following proposition, in writing: "State of Georgia, Walker County. I, N. C. Napier, agree to donate ten acres of land, No. 28, in the 7th district and 4th section of said county, bounded as follows: On the east by the railroad, on the north by original line, on the south by Mitchell hollow, and on the west by my

land. I also further agree to give an option on twenty acres of land lying west of the land to be donated, at \$25 per acre, to be paid for in stock if the Co. prefers. I also bind myself to furnish all the water to the factory to be built under the present charter for manufacturing purposes, provided said company will build a suitable and sufficient reservoir to hold the water as it gathers. It is further agreed that, in case said company should ever want all the water so as to stop my mill, that I will sell the said factory company my mill, with its fixtures and my good will, for the sum of \$3,000. This, October 3, 1891. In addition to the within, it is a part of my offer, if accepted by the directors of the Union Cotton Mills, to furnish all the needed right of way to and from the factory, and to and from the residences of the operatives, through any land I may own at the time of signing this paper lying on the west side of the C., R. & O. R. R. [Signed] N. O. Napier." Said proposition was fully accepted by the directors of plaintiff immediately after it was submitted to them by defendant, and said land was surveyed, laid off, and marked, and the boundaries made by him, and the possession thereof turned over by him to plaintiff, which at once commenced to erect its factory and operatives' homes, storehouse, etc., on said land. It has now (January 23, 1893) constructed a factory, and has the same in operation. It has also built its storehouse, operatives' houses, shops, and other buildings on said land, and constructed a sufficient reservoir to hold all water needed for the factory, and has fully complied with all the conditions of the contract on its part; but defendant, upon demand, refuses to make to it titles to said land with water privileges, as stipulated by him in the contract, he knowing that, but for the reason of the proposed donation and sale of said land and water privileges, the factory would not have been located on the land. Plaintiff is ready and willing to issue to him stock in the company as agreed in the contract, and now tenders the same to him. He owns the water privileges, with power to control the water in the stream north of the factory, and the same might be cut off entirely from the factory, to its great damage and almost entire destruction. Defendant also owns the land lying east of the factory, and a mill on the stream southeast of the factory; and, should the same be transferred with water privileges by defendant to an innocent purchaser, the right of plaintiff to water would be destroyed, to the destruction of the value of the factory. Plaintiff, under its charter, has the right to build a \$500,000 factory, which was well known to defendant at the time he induced plaintiff to locate its factory on his land by his proposition aforesaid; and while plaintiff has commenced operations with a capital stock of \$100,000, as it had a right to do

under its charter, it was well known to defendant at the time that the company intended to increase its capital stock as rapidly as it could, and, if possible, erect a \$500,000 factory; and but for the fact that the company had, under the contract or proposition of defendant, a right to a sufficient amount of water to operate a factory to be built to the extent of the charter, plaintiff would never have accepted the proposition of defendant, which was well known and understood by him at the time, and the proposition was made with that understanding on the part of plaintiff and the directors of the company. Plaintiff has reason to apprehend that defendant will sell or dispose of his lands adjoining the factory, mill, and water privileges, and thus defeat plaintiff in its right under the contract. In such event he is wholly unable to answer in damages for the injury which would be done to the company. Plaintiff is informed that, since the execution of the contract, defendant has created a lien on the property, or conveyed title to secure a debt, and has to a certain extent complicated the matter; and, on account of his inability to answer in so great damages, he is in that sense insolvent. By amendment, plaintiff alleges that said proposition was made by defendant to induce plaintiff to locate its mill on said land, in order that the remaining lands of defendant would be enhanced largely thereby, and that his lands have been largely enhanced in value by the location of the mill; further, before the commencement of any work by plaintiff on the land, and after the proposition of defendant had been made and accepted by plaintiff, defendant had the land laid off and marked, showing the exact boundary, to wit: Commencing on the north line of said lot at a point where the right of way of the C., R. & C. Railroad crosses said line; thence south to a pine stump (with said railroad right of way), said stump being in the Mitchell hollow; thence west to the west boundary of said lot of land No. 28; thence north to northwest corner of said lot; thence east to the beginning,—said tract of land containing 30 acres, more or less. The cotton mill was located on said land wholly on account of the proposition of defendant; and but for the fact that the proposition had been made, and the land laid off and marked, defendant would not have located its factory on the land. Said location was made on account of the contract for land and water; and plaintiff proposed to deliver to defendant stock for the land as stipulated in the contract, upon the delivery of deed for said land, with water privileges and right of way, as stated in the contract, and has always stood ready to deliver said stock upon the delivery of the deed. Defendant had subscribed to the capital stock of the company in the sum of \$1,000, but has never paid any of said stock except \$250; and it

was the direction of the directors of plaintiff that defendant should have credit on his subscription for the amount of the value of said land. The stock in payment of said 20 acres was tendered to defendant prior to the filing of this suit. Plaintiff has at all times been ready to deliver said stock to defendant, and it has been subject to his order since the date of the tender, and plaintiff makes the same a continuing tender, etc. The prayer of the petition is that defendant be required by decree to make deed to the land and water privileges and rights of way, as shown in his proposition aforesaid, etc.

The grounds of demurrer are as follows:

(1, 6) The alleged contract is too vague, uncertain, indefinite, and doubtful on its face to be acted upon by the court, and is not capable in its nature of being the subject of a decree for specific performance; and plaintiff does not present in its petition a case which entitles it to the relief it seeks, or any other relief which a court of equity can afford. (2) The agreement set out, in addition to the uncertainty of its terms as to the volume or quantity of water to be furnished, is also uncertain as to the time at which it is to be furnished, which uncertainty is such as could not be settled by decree. Countless questions of dispute might afterwards arise, which cannot now be determined. (3) The alleged agreement does not define the boundary of the 20 acres of land named therein, nor furnish such description of the property as will authorize the court to decree title to the same. (4) The alleged agreement only provides for an option upon the 20 acres of land, but fixes no time for its execution, nor the terms of the option; and plaintiff's prayer is for a deed, and not for an option, which prayer is at variance with the charges in the petition, as well as with the terms of the agreement. (5) The petition admits that plaintiff took possession of and improved the real estate referred to, with no other authority than that set out in the agreement, and also admits that plaintiff had paid no consideration to defendant for the land, and that the 10 acres referred to was to be a donation. The agreement nowhere refers to any deed or time for option. Therefore, plaintiff, having of its own motion, by its own laches and negligence, and with full knowledge of all the facts upon which it asks relief, entered on the lands, as it admits, cannot now be heard in a court of equity to complain as to matters, conduct, acts, or agreements untainted by fraud on part of defendant, and in which it voluntarily took part and risk, but is estopped from complaining against its own acts, and will be left to its remedy at common law, if any. (7) The agreement establishes, if anything, a relationship which could have been revoked by plaintiff at any time. As to the 20 acres of land, an option was given to plaintiff, if anything; as to the water privileges, plaintiff has never sustained any relation to de-

fendant that could not be revoked at any time by plaintiff; and as to the 10 acres of land, the donation may or may not be refused.

G. M. Napier and Copeland & Jackson, for plaintiff in error. Lumpkin & Shattuck, for defendant in error.

LUMPKIN, J. The Union Cotton Mills filed an equitable petition against Napier, praying the specific performance of a contract made by him with the plaintiff. This contract was in the form of a written proposal by Napier, which was fully accepted by the directors of the plaintiff. A copy of the same appears in the reporter's statement. The petition alleges, in effect, that the consideration of Napier's contract was the undertaking by the plaintiff to build a factory upon the land referred to in his proposal, and that, in point of fact, the factory has been built, at an expense of about \$100,000. It does not unequivocally appear that the factory was erected upon the 10 acres to be donated by Napier, but this is the only reasonable inference to be drawn from the petition, taking it as a whole. We see no reason why Napier should not be required to perform at least so much of his contract as requires him to convey this tract of 10 acres to the plaintiff. The description of the same in the written contract is sufficiently definite to identify it; and, besides, it appears from the allegations of the petition that, immediately after the acceptance by the plaintiff of Napier's proposition, he caused all the land referred to in the contract, including the 10 acres he had agreed to donate, to be surveyed, and the boundaries marked, and had delivered possession of "said land" to the plaintiff. Under these facts, it would be simply monstrous to allow Napier to retain the title to the 10 acres, which, beyond all question, belong to the plaintiff, because of the full and complete performance of its contract, as above stated. An examination of the written instrument will show that, as to the several matters embraced in it, it is severable, and there can be no difficulty in enforcing so much of it, at least, as relates to the 10 acres of land, the demurrer, though based on several grounds, being general, and going to the petition as a whole, and not separately to any part of it. There was certainly equity in the petition, at least to the extent indicated, and for this reason the court committed no error in overruling the demurrer.

As to the several other matters embraced in the contract, we do not at this time decide anything. If, after a trial of the case in the superior court, and a full development thereby of all the questions of law and fact involved, it should become necessary for this court to pass upon these questions, it will be time enough to do so then. In view of the great volume of business now

pending before this court, and which the constitution requires us to dispose of within a limited time, we cannot now undertake to settle questions which may not arise at all when the case is fully investigated. The demurrer was general; the decision of the trial judge upon it was general; and so we rule, generally, that there was enough in the petition to withstand a demurrer of this kind. Judgment affirmed.

(42 S. C. 306)

**MOBLEY v. CHARLOTTE, C. & A. R. CO.**  
(Supreme Court of South Carolina. Sept. 12, 1894.)

**REVIEW ON APPEAL—HARMLESS ERROR.**

1. A verdict on conflicting evidence is conclusive.

2. Where, in an action for breach of contract, plaintiff would, by the instructions, be entitled to recover "some" damages if the contract was as he claimed, but could not recover in case it was as defendant claimed, and the verdict is for defendant, error in instructing as to the measure of damages is not prejudicial.

3. The admittance of irrelevant testimony is discretionary with the trial judge.

Appeal from common pleas circuit court of Richland county; J. H. Hudson, Judge.

Action by John G. Mobley against the Charlotte, Columbia & Augusta Railroad Company. There was a judgment for defendant, and plaintiff appeals. Affirmed.

McDonald, Douglass & Obear, for appellant. B. L. Abney, for respondent.

**McIVER, C. J.** This was an action to recover damages for the breach of a contract alleged to have been made between the parties, whereby the defendant company undertook to transport a lot of cattle from White Oak, a station on defendant's road, about 40 miles above Columbia, to Savannah, in the state of Georgia; and the only controversy, so far as the terms of the contract were concerned, seems to have been as to the route by which such shipment was to be made. The plaintiff claimed that the contract required the cattle to be shipped via the South Bound Railroad, having its northern terminus at the city of Columbia; while the defendant insisted that the contract was to ship the cattle via Augusta, in the state of Georgia. The cattle were in fact shipped by the latter route, and reached Savannah about 24 hours later than they would have done if shipped by the way of the South Bound Railroad; and the plaintiff claimed damages for the delay occasioned by reason of the breach of the contract, as set up by him. There was no evidence in writing as to what route the real contract between the parties required the shipment to be made by, and the parol evidence was directly conflicting as to that point; and the jury were instructed that they must determine from the conflicting evidence what was the real contract between the parties, and, if they found that the contract was

to make the shipment via Augusta, the plaintiff was not entitled to recover any damages at all, unless they also found that there was some unreasonable delay in transporting the cattle by the Augusta route. If, however, they should find that the real contract was to make the shipment via the South Bound Railroad, then the plaintiff would be entitled to recover such damages as resulted from the 24 hours' delay in reaching the point of destination, and the jury were instructed as to the measure of damages in such case. The jury found a verdict in favor of the defendant, and the plaintiff appeals upon the several grounds set out in the record.

It is very manifest that the first and controlling question in the case was as to what route the contract required the shipment to be made by; and, this being a question of fact (there being no written evidence of the contract), the verdict of the jury must be regarded as conclusive. Under the instructions given to the jury, they must necessarily have found that the contract required the shipment to be made via Augusta, for otherwise they would have been compelled to find some damages in favor of the plaintiff; and, as there was no evidence of any delay in the transportation of the cattle by the Augusta route, the result necessarily was, just as we find it to be, a verdict in favor of the defendant. In an action to recover damages for the breach of a contract, the first inquiry necessarily is what was the contract, and whether there has been any breach of it; and, until this has been determined, no question as to the amount or the measure of damages can possibly arise. *Devereux v. Cotton-Press Co.*, 17 S. C. 66. Where, therefore, as in this case, the first and controlling inquiry has been determined in favor of the defendant, as we have seen, no inquiry as to the damages can arise; and hence the several grounds of appeal in which error is imputed to the circuit judge in his instructions to the jury as to the measure of damages need not be considered; for, even if error should be found therein (which we neither affirm nor deny), such supposed error cannot possibly affect the result. The same remark may be made in reference to so much of the charge as is excepted to, because of its supposed invasion of the province of the jury in relation to questions of fact, for that portion of the charge relates to the matter of damages,—an inquiry which never was reached, by reason of the finding of the jury upon the first question.

The fifth ground of appeal imputes error to the circuit judge "in allowing defendant to introduce in evidence a blank form of a contract, called a 'released contract,' without showing that the said form of contract had any connection with or bearing upon the issues of this case." At the most, the testimony here objected to was irrelevant, and the rule is well settled that the introduction of such testimony is largely subject to the

discretion of the circuit judge. Besides, the case shows that this paper was received mainly for the purpose of explaining more fully the meaning of a released contract, as to which the plaintiff had been permitted, without objection, to speak of in his cross-examination. We do not, therefore, see any such error in receiving this paper in evidence as would warrant the granting of a new trial.

It only remains to consider the several exceptions to the charge of the circuit judge, imputing error in the charge in reference to the waybill. We think it is a mistake to suppose that the judge charged that the waybill was the contract between the shipper and the carrier. His language cannot properly be considered as conveying any such idea to the jury. On the contrary, it seems to us that the jury were made to understand that there was no contract in writing, "no bill of lading made out;" and all that was said upon this point was that the waybill was the only written memorandum made out at the time by the agent at White Oak, and this was exactly the fact. Indeed, if the judge had regarded the waybill as constituting the contract, there would have been no question of fact to be referred to the jury, whereas the jury were distinctly instructed to inquire what was the contract between the parties; and their attention was called to the conflicting testimony as to that question, and the waybill was only referred to as one of the circumstances tending to show that the railroad agent, at least, understood that the shipment was to be made via Augusta, and it was so entered upon the waybill, which was seen by the plaintiff. We do not think that any of the exceptions as to this point can be sustained. The judgment of this court is that the judgment of the circuit court be affirmed.

POPE, J., concurs.

(42 S. C. 158)

**In re PERRY'S ESTATE.**

(Supreme Court of South Carolina. Sept. 12, 1894.)

**APPEAL—STATEMENT OF CASE—AGREEMENT OF ATTORNEYS.**

Under Code, § 345, subd. 5, which provides that on an appeal, if the attorneys agree on a statement of the case, it shall be a sufficient brief of the case, and no other paper shall be required, a "statement of the case," agreed on by attorneys, referring to papers containing the evidence, which are filed with the clerk of the supreme court, is insufficient, and the trial court's finding of facts cannot be reviewed.

Appeal from common pleas circuit court of Charleston county; James F. Izlar, Judge.

In the matter of the estate of Oliver Perry. From a decree of the circuit court amending and affirming a decree of the probate court against Henry S. Perry, the executor, he appeals. Affirmed.

O. S. Bissell, for appellant. Jervey & Prieau, for respondents.

GARY, J. The appeal in this case is from a decree of his honor, Judge Izlar, upon two exceptions based upon his findings of fact. The testimony is not set out in the "case," but the following agreement of counsel is contained therein: "We agree to the foregoing case, and consent that it shall constitute the return for the purpose of appeal to the supreme court, and that a copy of the testimony, together with the receipts, accounts, the statements, the deeds, the decree of the probate court, and all other papers sent to the circuit court by the probate court, be filed with the clerk of the supreme court for reference by either party. No other paper will be required to be served, or required to perfect the appeal." Subdivision 5, § 345, Code, provides that, "upon appeals to the supreme court, in case the attorneys for the appellant and respondent shall agree upon a statement of the case as prepared by them for the hearing of the supreme court, such statement of the case shall be a sufficient brief of the same, and no return or other paper from the circuit court shall be required." We do not think this case comes within the provisions of that section. The "statement of the case" should contain within itself all that is necessary to be considered by the supreme court upon the hearing of the case on appeal, and this requirement is not fulfilled by the "statement of the case" referring to papers and records filed with the clerk of this court. It is not shown by anything set forth in the "statement of the case" that the findings of fact by the presiding judge were without any testimony to support them, or against the manifest weight of the testimony. It is the judgment of this court that the judgment of the court below be affirmed.

McIVER, O. J., and POPE, J., concur.

(42 S. C. 170)

**BALLOU v. YOUNG et al.**

(Supreme Court of South Carolina. Sept. 12, 1894.)

**POWER OF TRUSTEE—EXECUTION OF NOTE—RIGHTS OF INDORSEER—INSTRUCTIONS.**

1. Where a trustee, authorized to "mortgage" property, executes a note as trustee, secured by a mortgage on the property, a bona fide indorsee of the note and mortgage does not take them free from equitable defenses, since, the power to "mortgage" not authorizing the trustee to give a note, the mortgage alone can be enforced.

2. Where a charge, taken as a whole, is not erroneous, the fact that parts considered in detail are erroneous is not ground for reversal.

Appeal from common pleas circuit court of Richland county; J. H. Hudson, Judge.

Action by W. H. Ballou against Anna Young and others. There was a judgment for defendants, and plaintiff appeals. Affirmed.



Robert W. Shand, for appellant. Andrew Crawford, for respondents.

**GARY, J.** This was an action for the recovery of a lot of land in the city of Columbia, called "Lot No. 1," and of a half interest of an adjoining lot, called "Lot No. 2." Both parties claimed from a common source, and plaintiff's title, on the face of the papers, seemed perfect. The defense was fraud in two links of plaintiff's title. The verdict was for the defendants.

One Maria Young purchased lot No. 2 on July 17, 1880. Prior to that date, Josephine Young, the daughter of Maria, had purchased lot No. 1. Josephine died in 1878 or 1879, leaving four illegitimate children,—the four Shelton defendants to this action. Josephine died intestate, leaving as her lawful heirs her mother, the said Maria, and her sister, the defendant Anna Young. Thereupon the fee in lot No. 1 vested in Maria and Anna, and then Anna had a half interest in lot No. 1, and Maria had the other half, and the entire interest in lot No. 2. Maria Young died intestate in 1887, 1888, or 1889. Thereupon Anna Young became seised in fee of both lots. On 17th September, 1889, Anna Young signed a deed which purported to convey to E. M. Babbitt the interest which the children of Josephine would have inherited if they had not been illegitimate, to wit, all of lot No. 1, and a half interest in lot No. 2, in trust for these four children, with power to sell, "and also with power, if necessary, in his discretion, to mortgage the same, to enable him to best promote the welfare of said children." The defendant Anna Young claims that whatever paper she signed was under representations of Babbitt that it was different from said deed. Babbitt made a mortgage of this property, under this power, to W. S. Monteith, on 27th December, 1890, with power of sale, to secure a promissory note, payable one year thereafter; and on the same day Monteith assigned the mortgage and indorsed the note to plaintiff. After default, plaintiff sold, purchased, and took deed, demand was made for possession, and action brought. Among other things, the presiding judge charged the jury that the said note and mortgage would not be valid in the hands of Ballou if Monteith knew that Babbitt did not borrow this money for the welfare of the four children of Josephine, even if Ballou did not know such fact. Plaintiff's attorney, in his argument, says: "Plaintiff's grounds of appeal make substantially two allegations of error in the charge: (1) In the law applicable to Anna Young's signature to this trust deed under the testimony. (2) In the law governing the holder of a promissory note and its security, which have been signed by a trustee, and put into circulation with intent to misapply the proceeds." The charge of the presiding judge is very full as to the rules governing in cases where a person signs a deed under fraudulent misrepresentations, and,

while there are parts of this charge which, considered in detail, would be erroneous, yet when—as it must be—it is considered as a whole no such error can be imputed to it. The question of negligence on the part of the defendant in the alleged signing of the deed was kept before the jury throughout the charge. The law, as charged by the presiding judge, is in harmony with the doctrine announced in *Montgomery v. Scott*, 9 S. C. 20, and 10 S. C. 449, which is one of the leading cases on this subject.

We come now to a consideration of the exceptions complaining of error on the part of the presiding judge under the second head. The words in the deed of trust conferring power on Babbitt to execute the note and mortgage are as follows: "With power to said trustee, at any time, in his discretion, to sell the whole or any part of said real estate, and reinvest the same in such manner as he deems best; and also with power, if necessary, in his discretion, to mortgage the same, to enable him to best promote the welfare of said children." The note and mortgage are both signed by Babbitt as trustee, and in the mortgage he uses the words: "I, Edward M. Babbitt, as trustee for the children of Josephine Young, deceased." This was notice to Ballou of the trust and of the power under which the note and mortgage were executed. In fact, this is not questioned; appellant's attorney, in his argument, saying: "There is no doubt that both note and mortgage carried notice to Ballou that Babbitt was trustee, and notice of the terms of the trust deed; but they did not carry notice of any breach of trust."

Appellant contends that, if Ballou became the indorsee of the promissory note, and at the same time assignee of the mortgage, before the maturity of the said note, for valuable consideration, and without notice of any facts that would have defeated a recovery thereon in the hands of Monteith, he took the note and mortgage freed from such defenses, and from all equities. This would be the case provided Babbitt had the power to execute both the note and the mortgage. There is no doubt of "the flexibility of the mortgage, and that it may be adapted to the fate of the note it is intended to secure," as was said by Mr. Justice Pope in *Patterson v. Rabb*, 38 S. C. 152, 17 S. E. 463. Section 133 of the Code provides that: "In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off, or other defense existing at the time of, or before notice of the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before due." The transfer of a note carries with it a mortgage given to secure payment of such note. *Walker v. Kee*, 14 S. C. 143; *Cleveland v. Cohrs*, 10 S. C. 225. Section 133 not only does not apply to a negotiable promissory note, transferred in good

faith, and upon good consideration, before due, but does not apply to a mortgage given to secure payment of such note. Under such circumstances the rule of the commercial law applicable to negotiable promissory notes is likewise applicable to the mortgage given to secure payment of the same. See *Patterson v. Rabb*, supra, and cases therein referred to. Did Babbitt have the power, under the deed of trust, to execute both the note and mortgage? We think not. The power conferred upon him was simply to mortgage, and under it Babbitt had no more authority for executing a sealed note or bond than to give a promissory note. A note and mortgage are both securities for the payment of the debt. They are separate and distinct. Nor is a note essential to the validity of the mortgage. In the case of *Plyler v. Elliott*, 19 S. C. 257, a note and mortgage were given to secure payment of the same debt. The note was altered in such a manner as to prevent a recovery thereon. The court, however, held that this did not prevent a foreclosure of the mortgage, saying: "But, considering the note as not recoverable either against the principal debtor or his surety on it, the more difficult question still remains whether the plaintiff can enforce the mortgage, which was not altered, against the principal debtor, for the balance of his debt, as a separate security unaffected by the alleged alteration of the note. This court has recently held, in the case of *Nichols v. Briggs*, 18 S. C. 484, that when a note and mortgage are both given to secure the same debt, the mortgage may be enforced although the note was barred by the statute of limitations. That case went on the ground that the debt itself is something different from either the note or mortgage, which are both mere securities for and evidences of the debt, and, as a consequence, the loss of the right to enforce one does not necessarily take away the right to enforce the other. The courts say: 'It must be kept in mind that there is a difference between the debt itself and the securities for it. The debt is one, but there may be a number of securities of different kinds,—personal, real, pledge, mortgage, etc. The note given is only evidence of the debt, and one of the means of collecting it; and, if there is a mortgage, that is only another security for the same debt.'" In the case of *Nichols v. Briggs*, 18 S. C. 484, the court says: "The mortgage would have been good as a security for the \$500, even if the bond had never been given." *Jones, Mortg.* § 353, quoted with approval in *McCaughrin v. Williams*, 15 S. C. 516, says: "The mortgage debt exists independently of the note. The inquiry is, does the debt exist? If it does, it is not essential that there should be any evidence of it beyond what is furnished by the recital of the deed. The validity of the mortgage does not depend upon the description of the debt contained in the deed, nor upon the form of the indebtedness, whether it be by note or bond or other-

wise. It depends rather upon the existence of the debt it is given to secure. Although there be no note or bond, and no time is specified for the payment of the mortgage debt, the mortgage, if given to secure the payment of the debt that actually exists, is valid." See, also, *Dearman v. Trimmer*, 28 S. C. 506, 2 S. E. 501. In the light of the foregoing authorities, the only security which Babbitt had the right to execute was the mortgage, but not the promissory note. It is the judgment of this court that the judgment of the court below be affirmed.

McIVER, C. J., and POPE, J., concur.

(42 S. C. 353)

BURDETT v. McALLISTER.

HARPER et al. v. SAME.

(Supreme Court of South Carolina. Sept. 26, 1894.)

SUPPLEMENTARY PROCEEDINGS—APPOINTMENT OF RECEIVER.

1. Proceedings supplementary to execution being legal in their nature, it was error to refuse, on the ground that there was an adequate remedy at law, an application by judgment creditors, after execution returned unsatisfied, for a receiver of the property of the judgment debtor, when it appeared that he owned an unsatisfied note and mortgage, on which something was still due.

2. It was not error to refuse to order a judgment debtor to pay off the judgment from money in his hands, in the absence of evidence that he had such money, he having refused to testify on that point.

Appeal from common pleas circuit court of Abbeville county; J. J. Norton and W. H. Wallace, Judges.

In actions by George F. Burdett against Jesse A. McAllister and by E. W. Harper and A. L. Latimer, copartners as Harper & Latimer, against Jesse A. McAllister, judgments were rendered for plaintiffs. The executions were returned unsatisfied, and on supplemental proceedings the plaintiffs applied for a receiver. From the orders denying such applications, plaintiffs appeal. Reversed.

Graydon & Graydon, for appellants. F. B. Gary, for respondent.

POPE, J. The plaintiffs in each of the two above-stated actions, after execution issued in each had been returned altogether unsatisfied by the sheriff, applied to his honor, Judge Norton, for an order in each action requiring the defendant to appear before W. A. Lee, Esq., as special referee, to answer concerning his property. These orders were passed by Judge Norton. The defendant and other witnesses appeared before such special referee, and gave their testimony. The special referee made his report of such testimony, which came on to be heard before Judge Wallace at the fall term of the court of common pleas for Abbeville county; and on the 21st October, 1893, the circuit judge

filed the following order: "The above proceedings came before me at my chambers at Abbeville Court House, South Carolina, on testimony taken before W. A. Lee, Esq., and the same being certified to me; and after notice to the defendant that the plaintiffs would ask for an order directing the said Jesse A. McAllister to pay the amount of the judgments above named, and appointing a receiver of the property of the said Jesse A. McAllister, it appearing that the plaintiffs have an adequate remedy at law, on motion of Frank B. Gary, defendant's attorney, it is ordered that the plaintiffs' motion be, and the same is hereby, refused. It is further ordered that plaintiffs pay the costs of this proceeding, said costs to be taxed by the clerk of this court." From this order the plaintiffs, respectively, have appealed upon the following grounds: (1) Because it was error to hold that the plaintiffs had an adequate remedy at law, when it appeared from the proceedings and evidence before the judge that the plaintiffs' executions had been returned nulla bona by the sheriff, and that the defendant had transferred his property, and refused to turn over the proceeds to his creditors. (2) Because of error in not holding that the plaintiffs had the right to treat the transfer as valid, and compel the defendant to account for the proceeds of sale. (3) Because the evidence clearly showed that the defendant had made the transfer of his land to defraud his creditors, and it was error not to appoint a receiver of his property, and allow the receiver to take such steps as might be necessary to subject the property of the defendant to the payment of his debts. (4) Because the evidence showed that the defendant had in his possession property, to wit, the note and mortgage, which was applicable to the payment of his debts, and it was error not to order the defendant to turn over said property to his creditors for that purpose. (5) Because the defendant himself swore that he had been paid several hundred dollars in cash a short time before the proceedings were instituted, and refused to say what he had done with the money, and it was error in the judge not to order him to pay the judgments of the plaintiffs. (6) Because it was error in the judge to order the costs to be paid by the plaintiffs, and to order them taxed by the clerk of court, without stating to whom they were to be paid, or fixing the amount and character of said costs. (7) Because the plaintiffs were asserting a purely legal remedy, and it was error in the judge to dismiss the proceedings on the ground that the plaintiffs were attempting to assert an equity.

We will first consider the first, fourth, and seventh grounds of appeal, for they raise the question whether the circuit judge did not err in holding that the plaintiffs in each of the causes before us had an adequate remedy at law, and therefore dismissed these proceedings.

Whenever any one contracts a debt, instantly thereupon there is created by law a duty on the part of the debtor to pay such debt, and a right on the part of the creditor to demand payment of such debt. Furthermore, there is thereby created a duty on the part of such debtor to apply himself, and have applied under the law, any property he may own, to the payment of such debt, subject, of course, to such exemptions as exist in law at the time the debt is created. Hence, when the debt is unpaid the creditor may sue his debtor, and, after judgment, is entitled to an execution against the property of the debtor for the satisfaction of such execution. When such execution is returned unsatisfied by the sheriff, the law very wisely says to the creditor, "Having failed to obtain your money justly adjudged to be due you by our courts, under process of execution, now, if you can show that your debtor has property that cannot be reached by the sheriff for the payment of your judgment, you shall be entitled, under proceedings supplementary to execution, to reach such property of your debtor." These proceedings are statutory, and are contained in sections 312 to 322, inclusive, of our Code of Civil Procedure. The first thing to be done by the judgment creditor, as set out in section 312, is, by affidavit, to prove to the satisfaction of the court, or a judge thereof, that the judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment. When this is done the circuit judge is required to issue an order commanding the judgment debtor to appear at a specified time and place to answer concerning the same. In these two causes, all this was done. When the defendant, the judgment debtor, gave his testimony, he admitted that he had in his possession, as his property, an unsatisfied note, and mortgage of land securing the note, for the sum of \$650, and that these papers were executed early in February, 1893; his examination taking place after June 28, 1893, and before October, 1893. It is true the debtor claimed that all but \$25 had been paid to him on this note and mortgage, but he refused to tell what he had done with this money. His words on this point were: "I spent the balance of the \$325 in various ways, and decline to say how I spent it." When McAllister admitted that he had this unsatisfied note and mortgage in his possession, it seems to us that thereupon plaintiffs' right to have the court appoint a receiver to collect this money, whether \$25 or more was due, became fixed. The very object of these proceedings supplementary to the execution is to enable the plaintiff (judgment creditor) to have the property of his debtor, applicable to the execution, taken possession of. It is a legal remedy. It is not an equity, so far as the judgment debtor is concerned. Such an order as was requested of the circuit judge in no wise prejudiced the rights of the person who gave the note and mortgage. All

the receiver could do under his appointment would be to receive what was rightfully due McAllister,—no more, no less. The order made by the circuit judge was erroneous.

As to the second ground of appeal: We do not feel that the circuit judge necessarily found that the plaintiffs in each of these causes could not elect to treat the sale of the land by McAllister as valid. He certainly did not so hold in words to that effect. We are confined to errors of law.

And as to the third ground of appeal, which relates to an alleged failure of the circuit judge to appoint a receiver when appellants alleged that the testimony clearly established fraud upon the part of McAllister in the transfer or sale of his land: We do not see that the circuit judge, by his order, passed upon this question. Hence, we will not discuss it, especially as it is likely to arise in another cause hereafter.

As to the fifth ground of appeal, that in effect alleges error in the circuit judge because he failed to order the judgment debtor, McAllister, to pay off these judgments from money in his hands: We think, on this point, that appellants are somewhat to blame, because they failed to avail themselves of their clear right to force the defendant, McAllister, to disclose his knowledge of the money he claimed his niece Mrs. Schroeder had paid him so recently on his note and mortgage. When the judgment debtor is brought up under proceedings like these, he is in duty bound to tell the whole truth as to his property; otherwise, this process of the law is a mockery. Of course, if an unfortunate debtor shows he is utterly unable to do this, all well and good. But when he assumes to say to a court of justice, "I decline to state what I know," the point is reached when no hesitation as to duty is allowable. So, therefore, there being no testimony showing that McAllister had money in his possession, the circuit judge very properly declined to issue his order for him to pay money.

As to the sixth ground of appeal, as to costs, we do not deem it necessary to speak. This matter of costs is statutory, and as the whole order of Judge Wallace is reversed, except where he refused to order defendant to pay from money in his hands the two judgments in question, his provision for payment of costs and their taxation will be set aside necessarily.

It is the judgment of this court that the order appealed from in each of the two cases here heard together for convenience, and by consent, be reversed, except as to so much of Judge Wallace's order refusing to require Jesse A. McAllister to pay each of the two judgments in question here from money in the hands of the said McAllister; but this reservation is not to affect the right of appellants, respectively, to require him fully to disclose his knowledge as to the whereabouts or application of any moneys in his hands at the date of his examination before W. A.

Lee, Esq., as special referee, if appellants should so elect. And it is further ordered that these two causes be remanded to the circuit court for such further proceedings as may be necessary.

McIVER, C. J., concurs.

(43 S. C. 190)

**EUSTACE v. GREENVILLE COUNTY.**

(Supreme Court of South Carolina. Sept. 12, 1894.)

**WITNESS IN FELONY CASE—ALLOWANCE OF FEES—CERTIFICATE OF JUDGE.**

1. Gen. St. § 835, giving the accused in felony cases the same process as the state to compel the attendance of witnesses, is not restricted to capital felonies.

2. Where a witness for defendant on trial for a felony is bound over, he is entitled to the same fees from the county as if he were a witness for the state.

3. Gen. St. § 2197, provides that no fees or other compensation shall be allowed to any witness bound over or summoned to testify in the court of general sessions unless the circuit judge who tried the case shall certify that such witness was material. *Held*, that a certificate that a witness "was regularly bound over as a material witness," signed by the clerk of the circuit court, and marked "Approved" by the circuit judge, is not a compliance with the statute.

Appeal from common pleas circuit court of Greenville county; James F. Izlar, Judge.

J. C. Eustace made application to the county commissioners of Greenville county for the payment of a certificate for witness fees. The commissioners refused payment, and on appeal to the circuit court their action was affirmed, and plaintiff appeals. Affirmed.

The following is the judgment of the court below:

"This is an appeal by the plaintiff from a judgment of the board of the county commissioners for said county disallowing a claim presented by the plaintiff against the defendant county. The facts, as I gather them, are as follows: The plaintiff, some time previous to July, 1892, was regularly bound over to appear at the July term, 1892, of the court of general sessions of the said county, and testify as a witness in behalf of the defendant in the case of the state against Geo. C. Head, indicted under the act of 1887 for house-breaking and larceny. He appeared at said term, was sworn as a witness, and testified in behalf of said defendant. After the trial a pay certificate, of which the following is a copy, was issued to the plaintiff:

"The State vs. Geo. C. Head. Indictment, housebreaking and larceny. July term, 1892. The county of Greenville, debtor to J. C. Eustace, to 7 days, \$3.50; total, \$3.50. Appeared before me, C. J. Hunt, and makes oath that he, J. C. Eustace, was regularly bound over as a witness in the above-stated case, and did attend as a witness as above stated. C. J. Hunt.

"Sworn to before me this 3rd day of Aug., 1892. A. J. Mosely, C. C. P. & G. S.

"I, A. J. Mosely, clerk of the circuit court

of Greenville county, do certify that J. O. Eustace was regularly bound over as a material witness in the above-stated case. A. J. Mosely, C. C. P. & G. S.

"Approved. T. B. Fraser, Presiding Judge."

"Afterwards, this pay certificate was presented to the board of county commissioners for said county for approval and payment. On the 21st day of February, 1893, the said board acted upon said claim, disallowing the same, and refusing payment thereof. From this action and judgment of the said board of county commissioners the plaintiff appealed to this court. The appeal was heard by me at the March term, 1893, of the court of common pleas for said county. Two questions are presented: (1) Did the circuit judge certify according to the requirement of the statute in such case provided? And (2) was the plaintiff bound over to testify in behalf of a person accused of a felony?"

"Section 2197 of the General Statutes provides that no fees or other compensation shall be allowed to any witness bound over to testify in any case in the court of general sessions unless the circuit judge who tried the case in which the witness was summoned shall certify that such witness was material, and in that case the witness shall be allowed fifty cents for each day of his attendance, and five cents per mile one way for necessary travel. It is contended that there is no certificate of the circuit judge who tried the cause as to the materiality of the plaintiff as a witness in said cause; that the only certificate is that of the clerk, and this certificate goes no further than to say that the plaintiff was regularly bound over as a material witness; and that the approval of the presiding judge was only of this fact, and not that the witness was material. While I cannot commend the form of the certificate in this case, I am inclined to think that when the whole certificate is considered there is substantial compliance with the statute, and that is equivalent to the certificate of the circuit judge who tried the case \* \* \* that such witness was material. This section 2197 plainly declares that, where the circuit judge who tried the cause shall certify that the witness was material, such witness shall be allowed fifty cents for each day of his attendance, and five cents per mile one way for necessary travel. The language is, in that case,—that is, where the circuit judge shall certify that the witness was material,—'the witness shall be allowed,' etc. No distinction is made in the act between the witness for the prosecution and a witness for the defense. If this objection to the form of the certificate was all, I think the county would be liable for the claim of the plaintiff. Section 622 of the General Statutes provides that each county shall pay witness fees in state cases for actual attendance upon the circuit court, as provided by law; and section 2197 provides in what case they shall

be paid, and what they shall receive. As to the second question, I am not so clear. Section 835 of the General Statutes provides that the accused shall, in felonies, and in no other cases, have the like process to compel the attendance of any witness in his behalf as is granted and permitted on the part of the state. I am of the opinion that the word 'felonies,' in this section, must be restricted to capital felonies. This, I think, will clearly appear by reference to the act of 1781 (3 St. at Large, 296). The certificate in this case shows upon its face that the plaintiff was not bound over to testify in behalf of a person accused of a capital felony. The offense, though a statutory felony, was one which did not entitle the defendant to certain privileges accorded by law to those accused of capital felonies. In the view I take of the case, therefore, the county is not liable for the claims of the plaintiff. It is therefore ordered and adjudged that the appeal be dismissed, and the judgment of the board of county commissioners be, and the same is hereby, affirmed."

C. J. Hunt, for appellant. Stoddard & Earle, for respondent.

GARY, J. The facts in this case appear in the judgment of the court below, which will be set forth in the report of this case. Section 622 of the Revised Statutes provides that: "Each county shall pay: Witnesses fees, in state cases, for actual attendance on the circuit courts, as provided by law." Section 835 of the Revised Statutes, among other things, provides: "And the accused shall in felonies, and no other case, have the like process to compel the attendance of any witness in his behalf as is granted or permitted on the part of the state." Section 2197 of the Revised Statutes provides that: "No fees or other compensation shall be allowed to any witness, bound over or summoned to testify in the court of general sessions, unless the circuit judge who tried the cause, in which the witness was summoned, shall certify that such witness was material, and in that case the witness shall be allowed fifty cents for each day of his attendance, and five cents per mile, one way, for necessary travel: provided, however, that in courts of trial justices they shall receive no fees or compensation whatever, for attendance in criminal causes."

Appellant's first exception is as follows: (1) "Because his honor erred in holding that witnesses for a defendant shall only be paid in case of capital felonies, and not in felonies less than capital." The presiding judge says: "Section 835 of the General Statutes provides that the accused shall, in felonies, and in no other cases, have the like process to compel the attendance of any witness in his behalf as is granted and permitted on the part of the state. I am of the opinion that the word 'felonies,' in this section, must

be restricted to capital felonies. This, I think, will clearly appear from the act of 1731 (3 St. at Large, 286). The certificate in this case shows upon its face that the plaintiff was not bound over to testify in behalf of a person accused of a capital felony. The offense, though a statutory felony, was one which did not entitle the defendant to certain privileges accorded by law to those accused of capital felonies." The act of 1731 (3 St. at Large, 286) uses the word "capital," which is left out in section 835 of the Revised Statutes. Section 44 of the act of 1731 is as follows: "And be it further enacted. That all and every person and persons, who shall be accused, indicted, or tried for any such treason, murder, felony, or other capital offense whatsoever, shall have the like process of the court where he or they shall be tried to compel their witnesses to appear for them at any such trial or trials, as is usually granted to compel witnesses to appear against them." We think the repeal of this section, and embodying a part of its provisions in section 835, Rev. St., in which the word "capital" is omitted, show that the view announced by the circuit judge cannot be sustained. This exception is sustained.

Plaintiff's second exception is as follows: (2) "Because his honor erred in not holding that the defendant county is liable for the pay of defendant's witnesses in all cases of felonies, where it appears that said witness was regularly bound over, and the circuit judge who tried the case certifies that such witness was material." There is nothing in the foregoing sections which denies to witnesses for the defendant their fees for attending in cases of felony, where it appears that they were regularly bound over, and the circuit judge who tried the case certifies that such witness was material. Taking all the sections aforesaid into consideration, we think it was the intention of the legislature that when it provided "the accused shall in felonies, and no other case, have the like process to compel the attendance of any witness in his behalf as is granted or permitted on the part of the state," such witnesses should receive their fees just as witnesses bound over for the state, in the absence of any provision of the law that a distinction should be made in the payment of such witnesses. This exception is sustained.

Plaintiff's third exception is as follows: "Because his honor erred in dismissing plaintiff's appeal, when he should have held that the defendant was liable for the amount asked for by the plaintiff; his pay certificate having been made in due form, and certified to by the trial judge, as required by the statutes in such cases." Respondent served the following notice: "Take notice that, if the supreme court should fail to sustain the judgment in the above-stated case upon the ground upon which the circuit judge based

said judgment, the respondent will insist that the supreme court sustain said judgment on the grounds: (1) That the certificate issued to the plaintiff, J. C. Eustace, is fatally defective (a) because said certificate was issued by the clerk of the court of common pleas and general sessions, and only approved by the circuit judge, and was not issued by the circuit judge who tried the cause; (b) because said certificate only states that J. C. Eustace was bound over as a material witness, etc., and does not state that he was material, as required by law. (2) That in no case is the county liable for the payment in criminal cases of witnesses for the defendant."

A copy of the witness' certificate is as follows:

"The State against George C. Head. Indictment, housebreaking and larceny. July term, 1892.

The County of Greenville Dr.  
To J. C. Eustace, to 7 days..... \$3 50

Total ..... \$3 50

"Appeared before me, O. J. Hunt, and makes oath that he, J. C. Eustace, was regularly bound over as a witness in the above-stated case, and did attend as a witness as above stated. O. J. Hunt.

"Sworn to before me this 3rd day of August, 1892. A. J. Moseley, C. C. P. & G. S.

"I, A. J. Moseley, clerk of the circuit court of Greenville county, do certify that J. C. Eustace was regularly bound over as a material witness in the above-stated case. A. J. Moseley, C. C. P. & G. S.

"Approved. T. B. Fraser, Presiding Judge."

This certificate is not sufficient. The certificate is not made by "the circuit judge who tried the cause in which the witness was summoned," but by the clerk of the court. Nor is the certificate to the effect that the witness was "material," but that he "was regularly bound over as a material witness in the above-stated case." It is true the presiding judge signed his name under the word "Approved" written on the certificate, but this was not a compliance with the statute. The object of the statute was that the question of materiality of the witness should be decided by the presiding judge, and that the certificate should be signed by him. The certificate, before it was approved by the presiding judge, was clearly illegal, and the approval by him did not give it validity in law. This question was not decided in the case of Hellams v. Greenville Co., 32 S. C. 441, 11 S. E. 211. This exception is overruled on the grounds stated in respondent's notice above mentioned. It is the judgment of this court that the judgment of the court below, for the reasons herein stated, be affirmed.

McIVER, C. J., and POPE, J., concur.

(42 S. C. 208)

**CATAWBA MILLS v. HOOD et al.**

(Supreme Court of South Carolina. Sept. 17, 1894.)

**TRIAL JUSTICE—REDUCTION OF CLAIM TO CONFER JURISDICTION.**

1. It is no objection to the jurisdiction of a trial justice that plaintiff reduced his demand to bring it within the amount over which the justice has jurisdiction.

2. Where plaintiff, in reducing his claim so as to bring it within the jurisdiction of a trial justice, leaves out an item which could be included in his cause of action, he cannot thereafter sue on such item.

Appeal from common pleas circuit court of Chester county; Watts, Judge.

Action by the Catawba Mills against J. A. Hood & Bro. to recover a stock subscription. A judgment rendered for plaintiff by a trial justice was affirmed by the circuit court, and defendants appeal.

S. P. Hamilton, for appellants. Geo. W. Gage, for respondent.

**GARY, J.** The respondent is a corporation, organized in 1892, under the general incorporation act of this state. The capital stock was, by the terms of the charter, and by the terms of subscription therefor, payable in monthly installments on the third Tuesday of each month. The first payment was to be made in June, 1892, and was to be \$2 per share; and the next five payments thereafter, up to and including November, 1892, were to be \$2 per share; and thereafter the payments were to be \$3 per share until the full par value of the stock was paid up, to wit, \$100 per share. The appellants subscribed for five shares, and paid the first six installments, but refused to make further payments. This suit was begun in a trial justice's court in November, 1893. It was alleged in the summons that Hood & Bro. "were on the 1st of April, 1893, indebted to the Catawba Mills in the sum of \$95, for subscription, etc." The suit was for the December, 1892, and the January, February, and March, 1893, installments,—four months on five shares, at \$3 per share, \$60. The trial justice's judgment is: "I find for the plaintiff, sixty dollars, due 1st April, 1893."

Appellants' exceptions are as follows: (1) "Because the trial justice court had no jurisdiction of the action, the complaint being to recover ninety-five dollars, when the amount due by defendants on the same demand was one hundred and eighty-six dollars." (2) "Because the amount due by defendants to plaintiff was purposely reduced in plaintiff's complaint to obtain the jurisdiction of the trial justice court." (3) "Because, under article 4, § 3, of plaintiff corporation's by-laws, no action can be maintained against defendant stockholders, who were delinquent in payment of installments, until the stock was sold in accordance with said by-laws."

Section 71 of the Code provides: "That trial justices shall have civil jurisdiction in the

following cases: 1. In actions arising on contract for the recovery of money only, if the sum claimed does not exceed one hundred dollars." The trial justice had jurisdiction, because the "sum claimed" arose on contract, the action was for the recovery of money only, and the "sum claimed" did not exceed \$100. In *Cavendar v. Ward*, 28 S. C. 472, 6 S. E. 302, Mr. Justice McGowan, speaking for the court, says: "As to the jurisdiction, we agree with the circuit judge. Subdivision 1 of section 71 of the Code gives to trial justices jurisdiction in actions on contracts 'for the recovery of money only' if the sum 'claimed' does not exceed one hundred dollars. The sum claimed here, as stated in the complaint, was 'sixty-four dollars,' although the penalty was \$140;" citing *Bennett v. Ingersoll*, 24 Wend. 113; *Wait's Ann. Code*, § 64. The case of *State v. Fillebrown*, 2 S. C. 404, decides that trial justices have the same jurisdiction as justices of the peace. Section 22 of article 4 of the constitution shows that the jurisdiction is to be determined by the amount "claimed." That section is as follows: "Justices of the peace \* \* \* shall have original jurisdiction \* \* \* in all matters of contract \* \* \* where the amount claimed does not exceed one hundred dollars." Although a party has the right to reduce the amount of his cause of action so as to bring it within the jurisdiction of a trial justice, yet when he reduces the amount of his claim for this purpose by leaving off any of the items that could be included in his cause of action at the time of the commencement of his action in the trial justice court, he shall not thereafter be allowed to bring an action on the items so left out. Leaving out such items is equivalent to payment of them. The party would not, however, be precluded from afterwards bringing an action on items that could not have been included in the action at the time of the commencement thereof, by reason of the fact that the cause of action on such items had not then matured. The objection to the remedy pursued in this case cannot be sustained. The remedy for enforcing payment provided in article 4, § 3, of the by-laws is cumulative, and not exclusive. This question is conclusively settled by the case of *Railroad Co. v. Cathcart*, 4 Rich. Law, 80. It is the judgment of this court that the appeal be dismissed, and the order appealed from affirmed.

McIVER, C. J., and POPE, J., concur.

(42 S. C. 195)

**MIMMS et al. v. DELK.**

(Supreme Court of South Carolina. Sept. 17, 1894.)

**CONSTRUCTION OF WILL—DEVISE TO EXECUTORS—POWER OF SALE.**

Where a testatrix devises lands to her executors for the purpose of carrying out the di-

rections of her will, and directs that it be distributed equally among her children, the executors have power to sell lands not capable of division in kind.

Appeal from common pleas circuit court of Barnwell county; James F. Izlar, Judge.

Ejectment by William Mimms and others against H. K. Delk. Both parties claim under Ellen Mimms,—plaintiffs as her heirs at law, and defendant by purchase from her executors. The question is whether, under the terms of the will, the executors had power to sell the land in question. The will devised all her property to the executors for the purpose of carrying out her directions, and directed that, after certain specific devises, the residue be equally divided among her children. There was a judgment for defendant, from which plaintiffs appeal. Affirmed.

James E. Davis and B. G. Rice, for appellants. S. G. Mayfield, for respondent.

GARY, J. The facts out of which this case arose are stated in the judgment of the circuit court. The exceptions complain of error on the part of the presiding judge in deciding that the executor had the power under the will to sell the lot or parcel of land described in the complaint. The testatrix appointed two persons as executors of her will, for the more effectually carrying out the several provisions thereof; and also vested the title in all her estate, both real and personal, in her executors, the better to enable them to see that all her directions were strictly followed. Vesting the title in all her estate, both real and personal, in her executors, of course included the lot of land in the town of Blackville, being the land described in the complaint. One of the directions of her will was that the rest and residue of her estate, both real and personal and mixed, which she gave to her eight children, should be distributed among them, share and share alike, as therein set forth. The object in vesting the title to this lot in the executors was to enable them to make this distribution. The property described in the complaint being merely a lot in the town of Blackville, it could scarcely have been the intention of the testatrix that the executors should distribute it among the children in kind. As it was the intention of the testatrix to vest the title to this lot in her executors for the purpose of carrying out the "directions" of her will, one of her "directions" being that the rest and residue of her estate, including the lot of land in the town of Blackville, should be distributed among her children; and as it was also her intention to confer upon her executors all necessary power for making such distribution, which, on account of the character of said property, it was not her intention should be made in kind; and as it is necessary that there should be a sale of said lot so as to make the distribution,—the power was conferred, by implication, upon the ex-

ecutors to sell said lot. It is the judgment of this court that the judgment of the court below be affirmed.

McIVER, C. J., and POPE, J., concur.

(94 Ga. 697)

# WILLIAMS v. WARDLAW.

(Supreme Court of Georgia. July 30, 1904.)

PRIVATE WAY—APPEAL FROM ORDINARY—DISMISSAL OF ACTION.

According to Desvergers v. Kruger, 60 Ga. 100, the court erred in rendering a final judgment dismissing the application. The case should have been remanded to the ordinary for a new hearing.

(Syllabus by the Court.)

Error from superior court, Walker county; W. M. Henry, Judge.

Action by J. A. F. Williams against M. C. Wardlaw, under Code, § 738, to compel defendant to remove a gate from an alleged private way, commenced before an ordinary, and taken on certiorari by defendant to the superior court. There was a judgment reversing the judgment of the ordinary and dismissing the action, and plaintiff brings error. Affirmed in part and reversed in part.

The following is the official report:

The petition to the ordinary alleged: Petitioner is the owner of a private way by the right of prescription, he having been in the constant and uninterrupted use of the same for more than seven years before the obstruction was placed across it. He has kept it in repair, and did such work as was necessary to keep it in good, passable condition during said time. It is not over 15 feet wide, and is located on the line between A. G. Dickson and the defendant, the length of the lane at the east end of which the gate has been erected, and it extends from the public road, near the mill of Dickson, eastwardly for half a mile or more, running through lands of Blackwell, and intersecting the Henry Springs road. Defendant pleaded that the way had not been in constant, continuous, and uninterrupted use for seven years, and worked during that time; and that in divers places along the way during the last five years the bed of the road had been changed to suit the convenience of the plaintiff. Further, the alleged private way is not on the land of defendant, but is on the land of A. G. Dickson, who gave defendant permission to erect a gate across the same, which Dickson had a right to do, because plaintiff has not, and never had, any prescriptive right to the way. Said way, a distance of two panels of fence west of the gate, is 20 feet wide, and a distance of six panels of fence from the gate in a westerly direction the way is 20 feet and 6 inches, and at no place from the gate to the creek along, near to, and on the land line of Dickson and defendant is the way less than 20 feet wide by actual measurement, and the way has



been of said width for more than seven years. At a point east of the creek and west of the gate, along or near the land line between defendant and Dickson, the way has, within the last seven years, been changed from the original roadbed on account of the old roadbed becoming impassable for want of work. At this place, from the outside track of the adopted road to the outside track of the old roadbed, by actual measurement, it is 20 feet wide, and from fence to fence 29 feet and 6 inches, by actual measurement. The old road, in the last seven years, has been abandoned more than once, and the land of defendant and that of Dickson frequently used in lieu of the old roadbed. The testimony introduced was conflicting, and the nature of it is indicated by the foregoing statement of the pleadings.

Lumpkin & Shattuck and R. M. W. Glenn, for plaintiff in error. Copeland & Jackson, for defendant in error.

PER CURIAM. Judgment reversed in part, and in part affirmed.

(94 Ga. 707)

ROUNSAVILLE et al. v. WATTERS.

(Supreme Court of Georgia. July 30, 1894.)

TRIAL—INSTRUCTIONS—NEW TRIAL—EVIDENCE.

The requests to charge, so far as they were applicable, were covered by the charge given, which fairly presented for determination by the jury the vital issue involved in the case, it affirmatively appearing that, as to the debt upon which the plaintiffs' judgment was founded, the credit was not extended upon the faith of the property in controversy; and, the evidence being otherwise sufficient to warrant the jury in finding for the claimant, there was no abuse of discretion in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by Rounsaville Bros. against Joseph G. Watters in aid of an execution issued on a judgment in favor of plaintiffs against G. F. P. Watters, and levied on certain lots of land claimed by defendant. There was a judgment for defendant, and plaintiffs bring error. Affirmed.

The following is the official report:

Plaintiffs alleged that G. F. P. Watters paid \$100 on the purchase of the lots levied on; and the stock of goods of G. F. P. Watters, after being fraudulently transferred to A. J. Watters, administrator, was managed still by G. F. P. Watters, and from the sales and profits of said stock \$367 were used in improving the lots; and that G. F. P. Watters paid \$50 in improving said lots, and from the sales and profits of the stock of goods of G. F. P. Watters \$250 was paid on the purchase thereof. They prayed that the payments be considered, and the property levied on be found subject to the execution, subject only to the remainder of the purchase money not yet paid. There was a ver-

dict for claimant, and, plaintiffs' motion for a new trial being overruled, they excepted.

The motion for new trial was on the grounds that the verdict was contrary to law, evidence, etc. Also because the court erred in refusing to give the following written requests of plaintiffs in charge to the jury: "If you find that the transfer of this property (or any of it) was made in contemplation of insolvency, although defendant was at that time solvent, and the defendant intended thereby to hinder, delay, or defraud creditors, and if you further find such intention was known to the claimant, or he had grounds of reasonable suspicion, then such transfer would be void and the property would be subject. I charge you that if the defendant in *fi. fa.* was insolvent at the time the bond for title was made to J. G. Watters, Jr., and if you further find that the bond for title was made as a transfer of an interest possessed by the defendant in *fi. fa.*, and that such transfer was made to defeat creditors of defendant in *fi. fa.*, then such transfer would be void as to creditors." Also because the court erred in not charging Code, § 1952, and paragraph 2, plaintiffs' counsel in argument having read section 1952 and paragraph 2, and asked the court in argument to charge said section and paragraph to the jury. Note by the Court: The court charged the jury that, "if the transaction by which the interest in the property, under bond for title, passed out of defendant and into the claimant, was not bona fide, but was colorable only, and intended only to cover up the defendant's interest in the land, while the real beneficial interest therein remained and was to remain in him, then you would be authorized to find the property subject in this case."

Nat Harris and O. A. Thornwell, for plaintiffs in error. J. H. Hoskinson and Wrights & Harper, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 658)

EAST TENNESSEE, V. & G. RY. CO. v. McCLURE.

(Supreme Court of Georgia. July 30, 1894.)

INJURY TO EMPLOYEE—EVIDENCE — INSTRUCTION—CARLISLE TABLES.

In view of the fact that the plaintiff, shortly after receiving the injury, joined in a sworn report of the facts, in which it was stated that the occurrence was an accident, and that no employee of the company was to blame, and there being abundant evidence that the plaintiff knew the contents of the report, and voluntarily took it to the notary who administered the oath to him, the verdict was contrary to the evidence, as a whole, studying it carefully from an honest and impartial standpoint; and, the court having erred in charging the jury with reference to the use of the Carlisle tables, a new trial should have been granted.

(Syllabus by the Court.)

Error from superior court, Whitfield county; T. W. Milner, Judge.

Action by J. L. McClure against the East Tennessee, Virginia & Georgia Railway Company for personal injuries caused by defendant's negligence. There was a verdict and judgment for plaintiff, and defendant brings error. Reversed.

The following is the official report:

The motion for a new trial alleges that the verdict is contrary to law and evidence, and is excessive, and that the court gave the following charge to the jury: "On the subject of permanent injury, if you find damages in his favor, you will inquire whether the injury was a permanent one. If you find that it is permanent,—that is, lasting his entire life,—then you look to the evidence, and see to what extent it has depreciated his capacity to labor, what is the difference between his present capacity to labor and his capacity to labor before he received the injury, and find out what the value of that difference is per annum, and his expectancy under the rules of the Carlisle table, which is in evidence before you. That table is before you, and may be used as data by which you may arrive at the present cash value of his injury, if you find that he was permanently injured. Whatever damages you find on that line you will add to the other damages that you may or may not find, and that would be the amount of your verdict." Defendant contends that there was no proof of permanent injury, and no testimony upon which to predicate a charge as to permanent injury; that this charge is incomplete and inaccurate, and does not state the correct rule for estimating damages for permanent injury, there being no reference to the decrease of capacity to earn money as plaintiff grows old; and that the charge gives no direction as to how to find the present cash value of plaintiff's lessened capacity to labor, except by reference to the Carlisle table, which only gives his expectancy, and throws no light upon the mode of determining the cash value of his diminished capacity. As to the extent of the injuries, etc., plaintiff testified: "My hip and back were hurt. The pain was very severe. I cooked dinner that day, but was unable to do my usual work. I went on till I met passenger train, and then came home to this county, and called in Dr. Lacewell. When he pressed upon my side the pain was severe. Remained in bed and about the house for three weeks. Was disabled from work about three months. Suffer some pain yet (more than a year after the injury), and am not able to do heavy work, as I once was. My back is weak. I am twenty-five years old, and was getting \$45 per month when I was hurt. I have since been employed as brakeman on a through freight train of another railroad. The work is easier than on local freight. Before I was hurt I was a strong, healthy man. Since, I can't stand long on my feet, or do heavy lifting, without pain. Cold settles in my back, where I was hurt. I was out of employment from July until December. Did

a little work, hauling, etc., about home. I went to work for another railroad December 4, 1891. Worked fifteen days, and then got hurt. I set up a switch, then ran down the track, stumbled and fell; hurt one of my arms badly, and broke my nose. Was off about five weeks from that, then went to work, stopped off one week, went back to work, and was suspended. At that work I made \$2.62 per day, and worked twenty-one days per month, or about \$45 per month. Am ready and willing to work all the time at that job, when I can get it. Stand ready to be employed. I had trouble about passing my urine after I was hurt. It was very bad for a little while. It then got better, came back on me again, then was relieved to some extent, but has never gotten entirely well. I still have some trouble with it." Dr. Lacewell testified: "I examined plaintiff, and found spinal column and spinal cord and kidneys considerably bruised. The worst trouble I found was with his urine, with which he passed blood, the symptoms indicating injury to the kidneys. He suffered considerable pain. Got better in a week. I made five visits to him in the latter part of July, and two in September, when he had trouble with his back. Can't tell about permanency or effect of the injury. A hurt to the kidneys, and back over the kidneys, is apt to be permanent, and cause suppression of the urine during cold. It might cause uric poison. I have not been called to the patient since September, 1891. I discharged him as convalescent in a week or ten days. I see no symptoms of uric disease or poison. He looks healthy." It was admitted that plaintiff's expectancy was 38 years at the time of the injury.

McCutchen & Shumate, for plaintiff in error. R. J. McCamy, for defendant in error.

PER CURIAM. Judgment reversed.

(94 Ga. 642)

SEARCY et al. v. COLLINS et al.

(Supreme Court of Georgia. July 23, 1894.)

EQUITY PRACTICE—EXCEPTION TO DECREE—RELIGIOUS SOCIETIES—RIGHT TO CHURCH PREMISES.

1. An exception to a decree that it does not follow the verdict, no particular departure being specified, does not raise the question whether the decree goes beyond the verdict, although it may do so in one particular.

2. The evidence, though conflicting, warranted the verdict as to all the answers specifically propounded to the jury; and no answer given was defective, either by reason of not being responsive to the question or by reason of not being sufficiently comprehensive to answer it.

(Syllabus by the Court.)

Error from superior court, Bibb county; C. C. Smith, Judge.

Two actions consolidated and tried together,—one by A. F. T. Searcy, trustee, and 32 others, against C. H. Collins and others, for an injunction, and for the appointment

of trustees of Guilfield Church; and the other by Guilfield Church and others, including defendants in the first action, against A. F. T. Searcy and the other plaintiffs in the first action, for an injunction. There was a judgment in favor of plaintiffs in the last action, and defendants in the first action, and Searcy and others, plaintiffs in the first and defendants in the last action, appeal. Affirmed.

The following is the official report:

Searcy and others, by their petition, alleged that about 15 years ago there was purchased a lot of land in South Macon, conveyed to be used by the Primitive Baptist Church of the community, for the purpose of building thereon a house of worship; that petitioner Searcy, Aleck Humphries, and Berry Hall were the trustees of the property, and the same was to be used by the said Baptists so long as they kept up the faith and practice of the Primitive Baptists; that petitioners, with such aid as was obtained from friends to the cause, built a house of worship on the lot, and a small house for the poor; that they worshiped in peace and harmony for quite a while, when, through the heresy of one Collins, who claimed to be moderator of the Antioch Association, discord was brought about, the heresy being that Satan is coequal and coeternal with God; that Collins also taught that it was a principle of Primitive Baptist practice that the association governs the churches, and the moderator had control of the church property, which is without foundation in Primitive Baptist faith and practice, which gives authority to the church, to which the property was conveyed, to have exclusive control of it; that petitioners are members of the church known as "Guilfield Church," on which the property above described, their house, is located; that Humphries and Hall and the other trustees of the property, following the heresy of Collins, have caused discord in the church, and have procured some persons to join with them, and have conspired together to take from petitioners their house of worship; that said trustees demanded the keys of the sexton, and, upon his refusal, took from the doors of the church house the locks, and placed other locks thereon, and refused to permit petitioners to enter the house for the purpose of worship, and when they did so enter had two of them arrested on a warrant for malicious mischief, and made threats as to what they would do in the future as to prosecution; that they withdrew the warrants, which were issued to annoy and intimidate petitioners from using their own house of worship, but still refuse to allow petitioners use of the house; that they have barred and locked it against them recently, to wit, on or about August 20th, and before, so that petitioners, on August 20th, had to hold their conference and services in the yard of their church; that there is danger

of the deed of such lot being revoked if such practice be allowed, and such doctrines be promulgated, since the same was conveyed to said trustees to be held so long as the property was used for the purpose of worshipping God by the church located there of that faith and practice; that Humphries and Hall do not, nor does Collins, follow the faith and practice of the Primitive Baptists, but they have gone off after strange heretic doctrines, which tend more to corrupt than to elevate, and more to blaspheme than to worship God, and have left off the practices of the Primitive Baptists, which have been distinct and known for centuries, thereby cutting themselves loose from the church; that petitioners are poor, and unable to build another house of worship, or to buy a lot; and that it took years of saving to build their present house, which is now out of their control by the action of said trustees, and without fault on the part of petitioners. They prayed for an injunction restraining Humphries, Hall, and Collins from interfering with the use of the house by petitioners, and from locking and barring the doors of the house against petitioners so that they cannot enter to worship, and from injuring or in any way interfering with the house. They also prayed for a verdict and decree appointing two other trustees in lieu of Humphries and Hall, they having become unfit for the trust; and for general relief. Defendants' answer set up that Humphries and Hall are deacons and trustees of Guilfield Church, and Collins the moderator of the Antioch Association, of which said church is a part and member; that the allegations of the petition are untrue, except that the regularly constituted deacons of the church will not allow petitioners to go into the church, and use it for meetings different from and antagonistic to the regular meetings of said church; that Humphries, Hall, and McNeal are the sole trustees and deacons of the church; that Searcy has not been a deacon of the church since August 12, 1891, he having been removed in the constituted manner at that time, and McNeal having been elected in his place; that under the laws and government of the church said three deacons and trustees have the absolute custody and control of the church property, and they, only, have the power and right under said law to appoint and call meetings of the church, whether of a religious or business character; that in no way have petitioners any right to the church, or the use of its property, since they are not members of said church, but were at different times, during the year prior to the filing of their bill, turned out of the church at a regular church meeting and conference, and in the regular and legal way ordained and established by the church; that they have the right to attend the meetings of the church when the meetings are called by the deacons or trustees,

which is regularly done, and such right has not at any time been denied them, but they have no right to have meetings whenever they wish in Guilfield Church; that under the laws of said church no body of members thereof have, nor have they ever had, any such right; that under the terms of the deed to the church building and property to said trustees or deacons, which deed is to the court shown, under no circumstances is there the smallest possibility of the church property vesting in the original grantor, or any one else, or of the church losing the same; that the trustees or deacons, if they have been unfaithful in their stewardship in any way, can be easily arraigned and tried for such offenses before the church conference, the regularly constituted tribunal and authority to try all offenses against the church laws, and, if found guilty, can be removed from their office as deacons or trustees, and others can be appointed in their place; that Guilfield Church is a member of the Antioch Association, has always been subject to its regulations and laws, and, if a majority of said church have departed from the Primitive Baptist faith and customs, the association has the right to withdraw fellowship from such members, and put the faithful few in authority in the church; that Collins is a pastor, and has authority to preach in Guilfield Church; and that if, under the laws of the Primitive Church, he preached any doctrine or doctrines that are heretical, the church has laws by which he can be tried for the same by the Antioch Association, and his right and license to preach be withdrawn. Guilfield Church and Clark, member, pastor, and moderator thereof, McNeal, and a number of others, by their petition alleged that Guilfield Church is a religious society under the laws of Georgia, organized to worship God according to the faith of the religious denomination known as the "Primitive Baptist;" that according to the rules of the church, before one can exercise the duties of minister, he must be ordained by the presbytery, and whenever the latter shall silence a minister his right to exercise the functions of the office are repealed; that each church is the supreme power as to its own membership, and Guilfield Church has the right to admit and expel members; that, in the exercise of this power, said church, according to its rules, has expelled Henry Taylor, Ellen Searcy, Parlee Hunt, and Vincent Smith; that despite this fact each of them is attempting to exercise the rights of membership in said church, and to control its property; that A. F. T. Searcy is attempting to exercise the duties of a minister and deacon; that he has been expelled from said church, and silenced as a deacon thereby, and has been silenced as a minister by the regularly constituted presbytery, according to the rules

of the church; that Dan Jones, who is not a member of Guilfield Church, and has never been, but who was a member of Union Church, from which he was expelled, has likewise been silenced by the presbytery; that York Myrick is not, and has not been, a member of Guilfield Church, but was a member of Union Church, and was expelled therefrom, and silenced from preaching, by said presbytery; that Pleas Dennis is not a member of Guilfield Church, but was a member of Mt. Calvary Church, from which he was expelled; that Searcy, Jones, Myrick, and Dennis are each insisting on and threatening to occupy the building belonging to Guilfield Church, and to exercise the duties, rights, and privileges of ordained ministers therein, without any right to do so; that to allow all or any of them to exercise rights of membership in Guilfield Church would be an imposition thereon, and upon the rights of its members and petitioners, and unless they are enjoined they will do so, to the great damage of petitioners. Petitioners prayed for an injunction against each of the parties named, enjoining them from exercising any right or privilege, as members of Guilfield Church, over the property of said church, or in the organization thereof, or its members or conferences; and that Searcy, Myrick, Jones, and Dennis be further enjoined from exercising any of the functions of deacons or ministers, so far as concerns or affects Guilfield Church, its property, houses, or franchise.

Searcy, Myrick, Jones, Dennis, and others answered the latter petition, and alleged that Guilfield Church has never expelled, according to the rules of said church, any of the members named; that according to the rules of the Primitive Baptist denomination a majority of the church governs, except touching fellowship, which means membership in the church in good standing; that before a member can be expelled from the church a charge must be made against him, and he be cited to appear at the next conference to deny or confess the charge, and if he appears and denies the charge, proof must be submitted by a member in good standing as to the truth of the charge; that if the member charged confesses, and begs forgiveness of the church, the church cannot expel him; that the charge must be specified, and must embrace something the member did contrary to good order and a Christian's work, or that the member holds to doctrine contrary to that held by the church; that no charge has ever been made against the members alleged to have been turned out, nor can any be made, for they have followed the rules of said church as nearly as they could, and, if any charge had been made against them, they could have answered the same to the satisfaction of all, and, if they were guilty of any wrong act, could have asked

forgiveness; which could not have been refused under the rules of church government; that they have never been expelled from Guilfield Church, because they have never been cited to any conference to answer any charge whatever; that they are exercising the rights of membership of the church, because they have never been expelled according to its rules and practice; that they have not attempted to control the property, but simply to assemble at the church, and worship in peace, not denying any member thereof the right to enter the church and worship whenever such member desired; that there is a schism in the denomination about doctrine, and respondents have all the time held to the true faith and practice as taught by the gospel and the church; that they are willing, and have ever been, to suffer all the indignities and prosecution without a murmur, and to never deny any one free access to the church building at any time; that it is not true that Searcy has been expelled from the church, but he is now a deacon and trustee of the church, and a licensed minister; that Dan Jones has been received in Guilfield Church on a confession of faith, but is not the pastor thereof, or other officer, and is not attempting to interfere in any way with said church; that York Myrick has been the pastor of Guilfield Church for the past five years, and is the moderator therein, never having been expelled by any authority of the church or by rules of the church; that no charge could be made against him, either in doctrine or conduct; that Clark is not a pastor at Guilfield Church, never was called by his own faction, and the claim he makes of being pastor is untrue; that respondents built the church house by their own efforts and money, and have ever cared for the building; that the faction led by Clark have paid but a small amount towards the building and keeping up the building, and is simply a faction, not following the faith and practice; that by inspecting the petition there are found only 42 members thereon, while according to the minutes there are 102 members in the church, and therefore petitioners are not a majority in the church; and that the names of two of the petitioners are used without their authority, and respondents are informed and believe the same is true as to many others. Respondents pray for an injunction restraining said faction from interfering with the church or church building, and, if none can be obtained, pray that a receiver be appointed to sell the house, and divide the money pro rata as to each one's share contributed, and that the same be reinvested in another church building.

The two cases were consolidated by consent. The presiding judge submitted questions to the jury for them to answer, and upon their answers made a decree. Searcy and others alleged that the court erred in grant-

ing the decree, on the ground that it does not follow the verdict. They moved also for a new trial, which motion was overruled, and they excepted.

The questions submitted to the jury, and their answers thereto, were as follows: "(1) Was Searcy or his followers turned out of the church in the manner prescribed by the church? A. Yes. (2) Was Searcy ever restored by the church to his position as deacon? A. No. (3) Did Guilfield Primitive Baptist Church have the power, within itself, independent of any other organization, to make rules and laws for its own government? A. Yes. (4) Was there any action taken by the church as a whole as to who should control the church? A. Yes. (5) If you find that any action was taken by the church as a whole as to who should control the church, say who had the majority, Searcy or Collins faction. A. Collins faction. (6) Who had the right to control the church property, the deacons and trustees or the church as a whole? A. Deacons and trustees. (7) How many deacons and trustees belonged to the church organization? A. Three. (8) Who has a majority of the deacons and trustees, the Searcy or Collins faction? A. Collins faction. (9) Was there any law of the church that, if any part of the members departed from the Primitive Baptist faith, they would forfeit any right they might have to a voice in the church, without being turned out of the church? A. If a member was not turned out, he would have a voice in the church. (10) If you answer the ninth question in the affirmative, say whether or not the Collins faction departed from the Primitive Baptist faith by preaching or teaching a faith contrary to the Primitive Baptist faith. A. Collins faction did not depart from the faith. (11) Did Searcy have the right to baptize under the laws of the church? A. No." The decree was that the entire possession and control of the church property of Guilfield Church be vested in the deacons and trustees thereof, Humphries, Hall, and McNeal; that Searcy and his followers are no longer members of said church, and have no right to the use, control, or title of the church property thereof; that the congregation of the church represented by Humphries, Hall, and McNeal constitute Guilfield Church, and are now its true members and congregation, and entitled to the exclusive use and control of the church property; that Searcy and his followers are enjoined from using the church property in any way, and from interfering in any way with the meetings of said true members and deacons and trustees represented by Humphries, Hall, and McNeal; and that York Myrick and Dan Jones be enjoined from exercising the functions of a preacher in said church. The motion for a new trial was upon the grounds that the verdict was contrary to evidence, law, etc., and because the jury

failed to answer the issue submitted by the court in the ninth question.

M. G. Bayne, for plaintiffs in error. John L. Hardeman and Ryals & Stone, for defendants in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 590)

**BOSTON v. STATE.**

(Supreme Court of Georgia. Sept. 17, 1894.)

CRIMINAL LAW—CONFESSIONS—WHAT CONSTITUTE—ALIBI—DEGREE OF PROOF.

1. A declaration by the accused, in substance, that he was casually present when the homicide was committed, but that he took no part in it, and did not know that it was contemplated until after it occurred, is not a confession; and to submit to the jury the question whether it was a confession or not was error, for which a new trial should have been granted. The law of confessions was not applicable to the facts.

2. In order to establish an alibi, two things are necessary: First, that the state of facts relied upon be such that, if true, it was impossible for the accused to have been at the scene of the offense when it was committed; and, secondly, that this state of facts should be proved to the reasonable satisfaction of the jury. It need not be proved beyond a reasonable doubt; much less is it requisite that the evidence should show that it was impossible for the alleged facts to be false or fabricated.

(Syllabus by the Court.)

Error from superior court, Bibb county; C. L. Bartlett, Judge.

Wash Boston was convicted of a crime, and brings error. Reversed.

R. L. Anderson and W. J. Grace, for plaintiff in error. W. H. Felton, Jr., Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

PER CURIAM. Judgment reversed.

(93 Ga. 259)

**CENTRAL RAILROAD & BANKING CO. v. BRANTLEY.**

(Supreme Court of Georgia. Sept. 17, 1894.)

RAILROAD COMPANY—VIOLATION OF ORDINANCE—LIMITATION AS TO SPEED—INJURY TO EMPLOYEE—ORDINARY CARE—INSTRUCTIONS.

1. Where a valid municipal ordinance, broad enough to cover the running of locomotives in yards of railroad companies within the city, limits the speed to five miles an hour, it is negligence, per se, relatively to employees whose duty requires them to cross or be upon the tracks within these yards, to violate the ordinance by running at a higher speed.

2. If such violation caused the death of such an employee, and if he was not at fault, and could not, by ordinary care and diligence, have avoided the consequences to himself which resulted from such violation, his widow would, under the statute applicable to negligent homicide, be entitled to recover.

3. Though there are no degrees in ordinary care, yet as more or less care is required under different circumstances to amount to ordinary care, it was a mere verbal inaccuracy to submit to the jury the question of what degree of ordinary care would be requisite under the circumstances of the particular case; and the

court having plainly referred to the jury, for their determination, what diligence, under all the circumstances, would amount to ordinary care, the inaccuracy was harmless.

4. As a general rule an employee of a railroad company, while engaged in the performance of his duties, has the right to act upon the belief that the other employees will observe the rules of the company prescribed for the safety of such employees, and municipal ordinances applicable to the situation. This, however, does not absolve him from caring for his own safety, in so far as every prudent man would do so under like circumstances.

5. Reading the charge of the court all together, there was no material error in instructing the jury, and the evidence warranted the verdict.

(Syllabus by the Court.)

Error from superior court, Bibb county; C. L. Bartlett, Judge.

Action by B. M. Brantley against the Central Railroad & Banking Company to recover for injuries causing the death of plaintiff's husband. Judgment was rendered for plaintiff, and defendant brings error. Affirmed.

The following is the official report:

Action by the widow of Brantley to recover the value of his life from the railroad company. The jury found for the plaintiff \$8,000, and the company excepted to the refusal of a new trial.

The plaintiff's declaration alleges that Brantley was employed by the defendant as a yard hand in its yard in the city of Macon, where freight trains were made up, and through which its freight and passenger trains were accustomed to pass. On account of the frequency of the passage of trains through the yard, and in making up of trains, a considerable number of switches are used in the yard; and on account of these facts it was the duty of the company to run its engines and trains through the yard at a slow rate of speed, to keep its switches properly arranged, and its track free of obstructions, and to give its employees timely warning of the approach of engines through the yard, especially when they were engaged in the discharge of duties which required their attention in a direction opposite to that in which such engines were approaching. On May 20, 1888, Brantley was riding on a switch engine of the defendant, in the discharge of his duties. Observing that a switch they were approaching had not been properly arranged by the employee whose duty it was to arrange it, Brantley gave a signal to the engineer to slack up, jumped from the engine, and began to fix the switch right, being then and there in the discharge of a necessary duty growing out of his employment. His attention was thereby concentrated upon what he was doing, and he was looking in the same direction as that in which the switch engine was going; and at the same time another engine of the company (one of its regular train engines) was coming up in the opposite direction, running at the rate of 20 miles per hour (a greater speed than engines usually ran in the yard, and greater than it should have

been running at this time and place). The engineer and train hands on said train, although in full view of Brantley arranging the switch, gave him no signal or warning of the approach of the engine behind him, but ran the engine over his body before he could get off the track. It was the regular duty of another employé of the defendant to have set the switch right before the switch engine approached it; but it was the absolute duty of Brantley, on seeing the switch was wrong, to get down from his engine and adjust it. He was without fault. If his purpose was not as above set forth, then it was his purpose, in getting down from the engine, to cross the track, and go to the yard of defendant's road, to report his delivery of cars by the switch engine. This it was his duty to do, in the discharge of which he had a right to be on the track, knowing that said freight engine had about reached a point where it should run slowly in order to see whether the switchmen ahead had arranged the switches for the freight engine to go forward, or to wait for certain passenger trains; and he believed, and had the right to presume, that the freight engine was thus running slowly, and had about come to a stop. On the contrary the engineer was negligently and unlawfully running at the rate of 20 miles an hour, and, while thus running, struck Brantley violently, hurling his body from the track, and killing him almost immediately. For a further count, it is alleged that a plank was improperly lying across the track, about the place where Brantley was standing; it being defendant's duty to keep a safe and clear track, and permitting the plank to be across the track being negligence on defendant's part. Almost at the moment of being struck, or shortly before, Brantley observed the approach of said engine, and attempted to get off the track, but in so doing his foot struck against the plank, and he was thereby prevented from saving his life, as possibly he might have done. The negligence of the company in failing to have the switch set right, and of its engineer in running the engine over Brantley, as well as the permitting the obstruction on the track, constitute a complete cause of action against the defendant for damages.

The motion for new trial alleges that the verdict is contrary to law and evidence; that the evidence shows that Brantley, who was defendant's yard conductor, was not himself without fault; that the damages awarded are excessive; and that the court erred in not granting a nonsuit on motion, the plaintiff's evidence showing that Brantley was at fault, and that by ordinary care he could have avoided the accident. The other grounds (8-15) assign errors in the court's charge to the jury, viz.:

(8) "The company pleads not guilty of the negligence charged in the declaration. They say that, while it may be true that Brantley

lost his life, they say their servants and employes were not responsible for it. They say he lost it by reason of the failure on his part to exercise all ordinary care and prudence, and that he could, by the exercise of ordinary care and prudence, have avoided the consequences of the act of the servants of the railroad company. They say further that the railroad company's servants and employes in charge of the engine which is alleged to have killed Brantley did exercise all ordinary care and prudence about the matter, and that his death was not attributable in any manner to any fault of theirs, or negligence of their servants, but was attributable to the fault and negligence of himself, or the failure of himself to exercise all ordinary care and prudence." The objection to this portion of the charge is that it failed to submit to the jury the chief defense, the issue arising under the evidence, whether the damage was caused solely by the negligence of other employes, and without fault or negligence on the part of Brantley.

(9) "Now, in order to determine the question with reference to who is at fault and who is not at fault, I charge you it would be negligence, per se,—that is, as a matter of law,—for the defendant's servants to disregard and violate a requirement of a valid municipal ordinance of the city of Macon, as to the manner of running its trains at a rate at which they should not be run within the city limits." Defendant contends that the question of negligence involved in this case was a matter of fact for the jury, not a matter of law, and that this part of the charge interferes with the province of the jury to pass on all questions of negligence involved in the case, and was liable to create the impression on the jury that, as a matter of law, defendant was negligent, and that plaintiff was entitled to recover.

(10) "If the defendant was negligent in this respect, and if such negligence was the cause of the death of plaintiff's husband, and if Brantley himself was not at fault, and could not, by ordinary care and diligence, have avoided the consequences to himself, caused by defendant's negligence, if it was caused by defendant's negligence or negligence of defendant's servants in the running of its trains at a greater rate of speed and in a different manner than that provided for by the ordinance, the plaintiff would be entitled to recover, as a matter of law in the case." Defendant contends that the last clause of this instruction was erroneous, misleading, and argumentative, and that the jury might have understood it as an intimation that the plaintiff was entitled to recover.

(11) "Therefore, you must inquire into the evidence what the ordinance of the city of Macon is with reference to the rate of speed at which trains should be run in the city of Macon. Inquire whether the killing occurred, if it did occur, within the city of Macon, and therefore determine, was the act of cross-

ing the track the act of a prudent man, under the circumstances under which he acted, and was he killed while crossing the track, or while upon the track, and was that the result of defendant's failure to comply with a valid ordinance of the city." Objected to as unduly restricting the issues in the case, as argumentative, and as making the whole case turn chiefly upon the single circumstance of violating a municipal ordinance, leaving out of consideration the other elements in the case, such as the gross negligence of Brantley in leaping in front of a moving train, which he had been hearing and looking at, and knew the speed of, for a distance of 300 yards, which defendant contends was the undisputed evidence. Further, it is contended that the inference derived from the use of the word "therefore," in the second sentence of this charge, was that the fact that the killing occurred in the city of Macon, where the ordinance was of force, was to determine the question whether the act of crossing the track was the act of a prudent man.

(12) "It is a question of fact, for the jury to determine, what degree of ordinary care is required of an employé engaged in his duties upon the track, and what degree of ordinary diligences is required of the company's servants in protecting any of the servants so at work on its track, and whether the same degree is required from an employé so employed on the track as other persons crossing the track, whose duty does not carry them there on the track." Defendant says this charge was argumentative and incorrect, and that it was erroneous in assuming that Brantley was carried by his duty across the track; the evidence clearly establishing the fact that he was not required by his duty, and was under no necessity, to cross the track at the time and place. And the charge intimated that a less degree of diligence is required of an employé crossing the track than of a person not in the employment of the company, without charging in the same connection that every employé engaged in a hazardous undertaking assumes the risks necessarily connected with such occupation, and is held to a higher degree of diligence on account of the hazardous nature of the employment.

(13) "An employé has the right to act upon the belief that the other employés will observe the rule of the company prescribed for the safety of such employés, and the law of the city prescribed for that purpose." This charge, without further qualification, was misleading, and prejudicial to defendant's side of the case, and left out of account the fact that the evidence all showed, as defendant contends, that Brantley could not fail to have seen and heard the engine that struck him, that it was the only moving engine near him, that its noise could not have failed to attract his attention, and that he was not acting on presumptions, but had the evidence of his senses of sight and hearing to show him

at what speed it was moving. It was error to charge that he could act upon presumptions, without charging, in the same connection, that he must act upon what he saw and heard at the time, and, if he saw that the engine was moving at a high rate of speed, he had no right to act upon the presumption that it was moving at a rate different from that at which he saw it was moving, merely because the law required it to move at the slow rate.

(14) "Now, in determining what is ordinary diligence, or the want of it, upon the part of the defendant, you are authorized to consider what the employment of plaintiff's husband was, what is diligence, and what were the circumstances surrounding the transaction. All these you are to consider, in determining what was the diligence of the parties. If the plaintiff's husband was killed by the negligence and too rapid running of the train of defendant, by being suddenly stricken and killed, and if he failed to protect himself because his attention was occupied with his duties; if, by reason of this fact, if it be a fact proven, that he was engaged in attending to the duties that he was employed to do; that he was on the track, or crossing it, or attempting to do it, either to perform his duties to his employer; that he had a right to be there, was authorized or required to do what he did do in crossing the track, or attempting to cross it; by reason of his attention being occupied with other duties, he failed to see the approaching train in time to protect himself,—then the jury should consider these and all other facts, and determine whether, under all the circumstances, he could or ought to have avoided the consequences of the company's servants' negligence, if there was any, by the exercise of ordinary diligence. If he could have avoided it, take into consideration what he was doing at the time, and what he had a right to do, and what his duties were. These are all questions, like all other questions of diligence or want of diligence, not of law, but of fact, to be determined by the jury from the evidence." This portion of the charge is objected to as argumentative; as intimating to the jury what was shown by the evidence; as presenting only plaintiff's theory, and ignoring the circumstances constituting defendant's theory of the case; and as not justified by the evidence. All of the evidence showed that Brantley was not authorized or required to do what he did in crossing the track, was not engaged in attending to the duties he was employed to do, did not have his attention occupied with his duties while attempting to cross the track, and did not fail to see the approaching train in time to protect himself, but recklessly, and at great and inexcusable risk, trusted to his agility to leap across the track just in time to escape the engine, and by miscalculation, taking too great chances, was struck on the far side of the track, just before he succeeded in clearing it, and his death could not



have been caused otherwise than by his negligence. This charge attempts to sum up the evidence on the subject of negligence of Brantley, by taking into account only the circumstances on which he relied to excuse his negligence, and entirely leaving out of account the facts and circumstances which showed that his negligence was inexcusable; and this portion of the charge wholly failed to present defendant's theory of the case as to the facts and circumstances constituting the negligence of plaintiff's husband.

(15) "Therefore, gentlemen of the jury, you will inquire into all the facts of the case, and determine first what the truth of the case is. In order to do that, you have got a right to look to the evidence, and to all the evidence, that has been offered in the case. You see what the witnesses have sworn about it. Ascertain if the plaintiff's husband was killed by the defendant's servants and agents in the running of its train, and, after doing that, determine the circumstances under which it was done; ascertain what his duty was, what was expected of him to do; ascertain if he was killed upon the track. If so, what was he doing upon the track? Had he a right to be there? Did his duty call him there? If so, inquire what particular matter he was doing at the time,—to what his attention was attracted. Was he in the discharge of his duty, and did the other employes of the defendant know that he was engaged, or ought to have known it? Was he killed by reason of that fact? Does the evidence show that he was killed by reason of the fact that the servants of the company were running cars faster than was permitted by the ordinance of the city, whatever that ordinance was, and was his death the result of that? If so, why, he would be entitled to recover, unless the defendant made it appear to you, as I have stated to you, by the proof, that he could have avoided it by the exercise of ordinary care." The objection to this charge is substantially the same as that stated in the next preceding ground.

Steed & Wimberly and J. R. Cooper, for plaintiff in error. Hill, Harris & Birch, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 562)

BUTLER v. MUTUAL AID, LOAN & INV. CO.

(Supreme Court of Georgia. Sept. 17, 1894.)

ACTION ON BONDS — SET-OFF — BREACH OF CONTRACT TO MAKE LOAN — BUILDING AND LOAN COMPANY — USURY — ATTORNEY'S FEES — JURISDICTION OF COURT.

1. The bonds sued upon being, as alleged by the defendant, the offering of a more general contract, under which two loans—one for \$1,200, and the other for \$800—were to be made by the plaintiff to the defendant, which contract was performed by the plaintiff only to the extent of advancing \$1,000, leaving \$1,000 to be

advanced at a specified time, some months afterwards, and the bond in suit covering the loan of \$1,000 having been executed with the express understanding and agreement that the second advance of \$1,000 would be made as then and previously stipulated, the defendant could recoup in this action any damages which she sustained by a breach of the contract on the part of the plaintiff in refusing to make the second advance, and withholding from her, or from those who were to receive it for her benefit, the money which should have been advanced according to the terms of the agreement: provided, on the state of facts which actually existed at the time the contract was made, or which was in contemplation of both parties as likely to exist afterwards, and which did in fact come to pass, these damages were the natural and proximate consequences of the breach, and not so remote or uncertain as to be on that account excluded from consideration and computation according to legal rules. Certain of the defendant's pleas, with the amendments thereto, indicate that there was material from which a proper plea of recoupment might be constructed, but the pleas, both before and after amendment, were too vague and indefinite as to this defense to withstand even a general demurrer.

2. The plaintiff, as indicated by the record, not being a building and loan association, pure and simple, like the one involved in Parker's Case, 46 Ga. 166, the object of which was to enable its members to acquire houses and homes by the payment of small sums monthly, but, on the contrary, being apparently a composite institution, embracing for its objects insurance, loans, and investments, the plea of usury should have been entertained for investigation and determination by the jury (under proper instructions from the court) as to whether the scheme of the institution as a whole embraced usurious measures and designs, and whether the loan to the defendant was infected with usury or not, and, if so, to what extent.

3. Under the terms of the bond sued upon, the plaintiff could recover all installments which matured up to the time of trial, although some of them had not become due when the action was brought, the same being embraced in the pleadings and the prayer for judgment, subject, of course, to any defense on account of usury or of damages which could be recouped.

4. Insurance, or expenditures for insurance, not alleged or claimed in the declaration, cannot be recovered in the action.

5. Under the act of July 22, 1891 (Acts 1890-91, vol. 1, p. 221), in reference to obligations for attorney's fees, construed according to the true intent of the legislature, one who in a bond, promissory note, or other evidence of indebtedness contracts to pay such fees, and who, when sued upon the instrument containing the contract, files a plea in resistance to the action, and insists upon the same, is liable for the payment of attorney's fees if, upon demurrer, the plea is stricken.

6. The jurisdiction of the city court of Athens is broad enough to embrace any defenses equitable in their nature which the superior court can entertain and administer as a court of law, on a special plea setting forth the facts fully and distinctly. This does not include decreeing specific performance of contracts, rescission, or the like.

(Syllabus by the Court.)

Error from city court of Clarke; Howell Cobb, Judge.

Action by the Mutual Aid, Loan & Investment Company against E. F. Butler on a bond. Judgment was rendered for plaintiff, and defendant appeals. Reversed.

The following is the official report:

The Mutual Aid, Loan & Investment Company brought suit against Mrs. Butler, alleg-

ing: On June 18, 1892, she executed to it her bond for \$2,000, copy of which is attached, the bond being made part of the petition. She procured an advance of \$1,000 from it on 20 shares of stock, which she held in it, under its by-laws, rules, and regulations. She agreed to pay, as was provided in the by-laws, rules, and regulations, and as stipulated in the bond, \$12 monthly, on the last Saturday in each month, being installments on the stock on which the said advance was procured, and \$10 on said days as premium and interest on the sum advanced, and \$2 as fine in case of default of payment of either of the installments or premiums and interest. She has defaulted in the payment of the \$12 as installments and the \$10 as premium and interest for July, August, September, October, November, and December, 1892, and there is now due petitioner, as installments and premium and interest and fines for said months, \$144. She also owes petitioner the \$1,000 advanced to her. The sum of \$12, monthly as installment, \$10 monthly as premium and interest, and \$2. monthly as fines, will be due petitioner each month hereafter until judgment. She is entitled to a credit of \$30 on the aggregate amounts now due, being the amount paid into the loan fund of petitioner by her on the 20 shares of stock, which shares she has assigned to petitioner as additional security to that hereinafter named for the loan. Copy of this assignment is attached. Under the terms of the stock, she will be entitled to a credit of \$10 per month on the amount due as installment up to the present time, and on the amount that will become due up to the time of judgment. On June 18, 1892, she executed to petitioner, under sections 1969 and 1971, inclusive, of the Code, and amendments thereto, a deed conveying to it certain realty described, to secure the payment of the money above mentioned, with 10 per cent. as attorney's fees on the full amount that might be recovered against her, which attorney's fees are now due petitioner, together with all cost of collection. The bond, a copy of which was attached, was given by Mrs. Butler to petitioner, at the date mentioned, for the sum of \$2,000. It recited that she had that day procured an advance of \$1,000 on 20 shares of stock which she held in the company, under its constitution and by-laws, rules, and regulations, and was conditioned to be void should she, or any one for her, pay to the company, so long as it should continue to exist, or as may be provided in its constitution and by-laws, rules, and regulations, \$12 monthly on the last Saturday in each month, being installments due on the stock, \$10 monthly on the same day as interest and premium on the advance, and keep the building on the property given to secure the advance insured for \$800 for the benefit of the company, and pay all taxes and assessments against the same at maturity, and comply with the requirements of the constitution and by-laws, rules, and regulations;

otherwise, to be of full effect. The defendant filed a sworn plea of not indebted and various other pleas, which were demurred to, upon the grounds: Because the contract between the parties was reduced to writing, and the writing speaks the contract; because the plea seeks to vary the terms of a certain contract by parol, which cannot be done; because the city court of Clarke county (in which the action was brought) has no jurisdiction in equity; and because, as to the plea of usury, that defendant was a member of the company, and participated in the profits and losses, and cannot plead usury. The demurrer was sustained, and the pleas stricken, upon the grounds taken in the demurrer, except the ground as to jurisdiction, to which ruling the defendant excepted pendente lite, and as to it assigns error in her final bill of exceptions. Amendments were made to the pleas; and to the pleas, as amended, including the plea that nothing or only a small amount was due, the demurrer was renewed, on the grounds above stated, and on the further ground that they did not show payment, nor show in any way why said amount is not due. The demurrer was sustained, except as to the ground of jurisdiction, and to this ruling, also, the defendant excepted pendente lite. On the trial, defendant objected to the introduction of the interrogatories of Porter, plaintiff's witness, on the ground that the certificate that they were received by due course of mail was not signed or certified to by the postmaster, as required by law, but purported to be signed by the assistant postmaster. This objection the court overruled, and to this ruling, also, defendant excepted pendente lite, and upon it assigns error in her final bill of exceptions. Plaintiff offered to prove that it had, since the filing of the suit, paid certain insurance, and asked to be allowed to recover therefor. Defendant objected, upon the ground that it was not due when the action was brought, and could not be recovered in the action; certainly not, as it was not sued for in the declaration, nor embodied in it at the time it was sought to be recovered. The objection was overruled. Plaintiff was allowed to prove the amount of fines and forfeitures since the commencement of the action claimed by it against defendant, with a view of recovering therefor, over the objection of defendant that they were not due when the action was begun, and could not be recovered in this proceeding, and that there was nothing therein to authorize the evidence. Plaintiff was allowed to prove that 10 per cent. of the principal sum was reasonable attorney's fees, and could be recovered. Defendant alleges that this ruling was error, because attorney's fees can only be recovered by law where pleas are filed, and not sustained; that the act was one to prohibit fees, not in the nature of an enabling act, and only allows their recovery where a plea or pleas are filed, and not sustained; clearly contemplating that there should be a regular trial, evidence in

troduced under the pleas, and defendant's evidence not sustaining the pleas to the satisfaction of the jury, and not authorizing fees where there are no pleas, it being contended that, when pleas were filed and stricken, there were no pleas and, if there were no pleas, they certainly cannot be sustained nor even an attempt made to that end. It does not appear what objection was made to the evidence as to attorney's fees when it was offered. Error is further assigned in the final bill of exceptions as to allowing proof of attorney's fees, upon the ground that, as the suit was prematurely brought, there could be no recovery of attorney's fees. As to all the rulings indicated above, exception was taken *pendente lite*; also, as to the following: Defendant offered to call various witnesses, and offered to prove by them the truth of all the allegations in all the pleas, and also tendered the contract attached to and referred to in the pleas, and offered each and all of said witnesses and papers in evidence, her counsel stating he could produce the other papers mentioned in the pleas, and thus offering them; but the court ruled out all of said evidence, holding that, as the pleas had all been stricken, the note and deed sued on was a plain written contract, which could not be varied by any prior or contemporaneous promises or agreements varying the same, and that the pleas stricken and evidence offered sought to vary the written contract by prior and contemporaneous promises, which were not admissible in law. There being a verdict for plaintiff, defendant moved for a new trial, which motion was overruled, and to this ruling, also, she excepts. The motion was upon the general grounds that the verdict was contrary to law, evidence, etc.; further, upon the grounds that the court erred in striking the pleas, in refusing to allow her to introduce evidence to substantiate any of the allegations in the pleas, and in each and all of the rulings complained of in her exceptions *pendente lite*.

The pleas, as amended, were (the plea of not indebted being the first): "(2) In March, 1892, desiring to borrow \$2,000, she applied to plaintiff for the loan of it. It stated to her that if she would take 20 shares of its stock, and give it the property described in the declaration as security, it would loan her the \$2,000, paying over to her \$1,200 in June, 1892, and three months later the balance of the \$2,000. At said time there were liens and other debts on the property amounting to about \$1,800, as plaintiff knew, and that she desired the loan for the purpose of paying off the same. It promised to make her the loan as stated, and, acting on the faith of the promise, she took the 20 shares of the stock, and conveyed to it the property, which cost \$2,750, and was worth considerably more, plaintiff assessing its value at about \$3,500. She had, at the time of the loan, insurance on the property of \$1,000, which was transferred to plaintiff, and it required

additional insurance of \$800, which was procured. When the loan came to be closed, it did not let her have the \$1,200, but only \$1,000, stating to her that it would let her have the other \$1,000 on October 1st. The \$1,000 was not sufficient to pay off the liens on the place, and the agents of the plaintiff induced the holders thereof [naming them] to cancel the liens on the property, and release the same, agreeing that they would be paid out of the other \$1,000, which was to be loaned October 1, 1892. At the time the first \$1,000 was advanced, this not being sufficient to pay off the claims, it was agreed by plaintiff that the dues from that time till October 1, 1892, should be by it deducted from the other \$1,000 when paid over, as it had failed to loan her the \$1,200, as agreed." The following was added to this plea by amendment: "She was induced to sign the bond and deed by said promises, and they were in writing; and said agreement was made by plaintiff in writing contemporaneously with the signing and giving of the bond and deed; and said agreement, on its part, was the inducement to her to sign the bond and deed, and she relied on said written promises of plaintiff, and acted thereon, and would not have signed said papers except for said written promise made by plaintiff at the time." "(3) On October 1, 1892, it failed and refused to pay the balance of the money, or any part thereof, and still refuses to comply with said contract and pay out said money. By reason of this, said liens on her property have not been extinguished, and are being sued, and putting her to large expense; and plaintiff has not only failed to comply with the contract, but is now suing her for the \$1,000 advanced on the loan, and endeavoring to sell the property at a ruinous sacrifice; wherefore plaintiff has damaged her, by reason of causing said unnecessary suits, attorney's fees, and court costs, in the sum of \$2,000. It is endeavoring to avoid its contract, not in good faith, but simply because, since the contract was made, money has become tight, and it does not desire to pay over the other \$1,000 agreed to be loaned her. Its failure has caused and will cause her serious loss, for, owing to the great scarcity of money, she will be forced to pay attorney's fees and court costs and other unnecessary expenses caused by plaintiff; and, if it is allowed to proceed with its unjust claim, her property will be sold at a ruinous sacrifice. She therefore prayed that plaintiff be decreed to specifically perform its contract, and pay over the balance of the loan, to wit, \$1,000, to be applied, first, to the extinguishment of any dues fairly chargeable to her by it, but that it be not allowed to charge any fines against her, because the failure to pay was its own fault, and in no way her fault; that the balance of the \$1,000 be applied to the extinguishment of said liens on her property, according to date and dignity; that she have judg-

ment against it for all loss and damage caused her by it as above mentioned, by its failure to comply with its said contract, resulting from said failure, as it was well aware it would; and for general relief. (4) [Added by amendment.] The promises above set forth were made in writing, and verbally, both before, at the time of, and after the signing by her of the bond and deed; and the promises, both verbal and written, before and at the time of the execution of the papers, were the inducements to her to execute them, and without said promises she would not have done so. They were made by plaintiff with the intention of inducing her to act, and of deceiving and taking advantage of her, and did deceive her, and such acts were a fraud upon her, in that said written promises were made to induce her to act, and with intent to defraud and take advantage of her. She did act on the faith of said written promises and guaranty, and plaintiff is now seeking to enforce the bond and deed, and to ignore and not comply with said written promises made by them to induce her to act. She had no notice or knowledge of their rules or by-laws or charter. They gave her no copy thereof, no notice or information of them, and she has never seen a copy, nor did she know their purports or contents, or whether they had any. Nothing was said to her about them at the time of the transaction. (5) [Added by amendment.] The consideration and inducement for which the bond and deed were given were twofold: The \$1,000 to be paid in cash, and the undertaking on the part of plaintiff to furnish on the same securities an additional \$1,000 three months after the execution of the bond and deed and the transfer of the stock aforesaid. The property conveyed to plaintiff under and by reason of its said promises and undertakings was worth far in excess of the amount advanced to defendant, and constituted her entire assets upon which she could secure a loan. Under no circumstances would she have so incumbered and transferred her property save for said undertakings and promises. Said conduct on the part of plaintiff was false and fraudulent, and was pursued by it with the purpose fraudulently to induce her to sign the bond and deed and transfer the stock, whereby it secured a first lien on all of her available assets, and fraudulently deprived her of the power of meeting other pressing claims against her. She acted on the strength of said representations and promises of plaintiff, believing them to be true, and has been greatly injured by them; wherefore the consideration for which the bond was given has entirely failed. (6) [Added by amendment.] She was not in default to plaintiff at the time the suit was brought, nor prior thereto, because it had in its possession \$1,000 of her money, which it retained and promised to pay over to her

on October 1, 1892, which sum was not only amply sufficient, but far in excess of any sum due it from her for dues or otherwise at said time. It was plaintiff's right and duty to deduct any sum due it out of said sum or fund, and to pay over the balance and extinguish said liens on her property, as it had agreed, as above stated. That it failed to do so after inducing her to take the stock and mortgage her property, under all circumstances, was and is a fraud, not only on her, but on her said lien creditors. Inasmuch as she was not in default to plaintiff, the bond was not due at the time suit was brought on it. It is not now due, and plaintiff has no right to declare thereon, and the suit was and is prematurely brought. (7) [Added by amendment.] The debt and bond sued on are usurious, for plaintiff's method of operating and loaning was and is a mere device to conceal the taking of usurious interest on its loans. While it is called 'A Mutual Aid & Investment Company of Atlanta, Ga.,' its chief object, as shown by its published statements and otherwise, is to collect a fund, and loan it at 'the highest rate of interest' and 'at compound interest every month.' It claims to loan money at 6 per cent. per annum, payable and collectible monthly but under the name of 'premium,' which is but another name for 'usury,' collects another 6 per cent. monthly, by such device collecting really 12 per cent. interest per annum, payable monthly on loans; thus, under fancy names, carefully eschewing the name of 'interest,' which said charges really are, and, with the object and intent to do so, contracting to take and collect a higher rate of interest than that allowed by law. It collects further sums under various names,—for membership fee, per share \$1; inspection of property by company's agents, \$1; inspection of property by other agents, \$10; company's attorney's fee, \$10 to \$15; recording deeds, etc., \$1.50. All of these sums, so retained by it out of said loans made under its plan of operations, are illegally retained; and such conduct and charges are a part of its scheme to evade usury laws, and constitute a novel and shrewd device to conceal usury. All of said charges have been deducted from said loan, and the same is therefore tainted with usury. The loan is usurious, for the further reason that, when plaintiff made the loan, it was with the full knowledge that defendant was in debt, poor, and hard pressed, that she owed \$1,700 or \$1,800, and desired to secure the loan of \$2,000 to pay this indebtedness, and to enable her to pay plaintiff the legal dues and charges accruing to it. It knew that the loan was not desired or intended for purchasing or building a home, but the transaction was, and was intended as, a loan, pure and simple. In order to procure the loan, defendant was induced and required to subscribe to the 20 shares of stock, and, after subscribing, was required to

transfer the stock back to plaintiff, and to give the bond and deed. Nominally, it paid over to her account \$1,000, as stated in the bond and deed. The bond was to be payable—\$12, called premium; \$12, called installments—thereafter, on the — day of each month, for the full term of 83 months. Out of said \$1,000 which plaintiff promised to pay to defendant, it deducted and retained, illegally and in violation of the usury law, the following sums, for its own agents and benefit: For H. A. B., for inspecting property, \$1.50; for inspecting fee, \$6; for recording deed to company, \$1.05; for fee for company's attorney, \$15,—thus contracting for and taking sums of money on account of the loan, and deducting from the sum loaned \$23.55, to be used and appropriated by it, with intent to contract for and take, and taking, a greater rate of interest than allowed by law, the interest charged in this indirect method being at the rate of 18 per cent. per annum; and it is endeavoring to collect the same, to wit, \$144, when 8 per cent., the highest rate allowed (it claims to loan only at 6 per cent.), would be only \$60. The usury is the difference in this rate, being \$74, to which adding the \$23.55 illegally retained, makes \$97.55 of usurious interest charged, which it is trying to conceal. The principal object of plaintiff in making loans and in making this loan is to contract for, take, and conceal usury; and it is by such methods it was enabled to make a gain of 42 per cent. on its ordinary, and 81 per cent. on its special, stock. Wherefore, the bond and deed, being tainted with usury, and taken to secure the same, are illegal and void, and defendant prays it will be so declared, and that the usurious interest be deducted, and the claim purged of usury." Further pleas by amendment: "Contemporaneously with the execution and delivery of the bond, a written contract was entered into by the parties, whereby said liens were to be canceled. The \$1,000 to be paid over at said time was to be prorated among all of the liens, except the first lien, held by the Scottish A. M. L. Co., Limited, which was to be paid in full; and plaintiff, in consideration of said release, and the giving of said security, and the execution of said papers, and in conformity with its agreement, was to pay over \$1,000 additional, October 1, 1892, which sum would have more than paid off in full all of defendant's indebtedness. Defendant was to transfer the bond for titles from plaintiff to the lien creditors as collateral security, which she did. Said contract was drawn by H. C. Tuck, at the instance of plaintiff, as evidenced by its letter to him. At the time, Tuck was attorney of the lien creditors, was assisting defendant in the matter, and was representing plaintiff, being the president of its board, as defendant is informed and believes. Said agreement was signed by the lien creditors, and delivered to Tuck,

as plaintiff's agent, and was afterwards turned over to and held by plaintiff, and ratified by it. A copy is attached. Defendant had no notice that plaintiff would seek to repudiate this contract until the time came for it to perform its part of the contract, when it refused to do so, thus seeking an undue advantage of and to defraud defendant and the lien creditors, to her great damage, whereby she will lose her stock and property, and be left in debt, and whereby she has been forced to incur large expenses for attorney's fees and court costs, to wit, \$500, to her damage \$2,000. Further, that no part of the debt sued on was or is due, and in no event is any of it due, except \$132, if that. Further, that Tuck has letters, agreements, and papers, written and signed by plaintiff, agreeing, as part of the contract, to pay the balance of the loan of \$2,000 agreed to be made, to wit, \$1,000, October 1, 1892. These promises and agreement were made before and at the time of the execution of the bond and deed, and to induce her to execute and deliver the paper sued on, and to transfer absolutely her stock, and deed her entire property to plaintiff, and were made with the intent to induce her to act, and to take advantage of her and defraud her; and relying on said written agreements and promises before and at the time of the execution of said papers, and contemporaneous therewith, she did execute the same. Plaintiff afterwards agreed in writing to pay over the \$1,000 on October 1, 1892, and Tuck has these also. She is unable to attach copies thereof, because, though she has often called for them, Tuck has mislaid them; but their purport is that, in consideration of her transferring the stock and the bond and deed, and the releasing by the lien creditors of the liens, and of defendant transferring to the lien creditors the bond for titles, all of which she and the lien creditors did, it would pay over the other \$1,000 on October 1, 1892; the balance due the lien creditors, \$700, to be by her prorated between them, and in extinguishment of their debts, and the \$300, less whatever dues and other charges might be coming to plaintiff, for her own use."

Lumpkin & Burnett, for plaintiff in error.  
F. A. Quillian and R. S. Howard, for defendant in error.

PER CURIAM. Judgment reversed.

(94 Ga. 651)

BAGLEY et al. v. KENNEDY.

(Supreme Court of Georgia. Sept. 17, 1894.)

LOST DEED—PROOF OF EXECUTION—COPY FROM RECORDS.

1. The execution of a lost deed, embracing lands in two counties, cannot be proved as to land in one of the counties, wherein the deed was never recorded, by a certified copy from the record of the other county, in which it was

duly recorded; and, without first proving the execution of an original deed, a copy of the same, taken from the records of a county in which the land in controversy is not situate, cannot be received in evidence.

2. The evidence as to the execution or genuineness of the alleged original deed was insufficient to make a prima facie case, and the court did not err in granting a nonsuit.

(Syllabus by the Court.)

Error from superior court, Gwinnett county; N. L. Hutchins, Judge.

Action by Mary A. Bagley and others against James R. Kennedy. Judgment was rendered for defendant, and plaintiffs bring error. Affirmed.

Sam J. Winn, for plaintiffs in error. T. M. Peeples, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 408)

**LOWE BROS. CRACKER CO. v. GINN.**

(Supreme Court of Georgia. Sept. 17, 1894.)

**ACTION ON ACCEPTANCE—PROOF OF EXECUTION—PLEA OF NON EST FACTUM.**

Where a person is sued in a justice's court upon an acceptance made, not in his own name, but in the name of another, the summons having a copy of the acceptance annexed, and being addressed to him in his own name, "doing business under the name and style of" the acceptor, the acceptance is admissible in evidence without proof of its execution, unless the defendant has filed a sworn plea of non est factum within due time. The action being founded upon the acceptance, and the summons substantially alleging it to be his act and deed, sections 2351, 3454, 3472, and 4149 of the Code apply in principle.

(Syllabus by the Court.)

Error from superior court, Bartow county; T. W. Milner, Judge.

Certiorari by the Lowe Bros. Cracker Company to review a justice's judgment in favor of L. C. Ginn. The judgment was set aside, and the said company brings error. Reversed.

The following is the official report:

Suit was brought in a justice's court against "Luke C. Ginn, doing business under the name and style of W. H. Terrell," on a draft in favor of the plaintiff, drawn on W. H. Terrell, and accepted by him. No plea was filed until the third term, when L. C. Ginn pleaded that he was not indebted to plaintiff on the contract sued on, nor in any manner whatever, and that he did not undertake or assume this debt, in writing or otherwise, and does not owe it. On plaintiff's motion, the court struck this plea, on the ground that it was not filed at the first term. Plaintiff offered in evidence the acceptance sued on, to which defendant objected, on the ground that it was not signed by Ginn, and that there was no proof showing that it was signed by Ginn or authorized by him. The objection was sustained, and the paper excluded. No further evidence was offered, and the court rendered judgment against the plaintiff, and

in favor of the defendant, for costs. To these rulings plaintiff excepted by certiorari, upon the hearing of which it was ordered that the same be sustained, and the judgment below be set aside, and that the case be remanded to the justice's court, with instructions to dismiss the same, unless plaintiff should prove the allegation in the summons; the court holding that plaintiff should show that defendant did business under the name and style of W. H. Terrell. To this ruling, and to the refusal to render final judgment against the defendant on plaintiff's motion, exceptions were taken.

J. W. Akin, for plaintiff in error. J. H. Wikle, for defendant in error.

PER CURIAM. Judgment reversed as to instructions given the magistrate.

(94 Ga. 683)

**CHICAGO CHEESE CO. v. SMITH et al.**

(Supreme Court of Georgia. Sept. 17, 1894.)

**ACTION ON ACCOUNT—NONSUIT—TRANSFER PENDING SUIT.**

1. Where an action upon an account is brought by a partnership dissolved since the account was made, it is no cause for nonsuit that one of the partners has assigned in writing his interest in the account to the other. Both partners being before the court as parties to the action, the defendant has no interest in the question of ownership of the account, as between the plaintiffs themselves. *Gilmore v. Bangs*, 55 Ga. 403.

2. The court having inadvertently granted a nonsuit, because of a supposed defect in the action as to parties, and not having passed upon the merits of the motion for a nonsuit as disclosed by the evidence, it was proper to reinstate the case on motion made during the same term.

(Syllabus by the Court.)

Error from city court of Floyd; W. T. Turnbull, Judge.

Action by Smith & Cothran against the Chicago Cheese Company on an open account. Judgment was rendered for plaintiffs, and defendant brings error. Affirmed.

McHenry, Nunnally & Neel, for plaintiff in error. Fouché & Fouché, for defendants in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 620)

**ELLIOTT v. PARKER.**

(Supreme Court of Georgia. Sept. 17, 1894.)

**LANDLORD'S LIEN—ASSIGNMENT TO THIRD PERSON—FURNISHING SUPPLIES.**

A landlord cannot take a lien for supplies already furnished to his tenant by a third person on the tenant's credit. Consequently, a special contract for such a lien, executed by the tenant in writing, and assigned by the landlord after the supplies to which the contract relates have all been furnished by the assignee, has no validity as against other creditors of the tenant. That the special contract was agreed upon, and the writing prepared for execution, and the assignment of it promised before the

supplies were furnished, would make no difference, inasmuch as, under the statute, no lien which the landlord can assign can be created except by special contract in writing, and there can be no contract in writing before the writing is actually executed by the necessary parties thereto.

(Syllabus by the Court.)

Error from superior court, Rockdale county; R. H. Clark, Judge.

Certiorari by G. P. Elliott to review a judgment in favor of J. D. Parker. The writ was denied, and petitioner appeals. Affirmed.

The following is the official report:

King was tenant of Veal, and wished to buy goods of Elliott in the spring of 1890. Elliott refused to credit him, but saw Veal, and there was an agreement by Veal, Elliott, and King that Veal would transfer to Elliott a landlord's lien for supplies if Elliott would sell King the goods on the lien. This was an unsigned, written obligation to pay Veal, landlord, or order, \$50 for provisions furnished to make King's crops that year on the premises occupied by King as the tenant of Veal, and giving Veal or order a lien on the crops, as provided by the act of February 25, 1875. Elliott furnished King the goods on the faith of the lien and agreement to the amount of \$50, which he would not have done but for the agreement and lien, and none of which \$50 has been paid. He sold King the goods, and not Veal for King. Elliott thought the lien was signed the day it bears date, until in the fall of 1890, when he found it was not, and then sent and got King to sign it and Veal to sign the transfer. This transfer was to Elliott or order, "under and according to Acts of General Assembly of Georgia in 1875, relating to transfer of landlords' liens. I guarantee the payment of the within obligation, and hereby waive my claim for rent on said tenant until this debt is paid, without recourse. [Signed] W. S. Veal, Landlord." The lien was signed and transferred after Veal was garnished in the suit in favor of Parker against King. On January 11, 1891, Parker obtained judgment against King in a magistrate's court, and also against Veal as garnishee. On the same day, Veal answered the garnishment, and offered the money to the court, but it was not finally paid in until April 11, 1891. This money arose from proceeds of the crop of King made on Veal's land in 1890. Elliott foreclosed the alleged landlord's transferred lien, and on an issue between Elliott and Parker, on a motion to distribute the money paid in by Veal, a jury in the magistrate's court found in favor of Parker. The foreclosed lien was in the magistrate's hands in March, 1891. Elliott, in his petition for certiorari, alleged that the jury erred in finding a verdict for Parker. The judge below held that the certiorari must be overruled, on the ground that the evidence showed that Veal, the landlord, did not make the contract as pur-

chaser of the goods from Elliott, nor become liable therefor by indorsing the lien, but transferred the same without recourse, and, therefore, that Elliott got no lien on the crops of King. To this decision Elliott excepted.

G. W. Gleaton, for plaintiff in error. J. N. Glenn, for defendant in error.

PER CURIAM. Judgment affirmed.

(33 Ga. 255)

HENDERSON, County Treasurer, v. PARRY.

(Supreme Court of Georgia. Sept. 17, 1894.)

COURT STENOGRAPHER—COMPENSATION.

Whether or not the services of a stenographer in "taking down" the testimony in the trial of criminal cases include services rendered in writing the stenographic notes out in longhand, there is no law authorizing the judge of the superior court to grant a stenographer an order upon the treasurer of the county compensating him for writing out such notes at so many cents per hundred words. The only legal order which the judge can grant to the stenographer for any service in criminal cases must be for a specified time, at the rate of \$15 per day. Acts 1884, p. 130.

(Syllabus by the Court.)

Error from superior court, Newton county; R. H. Clark, Judge.

Mandamus by H. L. Parry to compel John F. Henderson, county treasurer, to pay stenographer's fees. Judgment was rendered for plaintiff, and defendant appeals. Reversed.

The following is the official report:

Mandamus absolute was granted to compel the county treasurer to pay to the official stenographer of the superior court, for writing out the testimony in criminal cases, at the rate of 10 cents per 100 words, this being in addition to the payment previously made to him for the actual time he was engaged in taking down the testimony in shorthand notes, and he having been paid for transcribing the same. It is admitted that he was engaged for three days in writing out his notes into longhand, and that the bill for the work in question, at 10 cents per 100 words, was \$34.60. The treasurer excepts, contending that the judgment was erroneous, because the stenographer's account, as approved and ordered paid by the judge, is made out for transcribing the testimony in certain criminal cases at 10 cents per 100 words, whereas the law says the stenographer shall be paid \$15 per day for taking down testimony. In the answer of the treasurer to the rule nisi, it is set up that, under the law, the payment for "taking down" testimony includes the compensation for writing it out; that the testimony is not "taken down," in a proper or legal sense, until put into such language as can be readily read and understood by those whose duty it is to record it upon the minutes of court; that the marks or signs as made by the stenographer only serve him

with the means by which the testimony may be taken down, which it is his duty to perform, etc.

El. F. Edwards, for plaintiff in error. John S. Candler, for defendant in error.

**PER CURIAM.** Judgment reversed.

(94 Ga. 627)

**WILLIAMS v. WILLIAMS et al.**

(Supreme Court of Georgia. Sept. 17, 1894.)

**SALE OF LAND—SUIT FOR PURCHASE MONEY—INJUNCTION TO RESTRAIN—SETTLEMENT OF TITLE—DECREE OF DIVORCE—EFFECT ON PROPERTY RIGHTS.**

1. A vendee of land, being sued for a portion of the purchase money, and never having had possession of the premises, and the same being in possession of the vendor's divorced wife and minor children by virtue of a decree rendered in a divorce case awarding the property to the children as alimony, and the facts being such as to render the vendee's title doubtful, and he having no express warranty of title on which to repose, and being willing and offering to pay the purchase money as soon as the cloud upon his title shall be cleared away, may maintain an equitable action to enjoin the suit, settle the doubt as to title, and prevent a multiplicity of suits, making as defendants in the equitable action the plaintiff in the pending suit, together with the divorced wife and the minor children. The joining of these parties as defendants was proper, and the petition is not multifarious.

2. The decree in the divorce case having awarded the land specifically to the children as alimony, and not making any money award or specifying any amount allowed or to be allowed as alimony, and neither the purchase money nor the notes therefor, so far as appears, being included in the schedule of property filed in the divorce suit, no decree in the present case can be made substituting in place of the land, which was not subject to the claim for alimony, the money for which that land had been sold before the separation between the divorced parties took place, although this money, being still unpaid, can be traced and identified as proceeds of the sale. The decree in the divorce suit can, as a judgment in rem, operate only upon property embraced in the schedule or described in the decree itself.

(Syllabus by the Court.)

Error from superior court, Bulloch county; B. L. Gamble, Judge.

Action by John G. Williams against David A. Williams and others. Judgment was rendered for plaintiff, and defendants appeal. Modified and affirmed.

The following is the official report:

John G. Williams brought his petition against David A. Williams and against Nicey E., John, Julia, Maggie, Hannah, and Nicey Williams, the five latter represented by Nicey E. as their guardian ad litem by appointment of the court, alleging: Defendants, not including David A. Williams, are in possession of a tract of land in Bulloch county, containing 200 acres, more or less, describing it; have received its proceeds since January 1, 1890, of the yearly value of \$200, and refuse to deliver the land to plaintiff, or pay him its profits. On February 7, 1887, David A. Williams was seised and possessed of a tract of

land in said county, containing 500 acres, more or less, described, which embraced the tract first mentioned; and on said date conveyed said 500 acres by deed to one Sherwood, to secure a loan of \$550, made him by Sherwood, under the conditions of a bond to reconvey, made him by Sherwood, the deed and bond being executed to conform to sections 1969, 1970, and 1971 of the Code, and the amendments thereto. On the same day, Sherwood, in consideration of \$500, conveyed the land by deed to the American Mortgage Company of Scotland, which conveyance was made subject to the right of David A. Williams to have a reconveyance upon the terms of the bond. On July 28, 1890, David A. Williams, in writing, transferred the bond to petitioner and J. E. Collins for a valuable consideration, whereupon they became entitled to demand the deed to the land from Sherwood or his assignee; and on December 22, 1891, his assignee, by a quitclaim deed, conveyed the land to petitioner and Collins, who by deed of partition, on March 12, 1892, divided the land, petitioner getting the tract now in dispute. David A. Williams transferred the bond, and thus sold to petitioner and Collins all his right, title, and interest in said land, bona fide, in payment of certain debts of his, to wit, the indebtedness to secure which he conveyed the land to Sherwood, and for indebtedness to petitioner of \$110, which debts were in existence before the separation of David A. Williams and his wife, Nicey E. Williams. Petitioner and Collins purchased the land from David A. Williams for \$2,182. Of this sum petitioner was to pay \$1,500 and get 200 acres of the land, and Collins was to pay \$682 and get — acres of land. Out of this sum they were to pay said loan from Sherwood, and petitioner was paid therefrom the indebtedness of \$110 of Williams to him. In part payment of the purchase money petitioner gave Williams his three promissory notes, dated July 28, 1890, each payable to said Williams or bearer,—two for \$100 each, due September 1, 1890, and December 15, 1891, respectively; and the other for \$500, due December 15, 1890. Two of these notes are held by J. G. Moore, who claims that he became the holder for value before due, and has begun suit thereon, which will be for trial at the October term, 1892, of Bulloch superior court. Copy of this suit is attached. Petitioner denies that Moore is a bona fide holder for value before due. On the contrary, he took one of the notes after its maturity, and after its dishonor. D. A. Williams has begun suit on the \$500 note, which stands for trial at said October term, and copy of which suit is attached. On July 30, 1890, Nicey E. Williams filed her libel for divorce against her husband on the ground of cruel treatment. She attached thereto a sworn schedule of the property owned by her husband and herself, in which was included "one tract of land in Bulloch county, containing 200 acres, on which family now reside,



valued at \$1,000," and which is the same tract to which petitioner claims title. She obtained, at two terms of the court, two verdicts divorcing her from D. A. Williams; and on the second verdict, at the April term, 1892, of the court, the jury found that the five minor children above named of D. A. and Nicey E. Williams were entitled to permanent alimony, and set aside to them said tract of 200 acres. D. A. Williams is insolvent. The minors now claim that the title to said tract has been vested in them under the verdict and decree. Said verdict and decree did not vest the title in the minors, nor divest petitioner's title, for these reasons: (1) Because the title to the land was not in D. A. Williams when he and his wife separated, but in the mortgage company, or in petitioner and Collins; (2, 3) because petitioner and Collins purchased from D. A. Williams the bond for title, and all his interest, right, and title in the land embraced therein, before the separation of Williams and his wife, bona fide, in payment of debts which existed before the separation; (4) because they made said purchase before the libel for divorce was filed, and before libellant filed the schedule on oath of the property mentioned above; (5) because the attempt to set aside the land as permanent alimony for the minors is void, as it does not specify what amount the minors are entitled to for their permanent support, nor in what manner, how often, to whom, and until when it shall be paid. If said verdict and decree vest the title to the land in the minor children, then the consideration of the notes given by petitioner to D. A. Williams on the purchase of the land has wholly failed, and petitioner ought not to be required to pay them. After Williams gets judgment in his suit on the note, and collects the same from petitioner, and petitioner loses the land, petitioner would be without any redress against him, as he holds no bond for title or warranty from him to the land. If the court should hold that petitioner's title to said land was good, and was not divested by the verdict and decree in the divorce case, the \$500 note given for the purchase money of the land stands in equity in lieu thereof, and is properly the property of the minors as permanent alimony. In that event petitioner would not be justified in permitting the judgment to go against him therefor and paying the same to said Williams. By enjoining the said suit of Williams and by having his right to recover thereon and the rights of the minors to said lands determined in one proceeding, multiplicity of suits will be prevented. Besides, the questions can be better determined in one proceeding where all the rights of these different parties can be settled. The libel for divorce was a collusive proceeding between the husband and wife, instituted and prosecuted in order to recover said land from petitioner, after he had bought the same in good faith, and for a valuable consideration, and had paid out a large part of the pur-

chase money therefor, and given his notes for the balance, some of which had been transferred by Williams for value before due. D. A. and Nicey E. Williams lived together as man and wife after the institution of the libel for divorce, thus showing that the libel was collusive, and for the purpose above stated. Petitioner is willing and ready to pay into court the amount due by him on the \$500 note, and have the same declared by decree as permanent alimony for the minors, and invested for their benefit as the court may direct, if his title is confirmed by the decree, and D. A. Williams enjoined from prosecuting the suit on said note. Petitioner waived discovery, and prayed injunction restraining D. A. Williams from further proceeding with the suit on the note; that petitioner's title be declared and confirmed by the decree, and defendants be required to yield possession of the land to him; that, if the court should hold that his title to the land is valid, and the \$500 note should be paid, then that the court would give direction whether he should pay the same to Williams, or to the minor children, in lieu of the land, as alimony; that Williams and the minors be required to interplead, and their respective rights to the notes be determined by the decree in this case; and for the general relief and process.

Among the exhibits attached to the petition was the libel for divorce, with schedule of property, the verdicts, and decree thereon. The second verdict granted a total divorce, and found that the five minor children "are entitled to permanent alimony. We set aside to them the tract of land on which Nicey E. Williams and family now reside, containing 200 acres, more or less, to said minor children, to be held by them as provided by law." The decree thereon was that the marriage relation be set aside and totally dissolved so far as the plaintiff was concerned, and that the land "be used as permanent alimony by said children during their minority, free from the control of said defendant."

By amendment plaintiff alleged: D. A. and Nicey E. Williams had been married a number of years before the filing of the divorce suit, for a long time prior thereto having lived together in an unhappy and disagreeable manner, and at various times prior to the filing of said suit had had domestic trouble, and had often separated or threatened to separate. When David A. proposed to sell his interest in the lands to petitioner, petitioner, fearing he might have trouble growing out of Nicey E. Williams' assertion of her claim for alimony on the ground that she and her husband had separated, and on the very day he purchased the land, particularly inquired of David A. Williams whether he and his wife were then and there living together as man and wife, informing said Williams that he would not buy the land if Williams and his wife were then separated. In reply to petitioner's in-

quity, and in order to induce him to purchase the land, Williams replied that he and his wife were not then in a state of separation, and were living together amicably. On the faith of this representation petitioner purchased. If the statement was not then true, then petitioner was deceived and misled by the willful and false statement of Williams, and the notes are void if said fraud was perpetrated on him by Williams. The representation was true. But Nicey E. Williams and her children contend that it was not; that she and her husband were living in a state of separation; that, therefore, she was entitled to alimony out of the land, and the transfer and sale of the land, or his interest therein, by Williams to petitioner was void. Petitioner cannot safely pay the note until the controversy is settled.

David A. Williams demurred on the following grounds: Plaintiff has not set forth a cause of action, or a matter sufficient to authorize the granting of the injunction or relief he prayed. No sufficient grounds for relief and injunction are set forth in the petition against this defendant, and he is not properly joined as a party therein. There is no equity in the petition which entitles plaintiff to relief against this defendant, and none which authorizes this defendant to be joined with the other parties defendant. It is not shown by the petition that this defendant ever incurred to plaintiff any obligation to warrant or guaranty said land mentioned in the petition to him. The divorce proceedings did not vest title to the land in the minors, and, so far as said proceedings may purport to do so, they are void. Said proceedings do not vest the entire estate in the lands in the minors. Nicey E. Williams is not a proper party, nor is this defendant a proper party, to the petition. The petition is multifarious, and joins matters in which the parties defendant have no common or joint interest, but which are distinct and separate as to matter and parties. John E. Collins, who is a necessary party, is not joined in the petition. The allegations in the amendment make no cause for relief, and are insufficient in law. The allegations are not positive, and are not of what petitioner asserts, but what he does not believe. The demurrer was overruled, to which ruling Williams excepted.

The answer of Nicey E. Williams and her children was as follows: There was no collusion in the divorce proceedings, but the divorce was prosecuted and obtained in the utmost good faith. There was a conspiracy between D. A. Williams and John G. Williams to defeat the rights of these defendants to alimony in the property; and, at the time—July 28, 1890—when John G. Williams says he obtained the bond for titles from D. A. Williams, the latter had separated from Nicey E., and left her home, which fact was known to John G. Williams. John G. Williams never paid a dollar to Sherwood or the

mortgage company or any one, but the land was redeemed under the bond by Collins, who now holds part of the land, to which transfer and sale no objections are made. If D. A. Williams was indebted \$110, as claimed, John G. Williams should have sought remedy to collect the same. About a month before July 28, 1890, Nicey E. had employed an attorney to file her divorce suit, her husband having already deserted her; and it was well known to John G. that he had separated from his family, and that she was seeking a divorce. Sufficient title was vested in D. A. Williams, he holding the bond from Sherwood; and when the separation occurred he was the holder of the bond, and the grant of alimony in the land vested the title in the children until their majority. The alimony being in land, it was not necessary to designate to whom, how, when, how long, etc., it should be paid to them, but that the title was vested in them during their minority. Should the court hold that the title was not vested in D. A. Williams, and that the decree for alimony is void so far as the land is concerned, then these respondents pray that John G. Williams be compelled to pay into court the \$500, or other sum due by him on the bond, and that the minors be decreed the same for alimony under a proper decree, and for general relief.

The case was submitted to the jury by questions which, with their answers, were to the following effect, in brief: D. A. Williams and his wife were not living separate at the time of the purchase of the land of D. A. Williams by John G. Williams and John E. Collins. The divorce and decree for alimony were not procured by collusion between D. A. Williams and his wife. D. A. Williams did not practice any deception or fraud upon John G. Williams at the time of the sale of the land to John G. Williams and John E. Collins. The purchase of the land by John G. from D. A. Williams was in good faith. Upon this verdict the court decreed that the verdict be made the decree; that petitioner recover of defendant the premises in dispute, and petitioner's title thereto was confirmed; that the suit on the note by D. A. Williams against J. G. Williams be perpetually enjoined, and be dismissed, at the cost of J. G. Williams, and that D. A. Williams be perpetually enjoined from collecting said note; that J. G. Williams pay into court, within 30 days, the amounts due on said note, principal, interest, and attorneys' fees, and the principal and interest be paid to the trustee hereinafter mentioned, and the attorneys' fees be paid to the attorneys for D. A. Williams; that H. S. Blitch be appointed trustee to receive said principal and interest and directed to invest the same in a tract of land in the county within 60 days, in trust for the minors during their minority, and then to revert to and vest in D. A. Williams absolutely and

free from said trust, the land so purchased being set apart to the minors as alimony in lieu of the land recovered by petitioner, heretofore assigned them as alimony; that the trustee give bond; that a fee be paid out of the fund to the attorney for the minors and to the trustee for his services as trustee; and that the trustee report as to his acts in making the investment. David A. Williams excepted, alleging that the court erred in making the decree, and specially that the court erred in decreeing that the suit on the note be enjoined and dismissed, and that D. A. Williams be enjoined from collecting the note; that John G. Williams pay into court, within 30 days, the amounts due on the note, and the principal and interest be paid to the trustee, and the attorneys' fees be paid to the attorneys for D. A. Williams; that Blitch be appointed trustee to invest the funds mentioned in land for the use of the children. He further alleged that the court erred in not making a decree dissolving the injunction and authorizing him, D. A. Williams, to proceed to collect the note from John G. Williams, as requested by him, D. A. Williams.

Lester & Ravenel and Harrison & Peeples, for plaintiff in error. Hines, Shubrick & Felder, D. R. Groover, and J. A. Brannen, for defendants in error.

**PER CURIAM.** Judgment reversed as to enjoining the suit upon the purchase-money note and as to taking charge of and appropriating the fund covered by that note; in other respects, affirmed.

(94 Ga. 718)

**SOUTER et al. v. BANK OF SOUTHWESTERN GEORGIA.**

(Supreme Court of Georgia. Sept. 17, 1894.)

**RELEASE OF SURETIES.**

The court did not err in the ruling complained of pendente lite, nor in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Schley county; W. H. Fish, Judge.

Action by the Bank of Southwestern Georgia against J. L. Souter, J. G. Collins, and J. W. Souter. Judgment for plaintiff, and defendants bring error. Affirmed.

The following is the official report:

The Bank of Southwestern Georgia sued J. L. Souter, J. G. Collins and J. W. Souter on two promissory notes, each dated January 23, 1891,—one for \$161.45, due October 5, 1891, and the other for \$163.65, due November 5, 1891,—both signed by defendants apparently as makers, and both containing the words, just before the signature, "Mortg. on mule and mare." Neither of the notes contained a waiver of homestead. J. L. Souter pleaded the general issue and usury. Collins and J. W. Souter pleaded that they were simply

sureties upon the notes, and received none of the consideration; that, when they signed the notes, it was agreed the plaintiff should take a mortgage on a mare and mule, with a waiver in the mortgage of homestead and exemption to J. L. Souter, as collateral security for the payment of the notes, all of which was done; that, if it had not been for this mortgage so given, these defendants would not have been sureties; that plaintiff, without their knowledge or consent, charged J. L. Souter usury, specifying it, whereby said waiver was made void; and that this increased their risk as sureties, and discharged them. They further pleaded: At the time they signed the notes, the mortgage was given, and, after the notes and mortgage became due, they insisted that plaintiff should foreclose the mortgage, and plaintiff refused to do it, and kept the mortgage for an unreasonable length of time, until J. L. Souter had either disposed of the mortgaged property or lost it by death or destruction, to the injury of these defendants by said unreasonable delay, and to the increase of their risk as sureties. To each of these pleas the plaintiff demurred orally, and moved to strike the same because insufficient in law, and because the last-mentioned plea did not allege that any notice in writing was given by the sureties to the plaintiff to sue or to foreclose the mortgage. The demurrer and motion were sustained as to said last plea, but the order was not put in writing, to which ruling said defendants excepted pendente lite. In a note the court states that the case went on to trial before the jury, without any objections that the order was not written. From the charge of the court it appears that a third plea was interposed by Collins and J. W. Souter, to the effect that plaintiff consented for J. L. Souter to swap or dispose of one of the animals mentioned in the mortgage without their consent, and that, being so allowed, he did dispose of it, and the lien on it was released, for which reason these defendants were discharged. There was a verdict for plaintiff against J. L. Souter, as principal, and Collins and J. W. Souter, as sureties, for \$225, principal, with interest and attorney's fees. The mortgage was put in evidence, from which it appeared that it was given to secure the notes and on the same day the notes were given, and that it was upon a mule and a mare. Defendants moved for a new trial, and, their motion being overruled, excepted.

The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also, because the court erred in allowing Collins, on cross-examination, to testify, over their objection, that he supposed when he was signing the notes that there was usury in them; that he had borrowed money before from the same bank; and that he knew the bank usually charged over 8 per cent.—alleged to be error because the witnesses' supposition was not legal testimony, and because what the bank had previously done

In other contracts in charging usury was not proper evidence to show notice to defendants that usury was charged on these notes, and because the custom of the bank was not proper evidence to show notice to the other defendants, before first proving that they had full knowledge of this custom. It was not stated in this ground what objection was made to the testimony when it was offered. Error in allowing J. W. Souter to testify, over their objection, that he knew at the time he signed the notes that he could not get money from plaintiff at 8 per cent. per annum, and that he thought he knew at the time he signed them that the bank charged over 8 per cent., and that its rule was he could not get money at 8 per cent. It was not stated in this ground what objection was made to this evidence when offered. Error in striking the plea stricken as above mentioned. This plea is not set out in the bill of exceptions, but is in the bill of exceptions pendente lite. Because of newly-discovered evidence. In support of this ground, movant produced the affidavit of Collins, as follows: "On or about November 10, 1891, and soon after the notes became due, he sent a message by one Stewart to the bank to foreclose the mortgage, and at the time and until the trial was under the impression that he requested Stewart to bring him a copy of all notes from the bank of J. L. Souter upon which he was surety, and was impressed until the trial of the case that Stewart did bring from the bank a copy of the notes sued upon, with a message from the bank that affiant would have to give them notice in writing before they would foreclose the mortgage. Stewart did bring him this message from the bank, whereupon he sent the bank by mail a letter demanding that it foreclose the mortgage. He served notice upon the bank to produce such letter upon the trial, to show that it had failed to comply with his notice to sue, but it did not produce the letter on the trial, and at that time neither he nor his attorney nor his codefendants knew of any evidence by which they could prove that the bank actually received the notice through the mail. Immediately after the trial, one Thompson, who was present during the trial, but did not advise him of the fact until after the trial, [told him] that he, Thompson, was the party who brought from the bank a copy of the notes, and that at the same time he carried from deponent a letter to the bank. Then deponent remembered that he was mistaken as to Stewart having brought him a copy of the notes, and that, when Thompson brought the notes, he sent by Thompson a letter which was delivered to the president of the bank, and which contained a written notice demanding that the bank proceed to sue and collect the amount of the notes out of the mortgage. Deponent can now prove that the bank received said notice from him over three months before commencing suit on the notes. Neither he nor his codefendants nor

his attorney knew of this before the trial, because he was laboring under the impression above stated, and because Stewart advised him he was mistaken about his bringing a copy of the note, etc. For this reason, deponent did not plead nor insist on his plea of notice to sue. He exercised all diligence in preparing the case, and it was not until his memory was refreshed by Thompson that he remembered his ability to prove the notice." Also, the affidavit of Thompson that the facts stated in the affidavit of Collins are true, so far as they relate to Thompson's acts; that on or about November 20, 1891, Collins did request him to deliver a letter to the bank, and to get from it a copy of all the notes of J. L. Souter upon which Collins was surety, and also to deliver a message to the bank to foreclose the mortgage, which message he did deliver to Speer, its president, to whom he also delivered the letter. Deponent does not know what was contained in the letter, save from what he gathered from the conversation of Collins at the time, to the effect that he had to notify the bank in writing to sue the mortgage. Deponent did obtain a copy of the notes at the time, and delivered them to Collins. So far as he knows, J. L. and J. W. Souter knew nothing of this transaction, and after the trial he did remind Collins of deponent's having delivered said notice. Also the affidavit of the attorney for defendants as to his ignorance of the facts set out in the affidavits above, and as to his diligence in preparing the case for trial. By way of counter showing, Speer made affidavit that he had no recollection of ever receiving from Collins any letter written from Murray Cross Roads between October 15, 1891, and December 1, 1891, relative to foreclosing the mortgage against J. W. Souter; that he has made diligent search for the same, and cannot find such letter; that he keeps a file of all the letters received by the bank, and, had he received such notice, would have immediately foreclosed the mortgage; and that he is positive no such letter was received by him. Also, the notice served upon the bank by defendants, calling upon it to produce upon the trial, among other papers, certain letters written by Collins from Murray Cross Roads, directed to the bank, between October 15 and December 1, 1891, relative to the debt in question, to be used as evidence for defendant. Also, the response to this notice, that, after diligent search, no such letter was found, and that such letter had not been received. This response was accepted by defendants. The affidavit to foreclose the mortgage was made April 22, 1893. Also, because the court erred in refusing to give the following, as requested by defendants' counsel: "A creditor holding collateral securities is chargeable with a trust concerning the same for the benefit of the surety, and if the creditor, by any act of omission or commission, or any act whatever of a positive character, or by his gross negligence or bad

faith, and without the knowledge or consent of the surety, releases, surrenders, destroys, or fraudulently transfers such collateral security, so as to defeat any claim of the surety upon payment of the debt to be subrogated thereto for his indemnification, surety is discharged on such a contract, or, at least, is discharged to the amount of the actual loss or depreciation of such collateral. Such security must be a mortgage, pledge, lien, or some right to or interest in some property which the creditor can hold in trust for the surety, and [to] which the surety, if he pay the debt, can be subrogated." As to this ground of the motion, the court states: "Defendants' counsel read a good deal from several books, and, after furnishing lengthy paragraphs from the books, said he requested the court to so charge the jury. The court does not know whether he said this question or not, but presumed he did. There was no written request." Error in charging: "I charge you on this plea that if you believe from the evidence that Major Speer, as president of the Bank of Southwestern Georgia, consented and agreed with the defendant J. L. Souter that he should exchange or dispose of one head of the mortgaged stock, and that the lien of the bank on that head of stock be discharged, and that the defendant J. L. Souter did exchange said stock, and the lien was discharged, and that J. G. Collins and J. W. Souter on these notes, did not consent for J. L. Souter to exchange or dispose of the stock, then you would find in favor of the defendants J. G. Collins and J. W. Souter that they were discharged by reason of the action of the plaintiff in increasing their risk as sureties. I charge you, further, if you believe that J. G. Collins and J. W. Souter were sureties on these notes, and that J. L. Souter, the principal, traded one head of the mortgaged stock, and that Major Speer, as president of the plaintiff, did not consent or agree for him to trade or dispose of the stock, until the other defendants J. G. Collins and J. W. Souter should consent to it in writing, and until J. L. Souter should give to the plaintiff a new mortgage, if that is the truth of the case, then the defendants Collins and J. W. Souter would not be discharged on that plea, although J. L. Souter may have disposed of one head of the mortgaged stock. So you see that it is important on that plea to determine whether or not Major Speer, as president of the plaintiff, consented for J. L. Souter to dispose of or trade or exchange one head of the mortgaged stock, in the way in which it was disposed of. Look to the evidence and the surrounding circumstances as shown by the evidence, and decide that question of fact." "If you believe that the defendants J. G. Collins and J. W. Souter were discharged under the third plea,—that is, that J. L. Souter disposed of one head of the mortgaged stock by the consent and permission of the plaintiff, and that the lien on it was discharged thereby, and that these sureties had their risk in-

creased by such trade,—you would be authorized to find in favor of the sureties." As to the last paragraph the court states that it was not given in exactly this connection.

J. A. Hixon, for plaintiffs in error. Jaa. Dodson & Son, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 581)

#### MATHIS v. WEAVER.

(Supreme Court of Georgia. Sept. 17, 1894.)

ACTION AGAINST ADMINISTRATOR—POSSESSION OF PERSONALTY—JOINDER OF PERSON IN POSSESSION—JURISDICTION—VENUE.

1. Where the distributee of an estate brings an action against the administrator for assets in his hands consisting of money and property not described, and prays for a judgment in money, a person, whether a resident of the same or of another county, to whom the assets have been delivered by the administrator, and against whom there is no charge made that he converted, appropriated, or mismanaged them, or committed or threatened any wrong as against the rights of the plaintiff, and on whom no demand for the assets has been made, is not either a necessary or a proper party defendant to the action, and as to him the petition sets forth no cause of action, legal or equitable, there being against the administrator no charge of waste or mismanagement nor of any dealing with the assets of the estate, except the placing of them, together with all his own effects, in the custody of the codefendant, and this not being alleged to be wrongful, fraudulent, or hurtful to the plaintiff, or done without her consent.

2. The codefendant of the administrator being a nonresident of the county in which the suit was brought, and the original petition setting forth no cause of action as to him, jurisdiction over him in that county could not, if at all, be obtained by an amendment made to the petition after the death of the administrator, the resident defendant, and before making his legal representative a party.

(Syllabus by the Court.)

Error from superior court, Marion county; W. B. Butt, Judge.

Writ of error by Evan T. Mathis to a judgment in favor of J. A. Weaver, executor. Reversed.

Little, Wimbish & Worrill and J. H. Lumpkin, for plaintiff in error. Blandford & Grimes and Thornton & McMichael, for defendant in error.

PER CURIAM. Judgment reversed.

(94 Ga. 474)

#### BROACH et al. v. O'NEAL.

(Supreme Court of Georgia. Sept. 17, 1894.)

DESCRIPTION IN MORTGAGE—NUMBER OF ACRES—FORECLOSURE SALE.

1. Where a mortgagor, owning at the time of executing the mortgage a tract of land lying all in one body, describes the same in the mortgage as containing 1,000 acres, more or less, and all the contiguous owners are mentioned save one, and the mortgagor himself is not named as a contiguous owner, nor any division of the tract into two parts is indicated or hinted at, and nothing appears to show or suggest that the mortgagee understood or suspected that it

was the purpose of the mortgagor to except or reserve any portion of the tract, the mortgage is rightly construed as embracing the whole tract, although, upon an actual survey afterwards made, the contents are found to be 71.7 acres more than 1,000. The omission of the name of one of the contiguous owners should be treated as casual or accidental.

2. The omission of the words "more or less" after the words "one thousand acres" from the execution founded on the judgment of foreclosure, and from the entry of levy, as made thereon by the sheriff, will not vitiate the sale as a sale of the whole tract, nor limit the quantity sold and rightly to be conveyed by the sheriff to 1,000 acres of the tract. A deviation from the mortgage and from the judgment of foreclosure in so slight an element of description, the other terms of the description being substantially adhered to, and being apparently sufficient to locate and identify the premises, is of no real moment or consequence.

3. It is only when a description of premises is manifestly too meager, imperfect, or uncertain to serve as adequate means of identification that the court can adjudge the description insufficient as a matter of law. In the present case the adequacy of the description as applied to the whole tract was a question for the jury. It was also a question for the jury whether the description in the declaration could be applied, under the facts in evidence, so as to identify any definite part of the whole tract as the premises sued for, and as excluding land covered by the mortgage or by the sale under the mortgage *fi. fa.*

4. Where the question of homestead or no homestead is immaterial, the head of a family can recover upon his own title, without urging the homestead right. On the pleadings as ultimately shaped in the present case, the exclusion of the homestead papers when offered in evidence was harmless. The verdict was correct, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Jones county; W. F. Jenkins, Judge.

Action by A. H. Broach and others against one O'Neal. Judgment for defendant, and plaintiffs bring error. Affirmed.

The following is the official report:

The demises in this action were in the name of A. H. Broach, as trustee or head of his family, consisting of his wife and their minor children named, A. H. Broach, and James L. Hunt, guardian. The land sued for consisted of 70.7 or 71.7 acres in Jones county, described in the declaration and amendment thereto. There was a verdict for the defendant, O'Neal, tenant in possession, Martha Newton being the true claimant. Plaintiff moved for a new trial, and, his motion being overruled, excepted.

The motion contained the grounds that the verdict was contrary to law, evidence, etc. Also: Because the court erred in excluding the homestead set apart to A. H. Broach, as the head of a family, consisting of his wife and three minor children, of the premises in dispute. The application for the homestead was made December 20, 1877, by Broach, to the ordinary of Jones county. The land was duly surveyed, platted, etc., and the homestead duly approved. The objection to its admission was that the affidavit of Broach to the application being to the best of his knowledge and belief, and not positive, ren-

dered it fatally defective. Because the court erred in rejecting from evidence the return of three named persons as processioners. This return was dated August 18, 1887; stated that they, as the processioners appointed by the "court" of Bibb county to survey the lands,—“A. H. Broach lands, mortgaged to Flanders & Son, which were sold the first Tuesday in June, 1887, to satisfy said mortgage, and bid off by William Head,”—notified, 10 days previous to said survey, various persons, naming them, parties adjoining said land of A. H. Broach, all present except William Head, who was represented by his sons-in-law; as processioners, used all precaution to arrive at the true lines, and plainly marked the same, to the full satisfaction of all parties adjoining said mortgaged lands; that they knew the county surveyor did his duty, and his plat they would at any time testify to; that they found, in surveying, the A. H. Broach plantation 1,073.7 acres within the boundary of said plantation; that they had taken off 1,000 acres within the boundaries “of said *fi. fa.* given to Flanders & Son by the said A. H. Broach, and turned over to Mr. William H. Head, as his property, purchased by him on the 7th day of June last, in the town of Clinton, Jones county, Georgia, at sheriff's sale,” and the balance of 71.7 carefully laid off and turned over to Mr. A. H. Broach, and the two acres to Nancy Broach (col.) within her proper boundaries, “of which she now holds and can show deed to purchase by her thirty-five years ago,” signed by them as processioners. A statement annexed also was signed by them, and was that Joshua Harris was not a party adjoining the mortgaged lands in the mortgage *fi. fa.*, but adjoining the lands of said plantation of A. H. Broach. This return was accompanied by a plat and statement, signed by the county surveyor of Jones county, that it was a plat of the survey of the Broach lands, made by him as surveyor, and by the three persons named as processioners, and contained 1,073.7 acres, etc. The objection made by defendant was that there was no order showing the appointment of processioners, and that processioners could not be appointed for such purpose as this proceeding. The court sustained the objection, ruling that the law of processioning was inapplicable to a case of this sort, and was only applicable to re-marking lines once in existence. To this ruling, and the rejection of the evidence, plaintiff excepted. Because, when plaintiff tendered in evidence the plat, the court ruled that the plat would not be admitted to show that the lines were run by authority, but simply as a plat of the survey made. Because the court erred in ruling as follows: On examination of the county surveyor, in answer to the question as to the circumstances under which this survey was made, he stated that he went to the Broach place at the request of processioners, and found them there. The court ruled out this answer, holding that he could state what in-

dividuals were present, and not the official position that they held on that occasion. Because the court erred in admitting the execution of D. Flanders & Son against A. H. Broach, the entries thereon, and the deed of W. W. Barron, sheriff, to W. H. Head. In the execution the land was described as "1,000 acres of land in Jones county, in Hawkins and Roberts district, adjoining lands of James Newsome, Jackson Roberts, and William Johnson, and the Macon & Clinton road." The levy described the land just as the execution. The deed described the land just as the execution and levy, except that it stated the number of acres to be 1,000 acres, more or less, and added to the description: "Being the place now occupied by the said A. H. Broach, and the adjacent property owners of said land having changed since 1874, when the mortgage was given. Said land is now more particularly bounded as follows: On the north, by lands of T. R. Stripling, and formerly owned by James Newsome; on the east, by lands of Jackson Roberts; on the west, by lands of William H. Head, formerly owned by William Johnson; on the south, by Macon & Clinton road." The objections were: (1) That the execution did not follow the mortgage and rule absolute, in this: The rule absolute described the premises as 1,000 acres of land, more or less, lying in the county of Jones, one portion of said land lying in Roberts district, and the other portion in Hawkins district,—bounded on the north, by lands of James Newsome; on the east, by the lands of Jackson Roberts; on the west, by lands of William Johnson; and on the south, by the Macon and Clinton road,—while the execution and levy described the land as above stated; (2) that the deed varied from the execution and levy, in that the deed described the property as 1,000 acres, more or less, of land in Jones county, etc., while the execution and levy described the land as above set forth; (3) because the deed varied from the execution and levy in the added description as to the adjacent proprietors of the land having changed, etc.; (4) because the description in the execution and levy was so uncertain as to be void, and therefore no sale could be made under it; (5) because the description of the property conveyed in the deed was so uncertain and insufficient that no title passed thereunder. Because the court erred in charging: "If you find from the evidence in the case, applying to the evidence the law given you in charge, that the title to the property in controversy was in the plaintiff up to the date of the sale by the sheriff in June, 1887, and if you find further that the sheriff levied upon and sold one thousand acres of land, and not more than one thousand acres of land, and that the defendant claims title under or through that sale, and that the defendant's rights in the property are dependent thereon, then it would devolve on the defendant to show that the property in controversy is embraced in and consti-

tutes a part of the one thousand acres sold at such sale,"—alleged to be error, in that the construction of the levy and sale was for the court, and should not have been submitted to the jury, but the jury should have been instructed that the sheriff levied upon only 1,000 acres, and sold only 1,000. Error in charging: "If you find from the evidence that the sheriff sold one thousand acres, and not more than one thousand acres, and that the one thousand acres sold are capable of identification from the description in the levy; if you find further that the one thousand acres sold could have been identified with reasonable certainty, which is also a question for you to determine; and if you find that the defendant, or some one under the defendant, claims about only one thousand acres, but that the purchaser was put in possession of more than one thousand acres, and that the defendant claims title under or through the sheriff's sale,—then it would devolve on defendant to show that the premises in dispute are embraced in, and constitute a portion of, the one thousand acres levied upon and sold by the sheriff; and, if the defendant does not do so, you should find for the plaintiff, provided the premises sued for are capable of identification with reasonable certainty from the description used in the declaration,"—alleged to be error, in that the court submitted to the jury the question whether the levy and the deed to secure the lands sold had to be capable of identification, this being a question the court should decide from the construction of the papers themselves; further, because the charge authorized the jury to find for the defendant if the tract contains more than 1,000 acres, and only 1,000 acres of that tract was sold. If 1,000 acres, in a body containing more than 1,000 acres, was sold, Broach owned the remainder interest. Until there was a division, he was entitled to remain in possession of the land that he had in said tract; and if he was evicted, though the defendant got a title to 1,000 acres of the body, Broach would be entitled to recover in ejectment to be restored to possession. Further, that portion of the charge which authorized the jury to find for the plaintiff only in the event that the premises sued for are capable of identification with reasonable certainty from the description used in the declaration was leaving that question for the jury, when there was no evidence to authorize the court so to charge, and the construction and declaration were for the court, and not for the jury. Error in charging: "On the other hand, if you find the sheriff sold one thousand acres, and if you further find that the one thousand acres sold are capable of identification from the description in the levy, and the one thousand acres have been reasonably identified by such description in the levy, and that the premises in dispute constituted a portion of the thousand acres, then you should find for the plaintiff,"—alleged to be error, in that the court left the sufficiency of the de-

scription in the levy and deed to the jury, when he should have passed upon the same himself, and because there was no evidence to authorize the charge. Error in charging: "If you find from the evidence that the property sued for is so vaguely described in the declaration as to be incapable of identification with reasonable certainty, then you should find for the defendant; but if you find from the evidence that the property is capable of identification with reasonable certainty, under the description set out, then you would not be authorized to find for the defendant on the ground of insufficient description,"—alleged to be error, in that it was not authorized by the evidence, all the evidence upon this point being allowed before the amendment, and being cured by the amendment.

Hardeman, Davis & Turner, for plaintiff in error. Richd. Johnson, A. M. Speer, and J. M. Torrell, for defendant in error.

PER CURIAM. Judgment affirmed.

(34 Ga. 617)

CARSON v. MAYOR, ETC., OF CITY OF FORSYTH.

(Supreme Court of Georgia. Sept. 17, 1894.)  
TAX ON OCCUPATIONS—LEVY BY CITY—CONSTITUTIONALITY OF ACTS.

1. The title of the act of March 5, 1875 (Acts 1875, p. 165), touching the city of Forsyth, is sufficiently comprehensive to embrace all the provisions of the act in relation to the imposition and collection of taxes; and the act relates to one subject-matter only, to wit, the municipal government of the city.

2. The amendatory act of 1879 (Acts 1878-79, p. 269) is not unconstitutional for any reason specified in the assignments of error.

3. The imposition of an ad valorem tax upon property, either under the constitution of 1868 or that of 1877, would not hinder the imposition of a specific tax on business as such, though the property taxed be used in the conduct of such business.

4. An act authorizing the municipal authorities of a city "to make such assessments and levy such taxes on the inhabitants of said city who transact or offer to transact business therein, and on such persons as live without the limits of said city, but who transact or attempt to transact business within the limits of the same, as said mayor and aldermen may deem expedient for the safety, benefit, convenience, and advantage of said city," is sufficiently comprehensive to authorize the imposition of a special tax on all business occupations carried on in the city, and one class of such occupations may be taxed without taxing other classes.

5. The local act of 1875 authorizes the issuing of executions for unpaid taxes, whether ad valorem or specific, due the city of Forsyth, and the collection of the same by levy and sale; and the amendatory act of 1879 expressly provides that the taxes on occupations thereby authorized may be collected in the manner and by the means pointed out in the act of 1875. Where the same person in that city carries on two separate and distinct occupations liable to taxation in different amounts, an execution may issue for a gross sum including the amounts of all the special taxes for which such person is liable and in default.

6. It cannot be ruled as a matter of law that carrying on both a livery stable business

and a sale stable business is not two occupations, but one only.

7. The execution not being attacked in the pleadings for failure to specify on its face the particular occupations on which the tax was imposed, this question is not one for adjudication. (Syllabus by the Court.)

Error from superior court, Monroe county; J. J. Hunt, Judge.

Petition by Henry J. Carson for an injunction to restrain an execution issued by the city of Forsyth for a special tax. The injunction was denied, and plaintiff brings error. Affirmed.

The following is the official report:

An execution issued by the city of Forsyth, directed to the chief of police of that city, against H. J. Carson, for \$35, "special tax for the year 1893," was on May 9, 1893, levied on certain property of defendant. He filed his petition asking for injunction, and that he be held not liable for such tax, and that the same be held illegal. Upon the hearing the injunction was denied; to which he excepted.

Plaintiff made affidavit: Had no notice that special or license tax was required by the city for sale stable business until about April 1, 1893, when was shown for first time printed copy of ordinance. Has not engaged in sale business in city since said notice. Made no sale of stock, and did not conduct such business after the last of March, 1893. Had no notice, nor was tax demanded of him, until after he stopped said business. The card in evidence, signed by clerk of city council, showing council had valued deponent's property used in livery business for ad valorem tax in 1893, was received by mail. The receipt was given by the treasurer of city council when deponent paid \$17.33 for ad valorem tax for 1893 on his stables, stock, etc., used in the livery business. There was about \$2,250 on said card, which represented the stables, and \$400 for his stock which he used in the livery business. He paid ad valorem tax for 1893 on said property, as shown by receipt, and the city council is now seeking to force him to pay special or license tax for business on which he has paid ad valorem tax for 1893. The clerk of the city council testified: The ordinances were not recorded on the minutes until about June 1, 1893. Were printed in circular form in February, 1893, and copies were stuck up at public places in the city, not until after February 1st. Plaintiff introduced the card above mentioned, notifying him that his city property was assessed for taxation, "Real estate, \$2,750; stock in trade, \$400." This card was dated October 10, 1893, and showed his total taxes to be \$17.32 upon such real estate and stock in trade, and for the cemetery. He also introduced the receipt from the city treasurer for \$17.33 ad valorem tax for 1893, dated December 14, 1893. He also introduced ordinances of the city council for 1893 as follows: "Sec. 14. Each sale stable keeper shall pay in advance a license of \$20. Sec. 15. Each feed and sale stable keep-



er shall pay in advance a license of \$25. Sec. 16. Each livery stable keeper shall pay in advance a license of \$15." Also the section providing that any person violating any section of the above ordinance should, on conviction, be fined not less than half nor more than the whole tax under the section violated, or be imprisoned, one or both, in the discretion of the mayor. Defendant introduced evidence showing the following: In the early part of 1893, Carson was engaged in running both a livery and sale stable business in Forsyth. During 1893, and several times prior to the issuing of the executions against Carson for special tax, the city treasurer called on him several times, and demanded license, both for livery and sale stable business, which he refused to pay. Defendant also introduced two sections of its general ordinances, the first of which provided that all executions issued in pursuance of an order of the mayor and council for the enforcement of any order of the city, should be signed by the clerk, bear test in the name of the mayor, and be levied by the marshal. The second provided that, if any person taxed by any section of the ordinances should fail or refuse to pay the same when called on, the same might be forthwith collected by execution or otherwise, as the mayor and council might direct.

Plaintiff alleges that the judge erred in refusing the injunction, on the following grounds: (1) Because the execution issued by said city, and under which said "special tax" is sought to be collected for the year 1893, does not show on its face or elsewhere for what business said special tax is sought to be collected; its language being, "You cause to be made the sum of \$35, 'special tax' for the year 1893;" and plaintiff in error alleges special error in said ruling, for the reason that the ordinance for 1893 does not provide for collection of the special tax of \$35 for either the livery or the sale stable business, but provides (section 14) "each sale stable keeper shall pay a license of \$20," and (section 16) "each livery stable keeper shall pay license of \$15," and not a special tax on business. (2) Because in neither the charter of said city by act of the legislature in 1875, nor the amendment thereof, passed in 1879, is the authority granted said council to collect a "special business or license tax on the business of sale stable keeper," and therefore the mayor and council have no charter or legal authority to levy and collect said tax. (3) Because the judge erred in said judgment, for the reason that the sixteenth section of the ordinance provides for the collection of \$15 for each "livery stable keeper," and said execution is proceeding for \$35 special tax, and as a matter of fact plaintiff was only engaged during the year 1893 in livery stable business; and, if he had made sales, by a universal custom of said city this right was included in his business as livery stable keeper, and no extra license tax was collected. (4) Because neither the charter of said city nor the or-

dinance provided for the collection of special license tax by levy and sale, but provides in section 58 of the ordinance and section 18 of the charter for fines and imprisonment for violation thereof; and said judge erred in rendering said judgment and in refusing said injunction. (5) Because said charter was created by act of the legislature of March 5, 1875, and the amendatory act of 1879, under which authority is claimed to collect said special tax, which was operative under the constitution of 1868; and in section 5019 thereof it is provided that taxation of property shall be ad valorem, and uniform on all species of property taxed, which said clause does not convey authority to collect a special or license tax, and therefore said charter is in conflict with said section 5019 of said constitution, as the same does not authorize or provide for the collection of a special or license tax in the said section or elsewhere. (6) Because said act of 1875, creating said charter, is contrary to section 5056 of the constitution of 1868, which provides in said section, "nor shall any law or ordinance pass which refers to more than one subject-matter or contains matter different from what is expressed in the title thereof," for the reason that the body of said act of 1875 contains matter different from what is expressed in the title, and the body of said act refers to more than one subject-matter. (7) Because the amendatory act of 1879, under which said council claims authority to collect said special or license tax, being a part of the act of 1875, creating said charter, is controlled by the constitution of 1868, and is in conflict with section 5019, which limits the power of taxation of property to an ad valorem tax, and does not provide for or allow special or license tax as provided in said amendatory act of 1879.

Stone & Clark and J. P. Carson, for plaintiff in error. Berner & Bloodworth, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 673)

FARMERS' CO-OPERATIVE MANUF'G  
CO. et al. v. MIDDLE GEORGIA MAN-  
UF'G & IMP. CO.

(Supreme Court of Georgia. Sept. 17, 1894.)

BOND TO DISSOLVE GARNISHMENT — DEFENSES TO  
LIABILITY — RECEIVER — JOINDER AS DEFENDANT  
— LEAVE OF COURT — JOINT DEMURRER.

1. The petition sets forth a cause of action. A bond with security, given since the act of October 15, 1885, to dissolve a garnishment, but conditioned to pay the judgment recovered in the action, instead of pursuing the terms of the statutory condition, may be enforced by suit, subject, however, to any substantial defense, such as nonliability of the garnishee or exemption of the fund garnished, which would have prevented the fund from being adjudged subject, and hindered judgment from being entered upon the bond had it been given with the condition prescribed by the statute.

2. That a receiver is improperly sued with other defendants, without leave of the court that appointed him, is no cause for sustaining a joint demurrer by all of the defendants. The receiver, however, should be stricken from the action as a defendant where no leave to sue him could have been properly granted.

(Syllabus by the Court.)

Error from superior court, Spalding county; J. J. Hunt, Judge.

Action by the Middle Georgia Manufacturing & Improvement Company against the Farmers' Co-operative Manufacturing Company and others. A demurrer to the petition was overruled, and defendants bring error. Affirmed.

The following is the official report:

The Middle Georgia Manufacturing & Improvement Company brought its petition alleging that the Farmers' Co-operative Manufacturing Company, as principal, and Searcy, Walker, Johnston, Walker, and Wilson, as sureties, were jointly indebted to petitioner \$3,215.72, principal, \$1,020.40, interest thereon to September 28, 1893, and \$12, cost of suit, besides interest on said amounts since September 28, 1893. Defendants demurred to the petition, and the overruling of the demurrer is excepted to. The petition alleges that said indebtedness exists by reason of the following facts: On October 25, 1890, petitioner commenced suit in the superior court against the Farmers' Co-operative Manufacturing Company on two promissory notes, aggregating \$3,637.94, besides interest; and, while such suit was pending, petitioner, in due form of law, sued out process of garnishment, and had summons of garnishment served on the Griffin Banking Company, October 25, 1890. At the time of said service the garnishee had \$3,815.82 in money and \$7,272.06 in notes belonging to the Farmers' Co-operative Manufacturing Company, and subject to the garnishment. To get possession and control of the same, said defendant company and the sureties before named entered into an obligation in writing, dated October 30, 1890, for the payment of \$7,375 to "the Middle Georgia Improvement and Manufacturing Company," subject to the following condition: "That the said Middle Georgia Improvement and Manufacturing Company has an action pending in the superior court of said county for the recovery" of \$3,637.94, "which the said Middle Georgia Improvement and Manufacturing Company alleges is owing to them by the said Farmers' Co-operative Manufacturing Company; and that the Middle Georgia Improvement and Manufacturing Company has sued out summons of garnishment, which summons has been served on the Griffin Banking Co., a corporation, also of said county. Now, if the said Farmers' Co-operative Manufacturing Company shall pay to the Middle Georgia Improvement and Manufacturing Company the amount which may be recovered in said action, and cost thereon, then this bond to be void." This bond was executed by the defendants, and

tendered to and left with the clerk of the superior court, who accepted and approved it, and notified the garnishee of such acceptance and approval; whereupon the garnishee surrendered to the Farmers' Co-operative Manufacturing Company the money and notes in the garnishee's hands belonging to said company, and subject to the garnishment, and liable to the payment of petitioner's claim, and the same were delivered by reason of said bond and on the faith of it. Petitioner alleges that, although the bond on its face is payable to "the Middle Georgia Improvement and Manufacturing Company," in truth it was the intention of the makers when they executed and delivered it that it should have been made in favor of "the Middle Georgia Manufacturing and Improvement Company," and it was made, used, accepted, and approved for the purpose of dissolving the garnishment, and getting possession of the money and notes in the hands of the garnishee which were subject to the garnishment, and, by reason of the giving of said bond, the defendants did get possession of said money and notes, and all of them received a benefit or value therefrom; that the bond was so drawn through inadvertence or mistake of the writer of it, Searcy, the president of the defendant company, and the mistake was not discovered by petitioner until September, 1893; but that wherever the words "Middle Georgia Improvement and Manufacturing Company" occur in the bond they refer to petitioner, and were intended to mean and be written "Middle Georgia Manufacturing and Improvement Company," and the bond was understood to be payable to petitioner at the time of its execution. It is further alleged that said bond given to dissolve the garnishment was not a statutory bond or obligation, and consequently not such a bond as a judgment could be taken against the garnishee upon, but was simply a bond or obligation to pay the amount that might be recovered in the action then pending against the defendant company. At the September term, 1893, of the superior court, petitioner obtained judgment against the defendant company for \$3,215.72, principal, \$1,020.40, interest, and \$12, costs, which judgment the defendants refused to pay. The defendant company has failed, and been put into the hands of a receiver, by order of this court, and the receiver also fails and refuses to pay said judgment. Process is prayed against the defendant company, the parties signing the bond as securities, and the receiver. The grounds of the demurrer are: (1) No cause of action set out. (2, 3) No allegation that the garnishee ever made answer admitting property or funds in its hands belonging to defendant, which the court decided were subject to garnishment had the garnishment not been dissolved. (4) Plaintiff has not obtained the judgment of the court where the garnishment is pending, against the property or funds against which the garnishment issued. (5)

Defendant company and all its assets are shown to be in the hands of a receiver, and no judgment can be obtained against said company which would bind the assets in the receiver's hands, and the petition does not show that plaintiff had obtained the permission of the court which appointed the receiver to bring suit against him. (3) Failure to allege or set out any affidavit made or bond given by plaintiff to authorize the issuance of the garnishment.

Dismuke & Mills and J. S. Boynton, for plaintiffs in error. Hammond & Cleveland and R. T. Daniel, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 507)

COLUMBUS SOUTHERN RY. CO. v.  
WOOLFOLK et al.

(Supreme Court of Georgia. Sept. 17, 1894.)

CARRIERS — DELIVERY OF SHIPMENT — TIME FOR  
PAYING FREIGHT — SWITCHING ON SIDE TRACKS  
— DUTIES OF CONSIGNEE.

1. Where commodities, such as watermelons, are shipped in full car loads by railroad from one city to another, the freight is due, in the absence of an express contract fixing a different time, when the cars reach the usual place of storing such cars in the city of destination, and the consignee is notified of their arrival and of the company's readiness to deliver. This is so although it may be necessary, before actual delivery can be made, to switch them out, and place them upon particular tracks of the company, designated as "team tracks." The consignee has no right to postpone the payment of freight until they are placed on those tracks, but he can insist, after paying the freight, that they shall be placed there immediately, or as soon as it can be done with full diligence in the ordinary course of business.

2. If the consignee was in no default in failing to pay the freight, and there was no tender of delivery without payment, he was under no duty to sell the melons while they were in the possession of the carrier.

(Syllabus by the Court.)

Error from superior court, Dougherty county; B. B. Bower, Judge.

Action by Woolfolk & Co. against the Columbus Southern Railway Company. Judgment for plaintiffs, and defendant brings error. Reversed.

Following is the official report:

Woolfolk & Co. sued the Columbus Southern Railway Company for damages which they alleged they sustained by failure of defendant to convey with proper dispatch, and properly deliver to the consignee, in Chicago, six car loads of watermelons shipped by plaintiffs from Albany, Ga. There was a verdict for plaintiffs for \$420, and, defendant's motion for a new trial being overruled, it excepted. The motion contained the general grounds that the verdict was contrary to law, evidence, etc., and also the ground that the court erred in overruling defendant's motion for a nonsuit, made on the grounds that the evidence did not sustain the allegations of the declaration, and was

not sufficient to entitle plaintiffs to recover. Error in refusing to charge the following written request of defendant: "Even if the jury should believe from the evidence that defendant was at fault in the delivery of the melons, still, if, on the 20th of July, plaintiffs' agent could have realized one hundred dollars per car for said melons, it was his duty to have sold them; and, if the difference between the amount so realized and the amount the melons were worth on arrival was not more than the freight and charges on the melons, then the plaintiffs can recover nothing." Because the court, after giving in charge the following written request of defendant: "Defendant was not bound to deliver the melons until the freight and advances were paid, and if defendant was ready to deliver the melons on payment of freight and charges, and plaintiffs failed to pay the same, then plaintiffs cannot recover,"—added, in connection therewith, the following qualification: "I charge you that it is the law, and further that the defendant was not ready to deliver the freight until it got to the place where this consignee could receive it, and it was their duty to put it at a place where this consignee could receive it, before consignee was bound to pay the freight. Just as I said before, if they had put it at a place where he could receive it, then they were in a position to demand the freight before they delivered the melons; but so long as it was not put at a place where he could receive it,—until this was done,—it hadn't reached its destination, and, if it was shipped for freight to be paid at destination, they had no right to demand payment before it reached its destination." Movant insists that the written request was a proper charge, and that the court erred in making the qualification thereof. Error, after giving the following written request of defendant: "If the defendant carried the melons to Chicago, and notified the consignee in due time, and stood ready to deliver the melons to consignee on payment of freight, and consignee did not pay the freight, then plaintiffs cannot recover, and the verdict should be for the defendant,"—in adding the following: "I charge you that the defendant did not stand ready to deliver until they put the cars at some point where he could receive them. The plaintiffs were not bound to pay the freight until the melons were at some place where they could be received. If they could not be received at 49th street, could not be delivered there, then no freight was due on them if the freight was to be paid at the destination." Movant contends that its request should have been given without qualification or restriction, and that the court erred in making the addition to the request. Error in charging: "It was the duty of the railroad to place the freight where it could be delivered,—where it could be received. If it could not be received at

49th street, and if the shipment was made for the freight to be paid at the destination, the destination was not reached until the cars were put at a place where the consignee could get his freight; and they had no right to demand the freight until the cars had reached that destination, if it was shipped for freight to be paid at the destination. They might just as well demand the freight en route at some point between here and there, as at some point that was not the destination. The true destination of that freight was at a point where a man could have gone there and unloaded the cars. That was the destination, and no other place was the destination; and if he could not have done that at 49th street, although he could have gone there and examined the freight, and although he could have taken purchasers there, he was not compelled to do it." Error in charging further, in that connection, as follows: "A man is not obliged to sell freight and goods like other people want him to do it. He can do like he wants to do it. It is their duty to place freight at some place where he can take it off, and do as he pleases with it. The fact that he could have carried purchasers does not require him to do it. He might have wanted to sell it,—might have wanted to dispose of it some other way, at retail at his own store,—or he might have wanted to carry them to some place where he could throw them away if he wanted to. There is nothing at all in the view that he could have taken a purchaser to 49th street, and sold them there, because he was not compelled to do it all, and it does not enter into the case at all. You should entirely eliminate that question." Error in the charge as a whole, because the charge sets forth the theory of the plaintiffs with undue emphasis and prominence, and fails to properly set forth the theory of the defense.

Wooten & Wooten and Worrill & Little, for plaintiff in error. W. T. Jones, for defendants in error.

PER CURIAM. Judgment reversed.

(94 Ga. 690)

#### STUDSTILL et al. v. WILLCOX.

(Supreme Court of Georgia. Sept. 17, 1894.)

**PAROL GIFT OF LAND—EVIDENCE—ADVERSE POSSESSION—OCCUPATION UNDER PAROL CONTRACT OF SALE—SHERIFF'S DEED—IDENTITY OF PROPERTY—LEVY OF EXECUTION.**

1. If a parol gift of land was made in 1849 by a father-in-law to his son-in-law, and the son-in-law entered, made valuable improvements, continued in possession more than 7 years while the father-in-law was in life, claiming the land as his own, and (so far as appears) not paying rent or otherwise acknowledging ownership in the latter, then sold and conveyed to a purchaser for value, the legal representative of the father-in-law could not, in an action brought more than 30 years after the gift, recover the

land from one in possession, whose title was derived from the son-in-law by conveyances through successive vendees. Parol evidence to prove the gift, and the admissions of the father-in-law that he had given, and to prove all the facts and circumstances tending to establish the donee's equitable right to stand upon the gift, and to retain and transmit possession under it, is admissible in resistance to the action.

2. One who has actual possession of land under color of title does not, relatively to strangers, part with or lose such actual possession by contracting orally to sell the land to another, and putting him in possession under such contract. While the strict relation of landlord and tenant does not result from such arrangement, the relation of principal and agent, or that of a quasi tenancy, in respect to the occupancy of the land, does result, by reason of which the actual occupant holds under and for him who has the color of title, so long as the agreed purchase money is unpaid. And the same rule prevails with respect to a second purchaser by parol, admitted into possession by the first, where such change is acquiesced in by such holder of the color of title. All who come in successively, and are accepted or not objected to by him, represent him in the possession, and his color of title will inure to their benefit as well as to his own in case any one of them, with the consent of the others, should ultimately satisfy his claim for purchase money, and take from him a conveyance of the premises. Thus, where A., having entered under color of title, contracted by parol to sell to B., put him in possession, and B., failing to pay, restored possession, and then A. contracted by parol to sell to C., and put him in possession, and C. contracted by parol to sell to D., and put him in possession, after which, and pending this possession, A., with the consent of all parties, conveyed to D., there being no evidence that any purchase money was paid previous to the execution of this conveyance, all the connected and continuous possession of the premises up to that time should be treated as the possession of A. relatively to the statute of prescription. And this possession may be tacked by D., and by others coming in afterwards under color of title derived from him, to complete the statutory term of prescription in behalf of the present occupant. If A. received his purchase money when he contracted to sell, or at any time afterwards previously to executing a conveyance to D., he would hold his color of title up to the latter time in trust for his vendee or such successor to him in the possession as would at any time be entitled equitably to a conveyance on account of such payment and the stipulations in the various parol contracts of the successive occupants.

3. The fl. fa., with the levy thereon and entry of sale, offered in evidence, was admissible because a part of the color of title relied upon, and because the entry of levy was material as tending to explain a patent ambiguity in the sheriff's deed affecting the identity and quantity of land sought to be conveyed by the deed.

4. It was competent to aid the levy by parol evidence that the lot of land described by number and district, without mentioning the county, lay in Telfair county.

(Syllabus by the Court.)

Error from superior court, Dodge county; C. C. Smith, Judge.

The following is the official report:

An action of ejectment was brought on the demise of Peter H. Coffee, as administrator of Mark Willcox, against William Studstill and Bob Fletcher, for lot 316 in the fourteenth district of originally Telfair, but now Dodge, county. Pleas of the gen-

eral issue and of the statute of limitations were filed. The declaration is not in the record, and it does not appear when the action was brought. The case was tried at the March term, 1893, of Dodge superior court. J. C. Willcox, who appears to have been administrator de bonis non of Mark Willcox, was made party plaintiff instead of Peter H. Coffee, deceased, and there was a verdict in his favor for the premises in dispute. In the bill of exceptions the action is stated to have been for the lot of land. From the record it appears that it was for 130 acres, more or less, of said lot on the west side of Mill creek. A motion was made for new trial, which was overruled, and defendants excepted.

The motion contained the grounds that the verdict was contrary to law, evidence, etc. Also because the court refused to allow defendants to introduce any evidence going to show that Mark Willcox had made a parol gift of the land in dispute to his son-in-law, Wright Collins. Defendants claimed through Wright Collins. Because the court refused to admit an execution offered by defendants in favor of Campbell, guardian, etc., against W. R. Walker, Wright Collins, and William Studstill, upon a judgment rendered at the — term of Telfair court, upon which execution appeared an entry of John Larkey, a sheriff, of levy on various lots of land in the fourteenth district, among them all of lot 316 lying west of Mill creek, the levy being on said lands as the property of said Walker, Collins, and Studstill, and dated June 9, 1869. Also an entry by the same person that said lands were bid off by M. A. Walker for \$300. Error in admitting in evidence, over defendants' objections, the deed made by Peter H. Coffee, administrator of Mark Willcox, to T. P. Willcox, without the order of the ordinary authorizing the sale of the lot. It was not stated in this ground what objection was made to this evidence when offered. It appears that plaintiff also put in evidence a deed from T. P. Willcox to J. C. Willcox to the land in dispute, dated February 1, 1878, which was admitted for the same reason, which reason appears in the next ground of the motion. In his interrogatory Coffee testified that, as administrator of Mark Willcox, he advertised several lots of wild land, and sold them at the county site, and the lot in dispute was sold by his permission, though it was not in the advertisements, and was bid off by Willcox, and Willcox has never paid anything for it. He did make T. P. Willcox a deed, but did not consider it as setting up a claim to the land, but merely did it to gratify some of the heirs of the estate; and that he merely allowed said land to go to sale to gratify John C. Willcox. Because the court erred in charging the jury that they might consider the deed mentioned in the last ground of error from Coffee, administrator, to T. P. Willcox, although the same was de-

fective, in not being accompanied by the order of the ordinary; this deed being admitted expressly and only for the purpose of showing good faith in the present plaintiff in bringing the suit. Error in refusing to allow defendants to prove that the Mill creek referred to in the levy above mentioned, and the lot in dispute, are, or were then, in Telfair county. Error in not admitting the claim affidavit of C. B. Cole, agent of William R. Walker, made November 2, 1863, that Peter H. Coffee, administrator of Mark Willcox, had advertised and was proceeding to sell lot of land No. 316 in the fourteenth district of Telfair county as the property of Mark Willcox, the sale to be on the 3d day of November, 1863; and that said lot was not the property of Mark Willcox, but the property of William R. Walker, as deponent believes. This affidavit was offered in connection with evidence of Peter H. Coffee (the affidavit being attached to his answers to interrogatories sued out in the case) to the effect that as the representative of Mark Willcox he attempted to sell the land, and Judge Cole, then acting as counsel for W. R. Walker, filed a claim affidavit to the land, and stopped the sale, and it was settled in Walker's favor; that at the time he attempted to sell the land W. R. Walker was in possession of it; and that he had papers in his possession relative to the case then brought, but he gave W. R. Walker the paper, as a showing from him, as the representative of Mark Willcox, relinquishing all claim to the land. Because the court erred in admitting, over objection of defendants' counsel, the following rent contract, made by J. W. Stevenson to John C. Willcox, signed, sealed, and delivered by Willcox in the presence of two witnesses: "Georgia, Dodge county. In consideration of the lease of lot of land number three hundred and sixteen (316), being in the fourteenth district of said county, for the term of three years, commencing from this date, and terminating on the 29th day of Dec., 1880, I agreed to pay John C. Willcox the sum of \$25.00 in annual installments at the expiration of each year, and to surrender to him the possession of said lot of land at the expiration of three years, or sooner should I make default of paying said rent for ten days after the surrender of this agreement becomes due, and said J. C. Willcox should claim a forfeiture of this lease. This Dec., 1877." It does not appear from this ground what objection was made to the evidence when offered. Because the court erred in rejecting the evidence of Peter H. Coffee, Susan C. Burch, and John Cravy, offered in evidence by defendants' counsel, the same being their several answers to interrogatories sued out in said case; the evidence of Peter H. Coffee being as follows, to wit: "Myself and Mark Willcox were riding over said lot of land together, and Willcox told me he had given that lot of land to Collins." The

evidence of Susan C. Burch being as follows, to wit: "I heard a conversation between Mark Willcox and Wright Collins about the year 1849. I don't remember the number of the lot of land as being No. 316, but I do remember the Ford lot of land, then in Telfair county, but now Dodge county. The conversation took place at my father's house. Myself, father, and mother, and Wright Collins and his wife, and other members of the family. Father told Wright Collins, if he would buy the Bishop lot of land, that he would give his wife the Ford lot, and Wright Collins did buy the Bishop lot, and father gave him the Ford lot. I have heard father tell Wright Collins that he would make him a deed any time." The evidence of John Cravy offered being as follows, to wit: "In the year 1850 or 1851, at my house, I heard Mark Willcox tell Wright Collins to 'give the lot of land in to the tax receiver in Collins' name, as I have given you the land, and am ready to make you a deed any time you call for it.'" And also the evidence of William Studstill, as follows, to wit: "Mark Willcox told me in the fall of 1849 or 1850 that he had given Wright Collins the lot of land." Susan C. Burch is the daughter of Mark Willcox. Error in refusing to charge, as requested by defendant's counsel: "That if the jury should believe from the evidence that Wright Collins had been put in possession of the lot by his father-in-law, Mark Willcox, and that Collins' possession had been continuous and unbroken and peaceable and for more than seven years, and had been adverse, and that W. R. Walker, who had purchased from him, had gone in and remained in possession, under his deed, more than seven years; that the possession of Walker could be tacked onto that of Collins, and this would make a good prescriptive title, and would be such a higher outstanding title than that of plaintiff as that would defeat the plaintiff's title, and he could not recover." Because the court erred in charging the jury that the possession of W. R. Walker, who had purchased from Wright Collins, could not be tacked to the possession of Collins to make a prescriptive title under such color of title. Error in charging: "That if they believed from the evidence that J. E. Walker went into possession under a parol contract made with M. A. Walker for the purchase thereof, and that Ben Clark went into possession of the lot under parol contract for the purchase thereof made with J. E. Walker, and that J. W. Stevenson went into the possession of the lot under a purchase of the lot from Ben Clark, though all these transactions were made and done with the knowledge and consent of M. A. Walker, the original grantor, and that he made the deed to Stevenson, yet their possessions so had and held could not be tacked together with that of M. A. Walker to make out a prescriptive

title, although they together should amount to more than seven years, if it should not appear that J. E. Walker or B. F. Clark were not tenants or agents of M. A. Walker." Because the court erred in charging the jury that the statute of limitations had been suspended in this case two years from December, 1861, to January 1, 1863. Because, after the jury had been out all night, and had failed to agree on a verdict, and had the next morning been brought into court, and were asked whether they had agreed on a verdict, and the foreman had answered they had not, and the court asked them whether it was a question of fact or law, and the foreman replied that they had decided that neither party had been in possession seven years, the court then charged the jury that if they believed the plaintiff had shown an unbroken chain of title from the state down to Willcox they should find for the plaintiff. The court charged the jury that the plaintiff was not setting up title by prescription. This defendants allege as error. Because, after the court had charged as stated in the last ground, the court erred in refusing to charge as requested by defendants' counsel: "That if the jury believed that W. R. Walker went into the possession of the lot under a deed made by Wright Collins to him, and made valuable improvements thereon, and remained in the open and peaceable and continuous possession thereof for seven years or more, such a state of facts constituted a good prescriptive title in him, and plaintiff could not recover;" and, further, that if the jury should believe from the evidence that M. A. Walker went into possession of the lot under the deed from John Larkey, sheriff, and the said M. A. Walker put J. E. Walker in possession, and that J. E. Walker put Ben Clark in possession thereof, and that said Clark put Stevenson in possession, and that said Stevenson put said Clark back in possession, and that Clark put Fleetwood in possession, and that said Fleetwood put defendant Studstill in possession, and that if the jury should believe these several parties had succeeded each other, and that their possession had been continuous, peaceable, and unbroken, and for more than seven years, their possession should be tacked together, and that constituted but one possession, and made a good prescriptive title possession and title in defendants, and plaintiff could not recover. This request was made after the jury had been brought into the court, when they said they had decided that defendants did not have a good prescriptive title.

Jordan & Watson, B. R. Calhoun, and J. H. Martin, for plaintiffs in error. Roberts & Smith, for defendant in error.

PER OURIAM. Judgment reversed.

(94 Ga. 536)

**RAWLSTON v. EAST TENNESSEE, V. & G. RY. CO.**

(Supreme Court of Georgia. Sept. 17, 1894.)

**INJURY TO RAILROAD EMPLOYE—CONTRIBUTORY NEGLIGENCE.**

Under the facts disclosed by the record, there was no error in granting a nonsuit.

(Syllabus by the Court.)

Error from superior court, Glynn county; J. L. Sweat, Judge.

Action by Haywood Rawlston against the East Tennessee, Virginia & Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

The following is the official report:

Rawlston sued the railway company for damages for personal injuries. After the plaintiff closed his testimony, defendant moved for a nonsuit, which motion was granted, and to this ruling plaintiff excepted. For plaintiff a witness testified: "Along in the first of 1888, near the seventeen-mile post on the railroad of defendant, I came upon Rawlston and Ralford, supervisor of that part of defendant's roadbed. They were standing on defendant's track about a mile nearer Jessup than the seventeen-mile post. I heard Ralford tell Rawlston to hurry on down the track towards Brunswick as fast as he could; that, about a mile from where they were talking, he would see a bad and a dangerous break in the rails, on the left-hand side coming from Brunswick, and that Rawlston must hurry on and get it repaired in time for the passenger train from Brunswick to pass over it safely. Ralford looked at his watch, and told Rawlston he must hurry, as the passenger train from Brunswick would be there in about an hour; that he must not try to flag down or stop the train, but must have the track fixed in time for it to pass over. Rawlston walked rapidly down the railroad towards Brunswick, and afterwards, when I reached the place where I was cutting wood, about one hundred yards from where he stopped and went to work, I could hear him striking the rail with his sledge hammer. In about thirty or forty minutes I saw the passenger train coming. Saw the smoke of the train before the train came in sight. It was running about thirty miles an hour, and did not blow any whistle or ring any bell or slacken speed until it had passed the place where Rawlston was at work, when it blew the whistle, stopped, and backed to where Rawlston was working. The road is straight for probably a mile from where he was working down towards Brunswick, and there was nothing I know of to prevent him from seeing the train coming." Another witness testified: "One day in January, 1888, when near the seventeen-mile post of defendant, I saw Rawlston repairing a bad and dangerous break in the rail, on the left-hand side of defendant's track running from Brunswick towards Jessup. When I spoke to

him, he was working very rapidly and excitedly, driving the loose rail back into its usual and necessary position, so that the ends of the two rails would meet and join together. The fish plate which held the ends of the rails together had been torn up from the place where he was working, and the rails had lapped about four or five inches, and at the place where they had so lapped there was a space of four or five inches between the two. Of the two rails so lapped, the one nearest Brunswick was loose and out of place, and had slipped and lapped over four or five inches on the outside of the one nearest Jessup, so that if the passenger train from Brunswick, which was then nearly due, had run upon the rails in the position in which they then were, it would necessarily have been wrecked. When I spoke to him, he did not stop working, but replied he did not have time to talk, as he was fixing that dangerous break, and had to get it fixed so that the passenger train from Brunswick, which was due there in a short while, could pass over it with safety. I did not help him, because he had no tools except a shovel and sledge hammer. He was using the latter himself, and the shovel could not be used to assist him. He was standing astraddle of the loose rail, with his back towards Brunswick, and was driving the loosened rail back towards Brunswick, so that he could get the ends together and fasten the loose rail. This was the only position in which he could stand and drive the rail back into position. He appeared to be considerably excited, and was working very rapidly. I had gone off about ten steps when I saw the passenger train coming from Brunswick, at its usual speed of thirty or forty miles an hour. When it was about two hundred yards off, he turned his head, and looked towards it, without moving the position of his feet, and jerked off his hat, and waved it two or three times at the train, and immediately resumed striking the rail with his sledge hammer as fast as possible. I hollered to him to look out, and, just as I did so, the train struck him. The engine then blew, and the train ran on for a good little distance, then stopped, and backed back, and took him up and carried him off. There was nothing to prevent him from seeing the train for about a mile down the track, nor to prevent the engineer seeing him. The railroad, for a half mile from where he was struck towards Brunswick, was straight, and on a gradual down grade nearly all that distance. There was nothing to prevent him from getting off the track sooner, but if he had done so, and left the track as it was, it would certainly have ditched and wrecked the train, and probably resulted in the death of many of the passengers and servants of defendant who were on it. He had nothing to do with the running of the train, but was what is called a

'track walker,' whose duty it was to keep the roadbed in such repair that trains could safely pass over it. The train did not blow its whistle, ring its bell, nor slacken speed until after it had struck him and knocked him off the track." Evidence was also introduced by plaintiff as to his age, extent of the injuries inflicted, wages, etc.

S. C. Atkinson, S. R. Atkinson, and J. W. Bennett, for plaintiff in error. Goodyear & Kay, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 543)

ANTHANISSEN v. DART et al.

(Supreme Court of Georgia. Sept. 17, 1894.)

**SALVAGE SERVICES — ACTION IN STATE COURT — AMOUNT OF RECOVERY — EVIDENCE — RECORD IN ANOTHER ACTION — JOINDER OF PLAINTIFFS.**

1. The laws of Georgia furnish to suitors no remedy or process which operates purely as a proceeding in rem. Consequently, that principle in the law of salvage which allows bounties and rewards for perilous service, in addition to the actual value of the service, cannot be recognized and applied by the courts of the state, but should be treated as matter belonging exclusively to the admiralty jurisdiction of the United States. But the peril of the service, both to life and property, and the value of the property saved, may be taken into consideration in arriving at the value of the service, where there was no express agreement touching the amount of compensation.

2. The plaintiffs suing now for services rendered in saving a vessel, and seeking to recover upon principles of the law of salvage and for the value of the services, without reference to any express contract, the record of a previous action brought by the plaintiffs jointly with another plaintiff, whether a corporation or not, is receivable for the admissions contained therein tending to show, in connection with parol testimony, that the services then sued for were the same, so far as the present plaintiffs are concerned, as those now sued for, and were in fact rendered upon an express written contract, which was joint as to all the plaintiffs in the former action, and which fixed a lump sum to be paid to and received by them jointly. Though the admissions might not operate as an estoppel, yet they would be relevant evidence bearing both upon the right to recover and the measure of the recovery.

3. Where three render services without request, and another takes the benefit of the general result, thereby rendering himself liable on an implied undertaking to pay for the services, the three are not bound to sue jointly merely because they co-operated in rendering the services, and had an understanding among themselves as to a division of the compensation. Each one is entitled to stand upon his right, as against the defendant, to recover for himself the value of his own services, unless some other reason for implying a joint rather than a several contract appears. Even where the right is several, it may be necessary, or at least proper, to consider the value of all the services in arriving at the value of those rendered by the plaintiff in the action.

(Syllabus by the Court.)

Error from superior court, Glynn county; J. L. Sweat, Judge.

Action by Horace Dart and others against N. M. Anthanissen for salvage services.

Judgment for plaintiffs, and defendant brings error. Reversed.

Following is the official report:

Action was brought on a quantum meruit by Horace Dart, W. R. Dart, Frank M. Dart, and D. B. Stallings, against N. M. Anthanissen, as master and part owner of the Norwegian bark Svalen, for services rendered by plaintiffs, with their tugboat U. Dart, in rescuing the bark from its perilous position on the breakers of the outer bar of Brunswick on February 4, 1891. The jury found for the plaintiffs \$475, May 10, 1893. Defendant's motion for a new trial was overruled, and he excepted.

The declaration alleges that on February 4, 1891, the bark having grounded and being in peril, plaintiffs went with said tugboat, and endeavored to pull the bark off upon the high tide of that day; that the weather was rough and threatening, and the adventure of plaintiffs was hazardous and dangerous to them and their property; that subsequently the master of the bark abandoned and partly dismantled it, and left it to its fate; that plaintiffs sent out said tugboat, which, together with other tugboats in the harbor of Brunswick, succeeded, upon another high tide, in towing the bark from its perilous position to a place of safety, and but for the service so rendered the bark would have gone to pieces upon the bar where it lay grounded; that the bark was worth \$9,000, and its cargo of lumber worth \$3,500; and that the weather was rough, high, and threatening at the time the service was rendered, and the same was done at imminent peril and risk to plaintiffs' tugboat, and to the officers and employees thereon, and was worth the sum of \$1,800.

The motion for new trial contains the grounds that the verdict is contrary to law and evidence, and is excessive, and the following special grounds:

The defendant offered in evidence a copy of the record of a former suit in the same court (17 S. E. 951), "which showed that the plaintiff in the present suit had previously joined as a coplaintiff with two other plaintiffs, suing as copartners, and who, for the services in and about the rescue of the bark for which this action was brought, had in said suit based their right to recover upon a written agreement," dated at Brunswick, Ga., February 4, 1891, "between owners of tugboats Inca and U. Dart and N. M. Anthanissen, master of Nor. bark Svalen, now on south breakers of outer bar of Brunswick." The agreement further states "that said boats Inca and U. Dart shall render said vessel all assistance possible in relieving her from her perilous position; and should they succeed in pulling her off, and towing her into place of safety, that the said Capt. N. M. Anthanissen, as agent of vessel and cargo, shall pay to said tugboats Inca and U. Dart the sum of two thousand dollars." This is signed by "N. M. Anthanissen, Master of Bark Svalen," and by "Coney & Parker, Agts. Tugs



**Inca and U. Dart.** This record was offered "for the purpose of showing that the same was a joint cause of action, and could not be severally maintained by this plaintiff," and "that the debt due for the service for which this suit was brought was a partnership claim, and not the individual claim of this plaintiff." Defendant "offered to prove by the statements of fact in said record, as well as by the witness W. R. Dart, that the said steamboats, Inca, U. Dart, and Angie and Nellie, composed a partnership engaged in the towboat business under the firm name of the Brunswick Towboat Combination, and as such partnership had rendered the alleged service for which this suit was brought." Defendant further offered to prove that no separate contract was made with the owners of the steamtug U. Dart for towing said vessel off the breakers, but that the only contract made was a joint contract, as above set forth. All of the foregoing evidence so offered was rejected as irrelevant; and the court denied defendant's request to charge the jury that if "there was a joint undertaking between the owners of the steamboats Angie and Nellie, U. Dart, and Inca, and the service was performed jointly, the plaintiff could not so apportion the service performed as to recover on a quantum meruit without joining in the action with the owners of the steamtugs Inca and Angie and Nellie."

Over defendant's objection that such testimony was wholly irrelevant, and tended to the undue prejudice of his case before the jury, the court permitted witness Leo Lum to testify: "On Sunday there was no risk, but on Monday, when we left town, the fog was so thick we could not see half across the river. The fog was very thick, going out and coming in. We took the risk in that fog of running our boat ashore on the breakers against the beach, or into some vessel, that might have resulted in one thousand dollars' worth of damage, and if she had run on the breakers we might have lost our boat by the operation. I have been engaged in seamanship about 22 years, and have been master of a tugboat about 10 years; and, from my experience with the sort of service rendered, the peril was great." And W. R. Dart to testify: "On account of the character of the fog on that morning, our undertaking may have resulted in the loss of our boat and the drowning of the crew. The U. Dart at this time was worth about eight or nine thousand dollars."

The court charged the jury: "If you find from the evidence that this bark Svalen was grounded as claimed; that subsequently these defendants, by their tugboat U. Dart and their employes thereon, in connection with others, undertook to rescue it from its condition, grounded where it was among the breakers, and you shall find that that undertaking was attended by great or extra peril and risk and danger, and that the effort was successful in rescuing this bark and its

cargo,—then the court instructs you, gentlemen, that the compensation to be allowed these plaintiffs would not be measured alone by the actual value of the services performed by them, so much per day for the time they were engaged in this service, but that they would be entitled to their reasonable and just and proper sum as you may see fit to allow them as a reward or bounty for the peril, risk, and danger to the tugboat U. Dart, and the employes thereon, while engaged in the performance of this service, as well as for the success of the effort; and that amount, gentlemen of the jury, is one which, from all the facts and circumstances as proven, and the testimony in reference to the value of the property rescued, you are to fix and determine for yourselves." This charge is assigned as error for the reasons that, if entitled to recover, plaintiff could recover only the value of the service rendered; that he was not entitled to recover for dangers to which his boat might have been exposed, nor because of risk incurred by his employes; and that under no circumstances could he recover in this action a reward or bounty for the peril, risk, and danger to the boat and the employes thereon.

The court further charged: "You may likewise, gentlemen of the jury, take into consideration the value of the tugboat U. Dart, which was used in this effort to rescue this bark, the number of employes upon it, for the purpose of determining what amount of reward, if any, you will fix by your verdict, and give these plaintiffs, for the peril, if any, to which they put this tugboat and their employes in engaging in this service. Looking, gentlemen of the jury, to the testimony, for the purpose of ascertaining the value of the property which they themselves put to risk, and the danger in this enterprise; looking to all of them,—should you determine to compensate these plaintiffs by your finding, by giving them a reward or bounty, then you may regulate it, and make it suitable, taking into consideration all of these facts." Assigned as error because neither the value of the property saved, the value of that which plaintiffs put to risk, the lives of the employes put to risk, nor the danger of the enterprise, as bearing upon any reward or bounty allowed to the plaintiffs, was a proper subject of inquiry by the jury; nor were these, conjunctively, in any view of the case, pertinent questions.

The court further charged: "You are, likewise, gentlemen of the jury, to consider in this case who was engaged in the rescue of this bark; what other tugboats besides the U. Dart were engaged in that service, and aided in the rescue of this bark. I believe, in this case, it is admitted, and the fact is not contested, that there were three of these tugboats engaged in this service,—the U. Dart, the Inca, and the Angie and Nellie. Now, taking into consideration all the facts and circumstances in connection with the rescue of this

bark, its value as saved, the value of the property and lives put to risk in the enterprise, you will determine what will be a proper amount to be paid by this defendant, Anthanissen, as the master and part owner of this bark, Svalen, for the whole of the services required on that occasion by all of these tugboats engaged in the service. If you shall find that they were all simply entitled to compensation for the actual value of the services which they performed,—so much per day for the time they were engaged in that service,—then you could apportion your finding in this case as to the owners of the U. Dart; but if you should find that they were entitled not only to be compensated for the services rendered, and the time engaged in them, but they should be given a reward or bounty for the peril of their undertaking and its success, then, as the court has stated to you, as there were three of these boats engaged in that service, you will find what the whole services were worth, considering, as the court has stated to you, the conditions under which they were performed, the risk and danger and peril attending them, the value of the property as saved, and the value of the several tugboats engaged in it, and the number of lives put to risk or hazard; and, finding in that way the whole amount which this defendant ought to pay, then you will determine for yourselves, from all the facts which have been submitted to you, what proportion of that amount you will give the plaintiffs in this case,—Horace Dart and others, as the owners of the tugboat U. Dart,—whether you will give them one-third of the whole amount which you may thus find against the defendant, or what proportion you will give them." Error because this charge allows the plaintiffs to recover reward or bounty for risks incurred upon the part of other boats, and, as to the service rendered, undertakes, in this action, to apportion the recovery of the plaintiffs according as it shall have contributed in a greater or less degree to the success of the joint enterprise, or, in and about such joint enterprise, had incurred a greater or less risk, whereas, defendant submits, no sum could under any circumstances be allowed in this suit as a reward or bounty, nor could the court, upon the declaration in this case, apportion the amount to which each boat would be entitled, nor could it allow a reward or bounty to plaintiffs over and above the value of the service; and the charge submits rules for the guidance of the jury which leave them free to determine, upon conjecture and speculation alone, those rights of defendant which should in law depend alone upon the contract between the parties.

It is further alleged, as to the entire charge of the court, that it misconceives the real issue in the case, and submits to the jury the theory that, because of risk or danger incurred in rendering the service, the plaintiffs would be entitled to a reward or bounty over

and above the actual value of the service rendered; thus exceeding the limit of the demand stated in the declaration, and submitting a question not made by the pleadings.

W. F. Dunwoody and Crovatt & Whitfield, for plaintiff in error. Goodyear & Kay, Harris & Sparks, and F. H. Harris, for defendants in error.

PER CURIAM. Judgment reversed.

(94 Ga. 450)

#### SOUTHERN EXP. CO. v. HILTON.

(Supreme Court of Georgia. Sept. 17, 1894.)

JUSTICE OF THE PEACE—JURISDICTIONAL AMOUNT—CONFESSION OF JUDGMENT—RIGHT OF APPEAL.

1. The suit being against a common carrier, and the contract being one for the carriage of \$1,100 in money, and the breach alleged being a failure to deliver \$100 of that sum, and the amount sued for being \$100, with interest thereon, the action was a civil case arising ex contractu, and was within the jurisdiction of a justice's court.

2. Though a judgment in the justice's court be rendered upon a confession of judgment, the party making the confession may appeal therefrom to a jury; and since the act of December 11, 1882, the appeal may be taken, where the amount claimed is over \$50, to a jury either in the justice's court or the superior court, at the option of the appellant.

3. There was no error in overruling the certiorari.

(Syllabus by the Court.)

Error from superior court, Haralson county; C. G. Janes, Judge.

Certiorari by the Southern Express Company to review a judgment in favor of S. L. Hilton. The writ was denied, and the petitioner brings error. Affirmed.

Following is the official report:

Hilton brought suit in a justice's court againsts the express company, alleging that it received at its office in Tallapoosa, from a bank, \$1,100, the money of petitioner, to be by it carried and delivered to him at Kramer; that it carried the package or bag in which the \$1,100 was delivered to Kramer, and there it delivered the bag, with \$1,000; that it falls and refuses to deliver to him the remaining \$100; and that it is therefore due and owing to him \$100, with interest. Petitioner confessed judgment for costs, and appealed to a jury in the magistrate's court. The jury returned a verdict against defendant for \$100 principal, with interest, and defendant took the case by certiorari to the superior court, alleging: The magistrate erred in submitting the case to the jury at all upon plaintiff's appeal; plaintiff, upon the motion and at the instance of his counsel, having procured the judgment to be rendered against him, and therefore could not have been "dissatisfied" with that judgment, within the meaning of the statute. Further, the verdict was without evidence to support it, because plaintiff failed to show by evidence that the bag itself was not in the condition when it was received

at Kramer as when it was delivered at Tallapoosa, the broken seal on the tag in no way indicating that the bag itself was in different condition than when received at the office at Tallapoosa. Further, that the verdict was contrary to law, because there was no evidence to show that defendant, its officers or agents, took from the package any of the money placed there by the bank officials, and it was incumbent on plaintiff to show this fact under the circumstances. Further, that the verdict was contrary to law, because plaintiff's evidence made, under the law, an action of damages, if any at all, and the summons and action were not for damages, and the verdict was therefore without evidence to support it. Further, that the verdict was contrary to law, because, as a matter of law, the only verdict that could have been rendered, under the proof submitted, was one for damages, and if the verdict is to be construed as such the court had no jurisdiction of the case made by the proof; the verdict being for, and the plaintiff in his action claiming, more than \$100, and therefore violative of the law fixing the jurisdiction of justices' courts. Further, that the verdict was contrary to law, and without evidence to support it, because there was no proof showing that the condition of the bag indicated that any of the money had been or could have been taken therefrom, in the condition received at Kramer, and, unless the proof authorized the jury so to find, before plaintiff could recover he must show actually, and not inferentially, that the money was lost or stolen while in the custody of defendant, its officers or agents. Further, that the verdict was contrary to law, because the only verdict that the jury could legally render under the proof was for the wrongful, tortious, or negligent conduct of defendant as a common carrier. The certiorari was overruled, and to this ruling defendant excepts. Upon the trial before the jury there was evidence for plaintiff: The cashier of the Merchants' & Miners' Bank at Tallapoosa sent \$1,100 by express from Tallapoosa to plaintiff, at Kramer. The cashier was positive there was \$1,100, having counted the money twice. One Guthrie helped him count the money, and it was put in a bag, and carried by Guthrie, and delivered to the express agent at Tallapoosa, to be sent to Hilton. Before the sack was delivered to Hilton, at Kramer, the express agent at Kramer called Hilton's attention to the fact that the seal on the tag was broken. The sack was all right, so far as Hilton could see. The money was counted in the presence of Hilton, the agent, and others, by Hilton and the agent, and there was only \$1,000. When the agent called Hilton's attention to the fact that the seal was broken, he took the sack out of Hilton's hand, and cut the string that was around it, and poured the money out of the sack

on a table in the office of the express company at Kramer. The sack was turned inside out, and all the money that was in the sack was counted several times. The express agent who was running on the train at the time the trouble occurred about the money was discharged from the employment of the company.

B. G. Griggs and Wm. Phillips, for plaintiff in error. J. M. McBride and Colville & Noyes, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 580)

EAST TENNESSEE, V. & G. RY. CO. v. SMITH.

(Supreme Court of Georgia. Sept. 17, 1894.)

ACTION AGAINST RAILROAD COMPANY—INJURY TO PERSON ON TRACK—STATUTORY SIGNALS—EVIDENCE OF INJURIES—STATEMENTS TO PHYSICIAN.

1. Where one receives a personal injury, which causes at first temporary unconsciousness, and a physician is called, and during his attendance, extending continuously through some weeks, the patient complains of pain, and indicates the region thereof in her system, these facts are competent evidence in her favor on the trial of an action for the tort causing the injury, when testified to by the physician, in connection with a description of the symptoms which he observes in the course of his attendance and treatment.

2. According to the principle laid down by this court in *Railway Co. v. Gravitt*, 20 S. E. 550, the railway company was not, relatively to the plaintiff, who was injured by a passing train about 125 yards from a public crossing, under any duty to comply with the statutory requirements as to blowing the whistle and checking the speed of the train, and consequently the failure to observe these requirements was not, as to her, negligent, and she was not entitled to recover.

Bleckley, C. J., dissenting.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by Dora Smith against the East Tennessee, Virginia & Georgia Railway Company for personal injuries. Judgment was rendered for plaintiff, and defendant brings error. Reversed.

The following is the official report:

Dora Smith sued the railway company for damages from personal injuries which she alleged she received from being injured by a collision between a train of defendant and a buggy in which she was riding, on or near the public road; her declaration alleging that the collision was caused by the negligence of defendant's employes in not giving warning of the approach of the train, and not checking its speed for the road crossing. She obtained a verdict for \$2,500. Defendant moved for a new trial, and, the motion being overruled, excepts.

The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also because the court erred in

permitting a witness (Hammond) to testify over objection of defendant's counsel: "She complained while he visited her, and until he dismissed her. She was complaining of pain, and complaining of her back." The objection was upon the ground that such complaints were not admissible unless they could be brought within the range of *res gestae*, and the court ruled that he would permit witness to testify to such complaints until the witness, who was the attending physician, dismissed her from his care. Further, because the court erred in refusing to grant a nonsuit, defendant having moved therefor upon the ground that the evidence showed that it was the frightening of the horse by the flashing of the headlight and the rumbling of the train which caused the injury, and that the negligence set out in the declaration had nothing to do with the injury; that the violation of the statutory diligence complained of by plaintiff had nothing to do with the injury. The testimony showed: Plaintiff and one Brown were out driving in a top buggy, and were at a point where the public road and the railroad were very close together, having traveled a short distance beside the railroad, the space between the road and the railroad narrowing until they reached the point above mentioned. She did not see anything of the train, and did not hear any train, until it came right up behind her. Her attention was attracted by the rattling noise and the rumbling. It came dashing up like a flash of lightning, and frightened the horse; and Brown was unable to hold him. The train rushed by without blowing at all. Did not see any headlight, and in fact did not know if she saw any headlight at all. Thinks it was the engine got hold of the buggy. Is sure she could not say whether it was the engine or not. It all came up like a flash of lightning. It was the noise that frightened the horse, and, as for the headlight, she does not remember to have seen one at all. When the horse was frightened, he just stood up. Did not have time to turn away from the train. By that time the buggy was torn to pieces. Does not think the horse backed down the bank. Thinks the buggy was near enough to the train for the train to catch it as it passed. The dirt road and the railroad are all together, the one just a little higher than the other. Does not know how far the dirt road is from the railroad, but it is very near. The horse stood up, and Brown tried to hold him, but failed to do so. He didn't have time to go anywhere. The road does not come far away from the railroad at any place until they cross. This was a very close place, and extends for some little distance. It just dipped down to the road, and then went away gradually again. Mr. Brown drove down to this dip, and as the horse's head was parallel to the road the train came up. It did not make much noise, because the buggy top was up, and it was running

very fast; the very fastest she ever saw a freight train run,—25 or 30 miles an hour, to the best of her knowledge. She saw it but a moment,—just like a flash of lightning. In the case of suit against the railroad for the horse she testified that the train was coming behind them. That there was no blowing of the whistle. If there had been she would have heard it. That the train came behind them, and frightened the horse. She did not remember to have answered that there was a headlight and Brown held by the lines, for really she does not remember the headlight. Did answer that he tried to stop the horse, but could not do it. Does not remember to have answered that "the horse reared up and fell, and pulled the buggy right over;" but he was obliged to have fallen and pulled the buggy over. That is a fact. She did answer, "Over into the cut, and the train caught the buggy, and 'drug' us a few yards." She did answer before that they were going towards the crossing; that they did not hear it blow before it came up; that they heard it just about the time they saw it; that about the time they saw the headlight they saw it; and that the time she was hit and heard it were the same time. Can not truthfully say that she remembers seeing the headlight, but supposes, if she said it before, when it was fresh on her memory, it is so. Does not remember to have answered that the headlight was shining in front of them, but supposes, if she answered it that way, that was the way it was. The horse got frightened, and got into the ditch some way. When he reared up was the very last she remembered. Can not say whether the buggy moved when Brown pulled the lines. The train had hold of it at that time; was moving the horse about that time. She does not think they could have gone safely along there if the horse had not got scared. Supposes people pass along there if the trains will blow the whistle, and let them have a chance to pass. Does not think the road is wide enough at that point for a buggy to pass without going on the railroad. The track is some higher than the dirt road; and there is some space, but very little, from the high place where the bed of the road runs to the track. She does not mean the buggy was down on the railroad track. Of course it was when the train caught hold of it and tore it up, but certainly they were not driving on the railroad track; were following the dirt road. She has passed along there in a buggy since without trouble. People pass along there all the time. The horse was quite frightened. Of course, when the horse reared up, it kind of turned the buggy so that the train could catch it. The train came up very quick. Of course, that is what frightened the horse,—the train coming up with the noise, headlight, and everything else, coming up with a dash. She traveled the main road, and just before she got to this place there was a fence,

and, if they had blown the whistle, she would have stopped, and had the fence between her and the railroad. It is just a little way back of the fence. The fence turned out from the railroad, and crossed the railroad just below where she was hurt. The fence comes along down the side of the railroad. She could not hear the train, of course, for the woodland between. It further appeared for plaintiff that from the crossing which plaintiff and the train were approaching to the place of injury was about 130 yards; that it is about 700 yards from the crossing next above, and which crossing plaintiff and the train had passed over before approaching the crossing first mentioned, to said crossing; and that, approximately, the public road runs parallel with the railroad all the way along from one of these crossings to the other, coming closer where the accident happened than at any other point.

McCutchen & Shumate and Hoskinson & Harris, for plaintiff in error. Wrights & Harper and Dean & Smith, for defendant in error.

PER CURIAM. Judgment reversed.

(33 Ga. 256)

**CENTRAL RAILROAD & BANKING CO.  
v. MURRAY.**

(Supreme Court of Georgia. Sept. 17, 1894.)

**ACTION AGAINST RAILROAD COMPANY — SETTING  
FIRE TO GROWING TIMBER — MEASURE OF DAM-  
AGES—DESTRUCTION OF FENCES.**

1. Where growing timber, much of it young and immature, is destroyed by fire as a consequence of a negligent tort, and there is no depreciation in the market value of the land by reason of the destruction of the timber, the measure of damages is the value of the timber destroyed in its then state as attached to the land on which it grew, which value is to be ascertained by evidence as to what the owner of the premises could, under all the circumstances, have realized from the timber destroyed, by appropriating it to use himself, to the extent of any demand for it made by his own wants at and about the time of the fire, and by selling it to others to the extent of any demand for it which then existed; the value to be reckoned at the worth of the timber as it stood upon the land when it was destroyed, not computing anything additional thereto for the increase which would have resulted from severing it from the realty, removing it to the place of use or sale, and putting it in condition to be used or sold.

2. Timber injured by the fire, but not destroyed, is to be dealt with on the same basis, to the extent of the difference between its value as it was before the fire and as the fire left it.

3. For leaves and trash which the fire consumed there could be a recovery to the extent that the owner could have used or disposed of the same in supplying any demand then existing or near at hand, the measure being the value of the raw material as it lay on the ground, not including in the quantity to be paid for any of the material which could not have been used or sold to supply the demand then existing, or which arose soon thereafter. For material which, had it not been destroyed, would have been mere waste in the woods, there can be no recovery.

4. For fencing injured or destroyed the recovery should be measured by the cost of restoring it and making its condition as good as that in which it was when injured or destroyed.

5. The declaration was sufficient, and there was no error in overruling the demurrer thereto. (Syllabus by the Court.)

Error from superior court, Houston county; A. L. Miller, Judge.

Action by J. J. Murray against the Central Railroad & Banking Company for damages from a fire caused by an engine. Judgment was rendered for plaintiff, and defendant brings error. Reversed.

The following is the official report:

Murray sued the railroad company for damages sustained by the setting out of fire from its locomotives. He obtained a verdict, and a new trial was granted, which judgment was affirmed by this court at the March term, 1892. 15 S. E. 645. At the second trial the defendant demurred to the declaration, and moved to dismiss it on the ground that it set forth no sufficient cause of action, and on three special grounds. This demurrer was overruled, and the defendant assigns error on that ruling. Under the evidence and the charge of the court the jury found for the plaintiff \$700. A new trial was denied, and the defendant excepts to this ruling also. The declaration alleges that about March, 1890, the defendant, by negligent running of its train and throwing out and emitting sparks, set on fire the stubble land adjacent to plaintiff's woodland, which fire spread and destroyed much of the growing timber on the woodland, and damaged other timber, to the value of \$1,500, burnt up and destroyed the fencing on his pasture land, to the value of \$500, whereby he was deprived of the use of the pasture, of the value of \$250, and burnt and destroyed the leaves and litter upon said lands, to his damage \$250. In another count it is alleged that the defendant so negligently kept its road that it allowed stubble and other litter easily ignited to remain on its right of way, and negligently allowed said litter to be set on fire, which spread from the right of way upon adjoining lands, and was thereby communicated to plaintiff's land, where it burnt and destroyed the timber, fencing, pasture, and leaves and litter, in the manner and to the extent above stated. The special grounds of demurrer were, in brief, that the allegations as to damage done to the land were too general, vague, and indefinite to authorize a recovery; that there was no specification as to the number of trees burned or damaged, or their respective values, and no specification of the quantity or value of the leaves and litter, so as to enable the defendant to take issue as to these alleged injuries; it being contended that if it were not shown that the land was depreciated in value by the burning, then there was no damage.

The first two special grounds for new trial are that the court erred in allowing witnesses

for the plaintiff to testify that the damage done to him by the burning of the trees was two dollars per acre and three dollars per acre, defendant objecting on the ground that the actual damage could not be estimated in this way; that the testimony was too general and indefinite, and was mere opinion, without such knowledge as would authorize the jury to act upon it. Also that the court erred in allowing testimony going to show the damage to the plaintiff, instead of showing the damage to the land, judging from its value immediately before and after the injury, defendant insisting that this was the true measure of damage, and not the particular special value of the trees as they were growing on the land, or the leaves and trash as they lay on the ground. Another ground is that the court erred in charging the jury that in determining the amount of damage sustained by plaintiff they should look to the quantity and value of the timber, trees growing on the land considered as trees and timber, without regard to the effect upon the value of the land at the time. The remaining ground is that the court erred in refusing to charge: "That the true test of the damage done to the trees and timber on the land of the plaintiff, leaves, grass, and litter on the land (not including rails in the fence), is the difference in the value of the land just before the fire and its value just after the fire; and if the value of the land was not diminished by reason of the injury to the trees, timber, leaves, grass, and litter by the fire, then the plaintiff is not entitled to recover anything on account of the injury by the fire."

R. F. Lyon, Steed & Wimberly, and J. R. Cooper, for plaintiff in error. Hardeman, Davis & Turner, for defendant in error.

PER CURIAM. Judgment reversed.

(94 Ga. 611)

MITCHELL et al. v. ANDREWS.

(Supreme Court of Georgia. Sept. 17, 1894.)

WRONGFUL EVICTION—SUING OUT PROCESS WITHOUT PROBABLE CAUSE—DAMAGES—VENUE—WAIVER OF ERROR.

1. Where there was evidence, both for and against the truth of a plea of justification, the jury should find against the plea unless it is sustained by a preponderance of the evidence. An instruction to this effect is the same, in substance, as directing the jury that, in order to uphold the plea, they must be reasonably satisfied that it is true.

2. Where there would be no moral right to sue out legal process without probable cause, it was not error to instruct the jury that there would be no right to do it without such cause, and, a plea of justification being filed, the burden of proof as to the right would be on the defendant.

3. There was no error in charging the jury on the subject of damages; nor, as against the defendants below, was any charge complained of erroneous.

4. A suggestion of the nonresidence of one of the codefendants in the county in which the suit is located, no question having been raised on the jurisdiction until after verdict, and both

defendants having appeared and pleaded, is idle, and unfounded as a ground for a new trial. (Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action of trespass by William A. Andrews against E. J. Mitchell and others. Judgment was rendered for plaintiff, and defendants bring error. Affirmed.

The following is the official report:

Andrews sued Mrs. Mitchell, of Fulton county, and Manley, of Henry county, in the city court of Atlanta, for the wrongful and malicious suing out and execution of a warrant to dispossess him of certain premises in the town of Hampton, Henry county, affidavit having been made and the warrant sued out by Manley as the agent of Mrs. Mitchell. The court below held that a plea by both the defendants was a plea of justification, there being no special demurrer thereto for want of sufficient fullness and certainty; but upon a motion for new trial reversed this ruling. The case coming to this court at the October term, 1893, it was held that the court below erred in holding said former ruling erroneous, but that a new trial was properly granted, or rather that there was no abuse of discretion in granting a new trial upon a ground alleging newly-discovered evidence. 18 S. E. 1017. The motion for new trial then in question was made by the defendants. The case being again tried, there was a verdict for plaintiff for \$400 damages. Defendants moved for a new trial, and, their motion being overruled, excepted. The motion contained the general grounds that the verdict was contrary to law, evidence, etc., and also the ground that the verdict was excessive. Further, because the court erred in charging: "By the plea of justification the defendants admit that they procured the warrant described in plaintiff's declaration, and that under it plaintiff was dispossessed of the property in question in the manner as alleged,—that is to say, by the constable in Henry county; and the law casts upon them the burden of showing that they had the right to procure said warrant to dispossess the plaintiff, and this they must do to your reasonable satisfaction, by a preponderance of evidence." Alleged to be error, in that the law does not require in this class of cases a preponderance of evidence, proof to a reasonable certainty being all that is required. Also because the issue was not that defendants had the right to sue out the warrant, and dispossess the plaintiff, but it was only incumbent upon defendants to establish that they acted with probable cause, and without malice, in procuring the warrant, and having it executed. Error in charging: "In some torts the entire injury is to the peace, happiness, and feeling of the plaintiffs. In such cases no measure of damages can be prescribed, except the enlightened conscience of impartial jurors." Alleged to be error, in that it was given without qualification, and was calcu-

lated to mislead the jury. While there was no proof of actual damages, there was proof of the kind of business plaintiff was engaged in, and that it was the only business of the kind in Hampton at the time. Error in charging: "Now, in the light of these definitions, did the defendants procure this warrant and dispossess the plaintiff without probable cause, and with malice? If they did, and you find the other issues for the plaintiff, they would be liable to him for damages, and it would be your duty to so find." Alleged to be error, because there could be, under the law, but one issue in the case, viz. malice and probable cause, and the court groups other issues besides that of malice and probable cause; which error was calculated to mislead the jury, and induce them to believe that the whole case was thrown open to them. Because the verdict was contrary to the following charge: "Before you can find damages against the defendants in this case, you must find that the dispossessory warrant was procured maliciously and without probable cause, both concurring." Error in charging: "In every tort there may be aggravating circumstances, either in the act or intention. In that event the jury may give additional damages, either to deter the wrongdoer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff." Alleged to be error, in that there was no evidence of aggravating circumstances; therefore the charge was unauthorized; and, as there were no actual damages proved, nothing but nominal damages could legally have been given. Because the court should, of its own motion, have withdrawn the case from the jury, based on the conduct of plaintiff's attorney in moving the court, in the presence of the jury, after the evidence had closed, and the second argument begun, to allow him to open the case, and introduce Davis, giving as a reason that Davis, who it was alleged made the affidavit on which the first verdict was set aside, was in court, and he desired to prove by Davis that the affidavit was a forgery. It was further error on the part of the court to ask defendants' attorney, in the presence of the jury, if he had any objection to reopening the case. This was likely to prejudice the jury against defendants' said attorney, from his standpoint, having to offer objection in the presence of the jury. It seems that this objection was sustained. In a note to this ground the presiding judge states that, when counsel for plaintiff moved the court to open the case for further evidence, he asked that the jury be sent out, and the defendants' attorney said, without being asked by the court, that he did not care to have the jury go out. He made no objection to what transpired before the jury, and this motion is the first intimation to the court that he objected. Because, under the facts, the defendant Manley is entitled to a new trial on the ground that he resided in another county, and only did what he was authorized

to do, hence the court had no jurisdiction of him, and hence a new trial should be granted to both defendants on this ground. There was no plea to the jurisdiction.

R. J. Jordan, for plaintiffs in error. W. J. Albert, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 465)

BRANAN et al. v. EXCELSIOR SHOE CO. et al.

(Supreme Court of Georgia. Sept. 17, 1894.)

CREDITORS' BILL—DISTRIBUTION OF ASSETS—PRIORITY OF JUDGMENTS.

It not affirmatively appearing from the record that the creditors who commenced their suits before the creditors' bill was filed—the judgments thereon being rendered after the receiver was appointed—acquired any legal lien upon the assets which produced the money to be distributed under the decree on the creditors' bill, inasmuch as this money may have been derived from choses in action on which an ordinary judgment at law would have no lien, or, if it was the produce of goods sold by the receiver, those goods may have been sold before the judgments were rendered, so that no lien upon the goods had been acquired, this court cannot hold that the court below erred in distributing the fund pro rata among all the contesting creditors, instead of giving these judgments priority.

(Syllabus by the Court.)

Error from superior court, Pike county; J. S. Boynton, Judge.

From an order of distribution in a suit on a general creditors' bill against Murphey & Stroud, Branam Bros., creditors, bring error. Affirmed.

The following is the official report:

The firm assets of Murphey & Stroud were put into the hands of a receiver, under a petition in the nature of a general creditors' bill. When the cause came on for final hearing upon the petition, etc., and upon a motion to distribute money in the receiver's hands, it was agreed that as to the latter the presiding judge should determine all questions made, without a jury. The money was claimed by various creditors of Murphey & Stroud, who obtained their judgments, under the petition above mentioned, April 1, 1893. Branam Bros., who had obtained judgment against Murphey & Stroud on May 19, 1892, after the appointment of the receiver, but upon suit begun before such appointment, insisted that the money should be first applied to their judgment, as it was of older date than those of the other creditors mentioned. The judge held that, after paying costs and attorney's fees to certain mortgagees older than any judgment, the money should be prorated between all the judgments, and refused to give any preference to Branam Bros. To this decision, Branam Bros. excepted.

R. L. Merritt, for plaintiffs in error. Stewart & Daniel, S. N. Woodward, J. J. Rogers, S. J. Hale, J. F. Redding, and E. F. Dupree, for defendants in error.

PER CURIAM. Judgment affirmed.

(34 Ga. 403)

**GARDNER v. STATE.**

(Supreme Court of Georgia. March 19, 1894.)

**ASSAULT WITH INTENT TO MURDER — ADMISSIBILITY OF EVIDENCE—REVIEW ON APPEAL.**

1. This case falls within the rule that, unless the ground of objection to testimony presented to the trial court at the time the testimony was admitted appears, the matter is not one for review by the supreme court.

2. There was sufficient evidence to warrant the verdict, and no abuse of discretion in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Fulton county; R. H. Clark, Judge.

G. W. Gardner was convicted of assault with intent to murder, and brings error. Affirmed.

The following is the official report:

Dr. Gardner was convicted of assault with intent to murder, under Code, § 4337b. His motion for a new trial was overruled, and he excepted.

In the court's charge to the jury they were directed to consider whether the evidence showed the defendant's guilt under section 4337b or section 4337c. The woman on whom he operated was a white girl of 19 years, unmarried, and pregnant, when she went to him in June, 1893. At the time of the trial, November 2, 1893, she had been married to Hollingsworth, who testified that he sent her to the defendant. Hollingsworth was charged in the same indictment with being present, aiding and abetting in the commission of the offense.

The woman testified that nobody sent her to see defendant; she went of her own accord; but afterwards testified that she went to defendant instead of to another doctor, who was her regular physician, because she was sent there. She had known defendant about four months. She told him about her condition, and why she came to see him; and he subjected her to an examination, and with his hand, or some other instrument which she did not see, he penetrated her, without hurting her, and told her she would be sick in a few days, and nobody would know her troubles. He also told her, if she was not sick, to come back in three days; and she went back in the same week, and he gave her some little tablets, enough to last two days, one to be taken every four hours, and told her, if she would take the medicine, her trouble would soon be over, and nobody would ever know it. Up to that time no one but defendant had given her any medicine, or used any instrument on her. Nobody was with him when he made the examination and used the instrument. She told him when she went to him that she was pregnant, and her general health was good. No advice was given to her by any doctor or by defendant that this operation was necessary. He charged her \$15 for his services. She did not go to see him for any sickness other than the pregnancy. Later in the same month she

went to the house of a negro, and remained there from Wednesday to Monday. She was delivered on Saturday night, by Dr. Wright, who was called by the negro. The woman further testified: "I was in the family way, before my child was born, about three months, so far as I can tell. I don't know exactly when I became that way I can't tell. I had no symptoms—internal symptoms—that the child was alive. Never did feel that the child was quick. I am certain of that. I mean to state now that I never did at all, at any time, feel the motion of the child. I didn't know what was the matter with me before I was told."

Dr. Wright testified: "When I got there I found her in labor, labor pains, hemorrhage. I asked: 'How long have you been sick? What is the matter with you?' She said, 'I have been sick ever since Thursday.' I said, 'What is the trouble with you?' She said, 'I am about to miscarry.' The hemorrhage could have been brought about by the use of the hand or medicine. It would have been the natural way if it followed that operation. I was struck with the unusual character of it. That was the reason I asked the question. The hemorrhage was not very profuse. Her symptoms were unnatural in that stage. In my opinion as a medical expert, I would say she had been pregnant with it near the fifth month, I think. The stage of pregnancy when a child becomes 'quick' in the womb is about four or four and a half months,—the natural, usual time. I examined this child. In my opinion as a medical expert and a man of experience, that child had life in its mother's womb. I think it had passed what is called the 'quickening age.' There was something unnatural in the appearance of that child after its birth. I noticed that it looked blue along in the abdomen and breast. That could have been caused by the use of an instrument on the mother. There are several drugs and medicines known to the profession that will produce miscarriages, which can be administered in powders, liquids, and pills. The child was born dead. When I first went into the house, Hollingsworth was there. I then thought he and the woman were man and wife. He paid me for my services. When a child becomes quick in the womb, I think the mother will feel it, but may not know what it is. It is of such a character that, if the child does move, they cannot help but know it; they feel it; the system feels it. It causes a severe nervous spell at such time, and they go to bed. I have been called to see them when they say they did not feel it, but that was the cause. When I first examined this child I had a very sorry lamp. I examined it as well as I could; not very well; not as well as I did afterwards in the daytime, at the coroner's inquest, when I examined it minutely. I saw something that indicated a bruise about the lower portion of the ribs. I cannot tell what did it. I don't know that



I noticed it as particularly that night as at the inquest. A foetus at three months has skin that does not look like one at full age. It has no discoloration. The books make a little distinction between abortion and miscarriage. The difference is before quickening and after. It is abortion, I believe, after quickening. I think it is. I am not positive now. I never thought anything about it. I don't know which comes first, a miscarriage before or after quickening, or an abortion before or after quickening. A great many things will produce it,—a fall, lifting, a shock or fright, etc. A young mother pregnant with her first child is not apt to feel it as an older and more experienced mother. They are not apt to know it as well. It is more likely for an abortion to be produced from an instrument of any kind, and an internal administration of medicine for that purpose, than any other cause, a great deal. My opinion as to the age of this foetus is that it was about the end of the fifth month. I asked her particularly about her last sickness, and all, that night, and she told me all about it, and I counted it up. From the size of the child and the development—it showed the sex plainly—and the maturity of it I thought was about five months," etc.

The motion for new trial alleges that the verdict is contrary to law and evidence, and the following (third ground): "The court erred in allowing the witness Dr. Wright, over objection of defendant's attorney, made at the time, to testify as follows: 'I want to ask you whether it was five months. Answer. 'I think it was about the end of the fifth month. I asked her particularly about her last sickness, and all, that night, and she told me all about it, and I counted it up.' Also: "The court erred in not ruling out the testimony set out in the third ground thereof, that ruling having been invoked by defendant, and it further showed that the witness formed an opinion as to the age of the foetus from what the woman told him, and not as a medical expert. I understood the witness to testify as an expert, although he took the precaution to have the young woman's account of it."

R. J. Jordan, for plaintiff in error. C. D. Hill, Sol. Gen., for the State.

**PER CURIAM.** Judgment affirmed.

(94 Ga. 633)

#### DOYLE v. DAYS.

(Supreme Court of Georgia. Sept. 17, 1894.)

**ACTION BY TENANT—UNLAWFUL EVICTION BY LANDLORD—DAMAGES—LOSS OF BUSINESS.**

Conceding the plaintiff's right to recover some amount, the evidence was too vague, uncertain, and indefinite to authorize a recovery in his favor for the sum of \$750. The jury having been instructed by the court to find such damages only as would compensate the plaintiff for the actual damage he may have suffered, and not, therefore, having passed upon the question of exemplary or punitive damages, and the

evidence not containing sufficient facts or data on which to estimate or calculate the actual loss sustained by the plaintiff in his business by reason of his alleged unlawful eviction by the defendant (a specific item of loss by dealing in real estate, referred to in the evidence, being too remote to be recovered as damages in this case), the verdict cannot be sustained.

(Syllabus by the Court.)

Error from city court of Savannah; A. H. MacDonell, Judge.

Action of trespass by Paul Days against M. J. Doyle. Judgment was rendered for plaintiff, and defendant brings error. Reversed.

The following is the official report:

Days sued Doyle for damages, alleging that on July 1, 1891, plaintiff was in the quiet and legal possession of certain premises in Savannah under a contract of rent from Doyle, trustee; that defendant, by plaintiff's consent, entered upon the premises for the purpose of doing certain work thereon, and to return them to plaintiff's possession when he should demand them; that on August 28, 1891, he did demand them of defendant, but defendant refused to deliver possession of them to him, and excluded him from the possession of them, to which he was legally entitled, to his damage \$2,000. In another count, plaintiff alleged, that defendant, by his consent, entered upon the premises to do certain work thereon, and to return them to plaintiff in a condition reasonably suited for the business of a fish merchant, which petitioner was conducting at the time on said premises, and that defendant, being so in possession, willfully and wrongfully broke up, removed, and changed the arrangement and contrivances of petitioner for carrying on said business on the premises, so as to wholly deprive him of the use of the premises thereafter for said business, to his damage \$2,000. The jury found for plaintiff \$750, and, defendant's motion for new trial being overruled, he excepted. The grounds of the motion were that the verdict was contrary to law, to the evidence, to the charge of the court, decidedly against the weight of the evidence, without evidence to support it, and was excessive.

Much evidence was introduced. Briefly stated, that for the plaintiff was to the following effect: In June, 1891, plaintiff was holding a fish house in Bay lane, Savannah, under a contract of rent from Doyle, trustee, at the rate of \$200 annually, payable \$16.66% monthly in advance. He was holding over by agreement, his tenancy having begun under a written lease for 10 months made in 1887; and it was agreed between him and Doyle that the tenancy might be terminated at any time, on 30 days' notice to that effect given by either. Doyle wanted to make some repairs, and, after some demurring, Days moved out with his family (who occupied the upper part of the house as a residence), in order to allow the repairs to be made, Doyle at the time promising he could let Days have half of the fish house by the

1st of August. Days told him it was hardly enough, but he would try and do the best he could if Doyle would let him have half of the down stairs by the 1st of August. Days tried to find a place for a fish house, but without success, and temporarily occupied, by the kindness of Ely Avereno, a portion of the premises used by Ely. Doyle told Days that three weeks would be long enough to fix what he was going to do, and Days told Doyle he would get some kind of place to put his family for those three weeks, and did get two or three little rooms, where, instead of staying three weeks, he stayed two months. At that time a tenant of a house belonging to him was ready to move out, but he told her she could stay. Doyle kept his hands working on the house a week or two, and then stopped. Days went to him, and asked when he was going to get the house done, and Doyle told him he thought he had better get another place, and move out of there altogether; that he didn't think he could let Days have that place any more, and thought he was going to occupy it himself. Days asked him why he did not tell him that before, and told him he (Days) could have got a fish house by that time, and might have moved into his own house. Doyle said, well, he did not think he could let Days have it any more; and Days started to look around to see if he could find anything he could use for a fish house, but could see nothing. This was after three weeks. Doyle did not let him go back there, though Days demanded the place. After Doyle got the place fixed up, he would not let Days go back unless Days paid him \$40 a month. The fish business gets better in October than it is in the summer. Days was at Ely's for two months, and then Ely's business began to be better, and Days saw it was impossible for them both to get along there. Days then sold his own house for \$1,000 less than he was offered for it some time before, and bought a house from a Mr. Smith to use for a fish house, but was not able to pay for it, and sold it for about what it cost. It was a couple of months before he started again. His stall was two months vacant, and his customers all scattered, and gone to somebody else, and would not come back to him. His health was bad. He was losing money, and was compelled to quit. He had a large family, and when he was in business it cost him from \$1,300 to \$1,400 a year to support them. Some years he would make \$1,000 clear, and sometimes not \$10 clear. After he left Doyle's place, and started out first at Ely's, he was \$1,500 out of pocket; and, not only that, but lost his health, and since that has been worrying himself to death. He has quit the fish business, because not able to keep on any longer, and does not know yet whether he will be able to go into any business. Doyle did not tell him he was going to fix the whole house, but told him he was going to take down the wall between the fish house and

the front house. Days conducted his business at Ely's on a very small scale. He did not do one-third of the business he had been doing. He tried to do business, but could not, because he had no place to do it. Where he used to buy 10, 15, or 20 barrels, he could only buy 2 barrels, as he had no place to put them. Days went into the Smith house in October. After he had bought the Smith house, Doyle tendered him the premises on Bay lane, but he could not depend on Doyle. One day he would say one thing, and the next day another. Doyle told Mr. West (Days' lawyer) that if Days would not prosecute him he would let Days have the place. That was after October, Days thought, and at that time the place was not fitted for a fish house. There was not sufficient water. It was after Days got the Smith place that Woodhouse came to Days from Doyle, and asked Days how he wanted the fish house fixed; and Days told him he (Days) had nothing to do with him or the fish house. Doyle never told Days that he wanted to get into the place to fix it up, and never gave Days 30 days' notice. Doyle did offer Days the place in Mr. West's office, but the next day told Days he would not let him have the place, or that he did not think he could let him have the place. The following colloquy passed between a jurymen and Days while Days was on the stand: "Q. Was your loss of business due to your loss of health? A. Yes, sir; I had been suffering with asthma before that. I have been suffering with asthma for years, but since that business I feel worse every day, and the worry and excitement made me sick. Q. Did you get sick on account of my trouble, or did you lose your business because you were sick and could not attend to it? A. I got so bad from the worry that I was not able to carry on my business, because I was losing money every day. My health was not good, because I had so much worry to support my family. Q. Didn't you give up your fish business on account of your health? A. Both on account of my health and on account of losing money every day." In a letter from Doyle to Mr. West, dated September 26, 1891 (the last letter from Doyle appearing in evidence), statements were made that from the time Days moved out until now the mechanics have been at work reconstructing and repairing the premises; that they are now about ready,—plastering still going on; and that Mr. Days can now move in on the former terms, rent to begin on the 1st of October in advance. On September 29th Mr. West wrote to Mr. Doyle that he was instructed by Days to say that he would reoccupy the premises as soon as they should be put in the condition "specified this morning, to wit, water and sewerage, conveniences suitable for a fish house, partition placed so as to cut off the adjoining premises in the rear of his. The intention of reoccupancy refers to the whole premises originally occupied by him."

For the defendant the evidence was, in brief: Doyle went with a contractor to the premises, and Days promised to get out by the 1st of July. When work was begun, about the 1st, Days was still not out of the house. The work was carried on continuously, and was not finished until October. The portion of the premises occupied as a fish house by Days was in an unsanitary condition, and all the joists were rotten and unsafe. They were taken down, new joists and new floor put in, the south wall of the building was taken down, the stairs were altered, and much other work done. This work was expensive and was necessary. Doyle sent Woodhouse, a carpenter who was working on the building, to ask Days how he would like to have the house fixed, when Days told him he had nothing to do with it. This was while Woodhouse was at work on the building, some time between the first part of September and the first week in October; was before Days had bought the Smith house. Before Doyle made the repairs, he gave Days 30 days' notice that he wanted to make some improvements, and at the expiration of the 30 days would like to have permission to enter and make these improvements. At the end of the 30 days, Days would not let the contractor enter, and Doyle saw Days, and told him it was necessary for all concerned to have the partition taken down; and Days then made arrangements to move, but left his fish boxes there. The fish house was reconstructed, and was according to rule, with double flooring, all necessary water pipes, etc. Doyle went to West's office, and he said the fish house was not large enough. Days was there. Doyle said to Days and West that he would put the place in any kind of shape to avoid trouble. Days did not say anything, but, when Doyle left West's office, Doyle understood that the matter was settled, and that Days would move in again; and, the next thing Doyle knew, he received a notice from West to deliver Days his goods, up stairs, and did deliver them. Doyle told Days he would put the place in condition to suit Days. Days objected to the size of the fish house, which was about two-thirds the size of the old fish house. After the repairs were made, Doyle thought the place was cheap at \$40. Doyle did not put Days out, but Days left of his own accord.

O'Connor & O'Byrne and Denmark & Adams, for plaintiff in error. Harden, West & McLaws, for defendant in error.

PER CURIAM. Judgment reversed.

(42 S. C. 367)

HILL v. WESTERN UNION TEL. CO.

(Supreme Court of South Carolina. Oct. 5, 1894.)

TELEGRAPH COMPANIES—CIPHER MESSAGES—ERRORS IN TRANSMISSION.

In an action against a telegraph company for failure to correctly transmit a message,

it is error to strike from the answer allegations that the message was written in cipher unintelligible to defendant or its agent, and so intended to be, and that defendant was not informed of the importance of the message, or the probable consequence of a failure to transmit and deliver it correctly and promptly.

Appeal from common pleas circuit court of Abbeville county; I. D. Witherspoon, Judge.

Action by J. C. Hill against the Western Union Telegraph Company to recover damages for failure to transmit correctly a message. From an order striking certain allegations from the answer, defendant appeals. Reversed.

J. S. Cothran, for appellant. Graydon & Graydon & Giles, for respondent.

POPE, J. The present contention is now confined to an allegation that the circuit judge (Judge Witherspoon) erred when he ordered that paragraph 4 of defendant's answer be stricken out. To make the issue between the parties more intelligible, it may be stated that the defendant, in deciphering a cipher dispatch addressed to the plaintiff, erred in determining that the sender had written the word "hold," when in fact the defendant should have deciphered it as the word "sold." The plaintiff, alleging serious pecuniary loss from this failure of the defendant, has brought this action for \$500 damages. In the answer of defendant, among other things, in paragraph 4, he alleges: "(4) That said message was written in cipher unintelligible to the defendant or its said agent, and was so intended to be by the said Fewell [the sender]; that the defendant was not informed of the importance of said message, nor of the probable consequence of a failure on its part to transmit and deliver said message, nor of the probable consequence of a failure on its part to transmit and deliver the same correctly and promptly." Now, if the facts here alleged are necessary as the basis of a proposition of law which the defendant was entitled to have considered as a part of his defense to plaintiff's present action, it is evident that the circuit judge has erred; otherwise, he has not. In the light of our decided cases,—of *Aiken v. Telegraph Co.*, 5 S. C. 371; *Pinckney v. Telegraph Co.*, 19 S. C. 71,—and especially in view of the very recent decision of the United States supreme court in the action of *Primrose v. Telegraph Co.* (decided at October term, 1893) 14 Sup. Ct. 1098, we are forced to conclude that the circuit judge erred in striking this paragraph from the answer. We avoid saying more, because all these matters must necessarily come before the circuit court for adjudication, and lest we might inadvertently express some opinion on the merits of this interesting controversy. It is the judgment of this court that the order of the circuit judge, in so far as it orders paragraph 4 stricken from defendant's answer, be reversed.

McIVER, C. J., concurs.

(42 S. C. 330)

**EARLY et al. v. LAW et al.**

(Supreme Court of South Carolina. Sept. 21, 1894.)

**MARRIED WOMAN—MORTGAGE ON SEPARATE PROPERTY—INTEREST ON TRUST FUNDS—REVIEW ON APPEAL.**

1. Where a married woman mortgages her separate estate, the burden is on the mortgagee to show that the debt was contracted with respect to such estate.

2. On appeal from a decree on an accounting, exceptions to matters in which appellant is not interested will not be considered.

3. Where a married woman, in part payment for lands bought in her own name, uses the corpus of trust funds, in which she has only a life interest in the income, the remainder being in her children, and gives a mortgage for the balance, on an accounting between such children and the mortgagee, interest on the trust funds used should be allowed to the children from the death of the life tenant.

Appeal from common pleas circuit court of Abbeville county; James F. Izlar, Judge.

Action by Annie Law Early and others against Charles C. Law and others to remove cloud from title, and for an accounting. There was a decree for plaintiffs, from which defendants appeal. Affirmed.

The following is that portion of the decree of the circuit judge referred to in the opinion:

"The main object of this action is to have the court declare that title to the plantation or tract of land known as 'Stony Point,' situate in county and state aforesaid, is now in the plaintiffs, and that they are entitled to the possession of the same. In order to obtain a clear understanding of the controversy it is necessary to state, as briefly as possible, the facts upon which the action is based. It appears that on the 4th day of October, 1838, a marriage contract was entered into between John C. Gibson and Martha A. McCall, in which one A. L. Scarborough was named trustee. John C. Gibson died in 1846. A. L. Scarborough, trustee, died in 1853, and one Asa Godbold was substituted in his stead and place. Asa Godbold, trustee, died in 1869, and Martha Gibson died on the 17th day of June, 1870. The only issue of said marriage was Desdemona S. Gibson, who intermarried with Charles C. Law, the defendant, about the 15th day of January, 1857. There was also a marriage contract entered into between the said Desdemona S. Gibson and Charles C. Law, in which one W. H. Godbold was named as trustee. W. H. Godbold died in 1869. From 1869 to April, 1873, there was no regular trustee under this last-mentioned marriage settlement, and the defendant Charles C. Law assumed the duties of such trustee, and acted as such in all matters pertaining to the said trust estate. In April, 1873, the defendant Charles F. Godbold was appointed trustee in the place and stead of W. H. Godbold, deceased, and is now such trustee. On the 13th day of January, 1871, the defendant Charles C. Law qualified as administrator of the personal estate of Mrs.

Martha A. Gibson, deceased. Desdemona S. Law died on the 29th day of December, 1887, intestate, leaving surviving her her husband, the defendant Charles C. Law, and two children, Annie Law Early and Mary D. Caldwell. The said Mary D. Caldwell, originally a party plaintiff herein, died since the commencement of the action, intestate, leaving surviving her her husband, J. O. Caldwell, and two infant children, Charles L. Caldwell and Isabella Gibson Caldwell, as her only heirs at law and distributees. By an order of this court the heirs at law and distributees of the said Mary D. Caldwell, deceased, were made parties plaintiff in this action.

"By the terms of the marriage settlement between John C. Gibson and Martha A. McCall, the trustee, during the joint lives of the parties, was to receive the rents and profits of the real and personal estate, and pay the same over to the joint use of the parties, or suffer the parties to have the joint use of the estate, and to receive the rents and profits thereof, without infringing upon the capital; and after the death of the said John C. Gibson, his wife surviving, to stand seised and possessed of the estate for the use of the said Martha A. Gibson during her life, and after her death then to the use of the children of the said marriage, and, if the said Martha A. Gibson should leave no children living at her death, then to the right heirs of the said Martha A. in fee. The trustee was empowered to collect all choses in action, moneys, etc., and invest the same in real estate and negroes, according to his discretion, by and with the assent of the said Martha A. Gibson, expressed in writing, and stand seised and possessed of the property so purchased, in trust for the same uses, interests, and purposes. The marriage settlement entered into between Charles C. Law and Desdemona S. Gibson included the property mentioned in the marriage settlement between John C. Gibson and Martha A. McCall, which, at the death of the said Martha A., would vest absolutely in the said Desdemona S. Gibson. By the terms of the marriage settlement between Charles C. Law and Desdemona S. Gibson the trustee therein named was to have and to hold the property mentioned in 'Schedule B,' thereto attached, to and for the sole use of the said Desdemona S. for and during her natural life, free from the contracts, liabilities, alienations, and control of her husband, Charles C. Law, and, after her death, to and for the issue of said marriage then living, to be equally divided among and between them, and in further trust to allow the said Desdemona S., during her life, and at her pleasure, either to possess and use the said property and the increase thereof, or to account and pay over to her the annual increase of the same; and that her receipt therefor, notwithstanding her coverture, should be a complete and valid discharge; and upon the further trust that the

trustee should, upon the request in writing of the said Charles C. Law and wife, or the survivor of them, sell and convey the whole or any part of said trust property, or the increase of the same, and invest the proceeds in such other property, consisting of land, slaves, or necessary household furniture, as the said parties or the survivor of them should in writing direct, provided that the said Charles C. Law should not have any right to direct a sale of the trust property, should he survive his wife, and at her death there should be no issue. There are other provisions in said settlements, which, under the facts as they exist, have little or no bearing upon the issues involved. I have therefore only extracted such portions as I deem important to the present inquiry.

"On the 4th day of August, 1873, Charles C. Law entered into an agreement in writing with one D. Wyatt Aiken, for the purchase of the Stony Point plantation. Several payments on account of the purchase price of said plantation were made by the defendant Charles C. Law. On the 11th day of March, 1879, a conveyance of said plantation was executed by one W. Joel Smith, trustee, to the said Desdemona S. Law. The consideration expressed in this conveyance is five thousand dollars. Afterwards, to wit, on the 11th day of August, 1879, the said Desdemona S. Law conveyed seventy-seven acres of the Stony Point plantation to her daughter, Mary D. Caldwell. By this deed it is provided that the seventy-seven acres are to be taken by the said Mary D. Caldwell as part of her share in the estate of her mother, the value to be accounted for in the distribution of said estate. The Stony Point plantation now contains one hundred and eighty acres, more or less. On the 16th day of October, 1879, the said Desdemona S. Law signed and delivered to the said Charles C. Law, her husband, an instrument of writing, of which the following is a copy: 'Abbeville Co., S. C., 10th April, 1879. This certifies that I am indebted to Charles C. Law in the full and just sum of three thousand five hundred dollars, being money advanced by him to me for the purchase of Stony Point plantation (exclusive of the amount of land given by me to my daughter M. D. Caldwell). This obligation of indebtedness is not to bear interest during our joint lives, but is intended to constitute a first-class mortgage on said premises in favor of C. C. Law or his assigns, in the event of my decease during his life. In witness whereof I have signed, sealed, and delivered this obligation to him as of the day and year expressed. 16th October, 1879. Desdemona S. Law. [L. S.] In presence of C. V. Law.' Afterwards, to wit, on the 8th day of July, 1884, the said Desdemona S. Law, to secure the payment of a certain promissory note for the sum of \$760, made by her to Phillips & Jackson, and bearing date the 1st day of

July, 1884, executed to the said Phillips & Jackson a mortgage of the Stony Point plantation, then containing one hundred and eighty-five acres, more or less; which mortgage was duly recorded in the office of the register of meane conveyances for said county on the day of its execution. Since the death of the said Desdemona S. Law the defendant Charles C. Law has been in the possession of Stony Point plantation, and has received the rents and profits derived therefrom. The evidence tends to show that the rental value of said plantation is about \$200 per year.

"A number of questions arise in the cause. The following, however, are the questions upon which the rights of the parties chiefly stand, and upon which the result mainly depends: (1) How much, if any, of the moneys belonging to the trust estate of Desdemona S. Law was used in the purchase of Stony Point plantation? (2) Is the paper executed by Desdemona S. Law to the defendant Charles C. Law a good equitable mortgage, having lien upon the said plantation? And, if so, from what time, for what amount, and to what extent? (3) Is the mortgage executed to Phillips & Jackson by Desdemona S. Law a valid mortgage on said plantation? And (4) is the defendant Charles C. Law liable for the rents and profits derived from said plantation since the death of Desdemona S. Law? And, if so, for what sum? I will consider these questions in the order in which they are stated.

"There can be no doubt, I think, but that Stony Point plantation was purchased by Desdemona S. Law. It is true that the agreement to purchase was entered into between Charles C. Law and D. Wyatt Aiken, but that Desdemona S. Law afterwards took the place of Charles C. Law is fully shown by the evidence in the cause. The paper introduced by the defendant Charles C. Law as a mortgage on said plantation, recites that the debt intended to be secured thereby was money advanced by Charles C. Law to Desdemona S. Law for the purchase of Stony Point plantation, and the conveyance was made to her by W. J. Smith, trustee. This being the case, I shall treat Stony Point plantation as the property of Desdemona S. Law. The purchase price of this plantation is stated in the conveyance as being \$5,000. I have carefully read and studied the testimony, and the conclusion reached is that \$1,875 of the purchase price of Stony Point plantation was paid out of moneys belonging to the trust estate of Desdemona S. Law, and the remainder thereof—\$3,125—was advanced by the defendant Charles C. Law out of his own funds. It is admitted by Charles C. Law that \$1,200 of the moneys of the trust estate entered this purchase. He only claims that he advanced \$3,500. This would leave a deficit of \$300 of the purchase price of the plantation unaccounted for, and he does not undertake to show where this

sum came from. As he had in his hands at the time moneys belonging to the trust estate, the presumption is conclusive that sum was paid out of the trust funds in his hands. Again, the \$375 paid to W. Joel Smith was certainly moneys belonging to the trust estate. He attempts, it is true, to show how this money became his money. The explanation is not satisfactory. The mere declaration that he advanced large sums of money to the trust estate, and reimbursed himself with this \$375, is not enough to change the character of the fund. He does not show how and for what purposes these large expenditures by him on account of the trust estate were made. This he should have done. Without it, the court cannot say whether or not the expenditures were authorized and lawful.

"Now, as to the paper executed by Desdemona S. Law to her husband to secure the amount advanced by him on account of the purchase money of Stony Point plantation. I am clear this paper is a good equitable mortgage, and as such may be enforced between the parties. The rights of third parties, however, cannot be affected thereby. Papers of this kind, informal though they be, have been so frequently held to be good equitable mortgages that it would be a waste of time and space to review and discuss the authorities. It seems to me that this paper must be regarded as a mortgage on Stony Point plantation, as described in the complaint, in favor of the defendant Charles C. Law, to secure the payment of \$3,125, with interest from the 29th day of December, 1887; its lien dating from the 16th day of October, 1879, the day of its execution and delivery.

"The next question is that in relation to the Phillips & Jackson mortgage. There is no question as to the execution and delivery of the note and mortgage by Desdemona S. Law. There is, however, no testimony in regard to the consideration of this note and mortgage. The only witness examined with reference to these papers was J. P. Phillips, the survivor of the late firm of Phillips & Jackson. All he says is: 'All the credits are on the papers. I had no knowledge, at the time I took these papers, of any trust affecting the property. The mortgage includes the judgment that is set up in the complaint, and represents all that Mrs. Law owes me. It was given for full value.' At the time these papers were executed by Desdemona S. Law she was a married woman. This being so, the burden of proof was on the defendant J. P. Phillips, survivor, to show that the contract was made by the said Desdemona S. Law with reference to and for the benefit of her separate estate; in other words, to show affirmatively that the debt which the mortgage was given to secure arose out of a contract which the said Desdemona S. Law, then a married woman, was competent to

make. This he has not done. Having, therefore, failed to establish this fact by proof, he fails to establish any liability against the said Desdemona S. Law or her separate estate. *Taylor v. Barker*, 30 S. C. 242, 9 S. E. 115; *Chambers v. Bookman*, 32 S. C. 455, 11 S. E. 349.

"The last question stated is in relation to rents and profits. It appears that the defendant Charles C. Law has been in the exclusive use and occupation of Stony Point plantation since the death of his late wife, Desdemona S. Law, and has received the rents derived therefrom during this period. The rule of law applicable to this question is, I think, well settled, and it is not necessary that I should cite authorities to support it. In the present case there has been no ouster by the defendant Charles C. Law; hence, if liable at all, he is only liable for the rents received and the profits made upon so much of the tillable lands as he rented and cultivated in excess of his share. The testimony in relation to rents and profits is vague and unsatisfactory. One witness testifies that there is about one hundred acres of open land, and two testify that the rental value of the tract is from \$200 to \$250 per annum. How much of the open land has been used and rented by the defendant Charles C. Law each year since the death of his wife does not appear. He testifies that he received some rents, but no profits, from the plantation; that the average rent received for the last two years was one thousand pounds of lint cotton. I find no testimony as to the price of cotton during these years. If I should fix a price, it would be purely speculative, even if there were no further difficulties connected with this question. I regard the testimony too slight and indefinite to support an intelligent and accurate finding. This conclusion renders it unnecessary to determine what portion of the rents and profits, if any, should go to the trust estate,—by no means an easy question. It is therefore ordered, adjudged, and decreed that the lands described in the complaint, known as the 'Stony Point Plantation,' be sold; \* \* \* that out of the moneys or proceeds arising out of said sale the said master do pay first the costs and disbursements of this action as taxed by the clerk of the court, and any lien or liens for taxes and assessments upon the said premises at the time of said sale; that he pay next to the plaintiffs Annie Law Early, Charles C. Caldwell, and Isabella Gibson Caldwell the sum of \$1,875, with interest from the 29th of December, 1887, according to their several and respective rights and interests (the shares of the minors to be paid to their regularly appointed guardians or guardian), the same being the amount of the trust funds invested in said lands as hereinbefore found; that said master pay next to Charles C. Law the sum of \$4,291.68, his mortgage debt, with interest from the date of this decree; and if there shall remain a surplus after paying the sums

hereinbefore ordered paid, the said master do hold the same subject to the further order of this court. The said Mary D. Caldwell, having been advanced by her mother to the extent of the value of the seventy-seven acres of land conveyed to her, and having since departed this life, leaving as her heirs at law her husband and two minor children, it is ordered that it be referred to the master of said county to take testimony, and report to this court the value of the seventy-seven acres of land advanced to the said Mary D. Caldwell in her lifetime at the time of the death of her mother, not taking into the computation the improvements put upon said land by the said Mary D. Caldwell, in her lifetime. It is further ordered and adjudged that the claim of J. P. Phillips, survivor, be, and the same is hereby, disallowed as a valid claim against the estate of the said Desdemona S. Law, deceased."

Benet & Caron and Perrin & Cothran, for appellants. Ward & Woods and Parker & McGowan, for respondents.

POPE, J. The facts underlying this controversy are sufficiently stated in the circuit decree, which, to that extent, must appear in the report of this case. Two of the defendants, Charles C. Law, and J. P. Phillips, as survivor of Phillips & Jackson, have appealed from the decree of his honor, Judge Izlar, filed on 6th day of May, 1893, on the following grounds, to wit: (1) Because his honor erred in holding that \$1,875 of the trust money under the marriage contracts set out in the complaint was invested in the Stony Point plantation, whereas he should have held that only \$1,200 was so invested, or, at most, \$1,575. (2) Because he erred in holding that only \$3,125, with interest, was due on the mortgage given by Mrs. Law to C. C. Law. (3) Because he erred in not holding that the children of Mary D. Caldwell should account to the estate of Mrs. Law for the value of the 77 acres, being a part of Stony Point conveyed to her by Mrs. Law in 1879; or, if not to account in that way, then that the value should be charged to them as so much upon what may be due them of the trust estate, and, if more than that is due them, then to account for the balance. (4) Because he erred in directing one-half of \$1,875, and interest, to be paid to the children of Mary D. Caldwell, whereas he should have ordered such portion as they may be entitled to to be held until the land conveyed to their mother by Mrs. Law should be accounted for. (5) Because he erred in not holding that the 77 acres conveyed to Mrs. Caldwell by Mrs. Law, being a part of the Stony Point plantation, were liable for their pro rata share of the trust funds which were paid upon the purchase of Stony Point. (6) Because he erred in crediting to the trust estate \$300, which he states is necessary to make up the purchase price of Stony Point,

to wit, \$5,000, whereas the \$3,500 advanced by Mr. Law, and the \$1,575 of the trust money, would make in all \$5,375. (7) Because he erred in allowing interest on the amount of trust funds found by him to be invested in Stony Point from the death of Mrs. Law, and in not holding that Mrs. Mary D. Caldwell or her children should be liable for interest on the value of the 77 acres aforesaid from the same time. (8) Because he erred in holding that the mortgage given by Mrs. Law to Phillips & Jackson is not a valid lien upon Stony Point. (9) Because, after holding that said mortgage was invalid, he erred in not directing that the judgment of Phillips & Jackson against Mrs. Law, which was included in the mortgage, should be paid out of the proceeds of Stony Point.

We will first consider the eighth and ninth grounds of appeal, involving as they do the entire contention of J. P. Phillips, as survivor of Phillips & Jackson; and, if we should find that his exceptions are not well taken, then J. P. Phillips has no further interest in the matters involved in the other grounds of appeal. The complaint alleges that said Phillips is the holder of a judgment which, on the record, appears to be unsatisfied, and upon which some \$70 is apparently due; and also that said Phillips holds a mortgage, duly recorded, upon which about \$200 is apparently due, and that both are liens upon the lands sought to be partitioned. But in such complaint it is alleged that neither said judgment nor said mortgage are upon proper obligations or debts of Desdemona S. Law, deceased, but the same were given to secure the debts of her husband, Charles C. Law, and were not contracted for the benefit of or on account of any separate estate of the said Desdemona S. Law, deceased, though, as now standing, such judgment and mortgage are clouds upon plaintiffs' title to said lands. In the answers of Phillips and Charles C. Law these facts are denied. It seems that the mortgage was given in 1884, and that Mrs. Law departed this life in December, 1887. The decree of the circuit judge disallowed both claims of Phillips as valid claims, and in discussing these claims the circuit judge states: "The next question is that in relation to the Phillips & Jackson mortgage. There is no question as to the execution and delivery of the note and mortgage by Desdemona S. Law. There is, however, no testimony in regard to the consideration of this note and mortgage. The only witness examined with reference to these papers was J. P. Phillips, the survivor of the late firm of Phillips & Jackson. All he says is: 'All the credits are on the papers. I had no knowledge, at the time I took these papers, of any trust affecting the property. The mortgage includes the judgment that is set up in the complaint, and represents all that Mrs. Law owes me. It was given for full value.'" We have compared the statement made by the circuit judge of the testi-

mony with the "case," and find that he was strictly accurate in its reproduction. We have shown by the pleadings that the plaintiffs tendered, and the defendants accepted, the issue that these debts did not have the necessary basis for their support as debts secured by lien on the property of Desdemona S. Law, deceased, to wit, that, she being a married woman, and such debts being contracted subsequent to the year 1882, it was necessary that such debts should have been contracted with respect to her separate estate. Here there is not the slightest testimony in favor of Phillips' debts coming within this class; in other words, he has absolutely failed to successfully meet the issue he had accepted by his answer. Under such circumstances we are left no other course, under the repeated decisions of this court in regard to such issue, but to overrule these exceptions (8 and 9). *Taylor v. Barker*, 30 S. C. 242, 9 S. E. 115; *Chambers v. Bookman*, 32 S. C. 455, 11 S. E. 349; *Pelzer v. Durham*, 37 S. C. 354, 16 S. E. 46; *Habenicht v. Rawls*, 24 S. C. 461; *Aultman v. Rush*, 26 S. C. 517, 2 S. E. 402; *Gwynn v. Gwynn*, 27 S. C. 525, 4 S. E. 229.

It remains now to investigate the grounds of appeal presented in behalf of Charles C. Law. The first ground of appeal alleges that the circuit judge should have found as a fact that only \$1,200, or, at most, \$1,575, of the trust estate of Desdemona S. Law went into the purchase of the Stony Point plantation of land, whereas he found as a fact that \$1,875 of this trust estate was so invested. The appellant, well knowing the great respect shown by this court to the findings of fact by the circuit judge, earnestly requests the court to scrutinize the testimony closely for itself. We have done so, and with reluctance state that we see no ground upon which to base a conclusion at variance with that reached by the circuit judge. On all hands it is admitted that \$1,200 of trust funds was so invested. The appellant admits that he paid \$375 additional of trust funds, but claims that this \$375, although paid by him out of the trust funds, was really his own money, as the trust estate owed him that money. We, with the circuit judge, are not satisfied with his explanation. When it is considered that Mr. Law received \$2,500 of this trust estate, and, according to the testimony, paid \$1,200 at one time on this purchase, paid himself \$857.34, there was still left the sum of \$442.66 in his hands. From this sum of \$442.66 no doubt this \$375 was paid. This accounts for \$1,575 of the purchase money of \$5,000 paid for the land. The circuit judge found from the testimony that \$300 additional was paid from the trust estate. He says, in this connection: "He [C. C. Law] only claims that he advanced \$3,500. This would leave [he means by subtracting \$3,500+\$1,200 from \$5,000] a deficit of \$300 of the purchase price of the plantation unaccounted for, and he does not undertake to show where this sum came from. As

he had in his hands at the time moneys belonging to the trust estate, the presumption is conclusive that sum was paid out of the trust funds in his hands." This exception is overruled.

The next exception—the second—alleges error in the circuit judge in finding that Charles C. Law only advanced \$3,125 of the purchase money, and that his mortgage only secured that amount and interest, instead of \$3,500, and interest, from the death of Mrs. Law, which occurred 29th December, 1887. Charles C. Law claimed to have advanced \$3,500 of the \$5,000 paid for the land, and his wife gave him a mortgage on the land to secure this sum. But in considering the first exception we have just held that \$375 of the \$3,500 claimed by him as paid out of his own funds was really out of the trust estate. It necessarily follows that \$3,125, and not \$3,500, was the sum paid by him. This exception is overruled.

We will next consider the third, fourth, and fifth exceptions by Mr. Law. It must be borne in mind, in considering these exceptions, that Mr. Law now has no interest in the trust estate of his wife, Desdemona S. Law, at her death. By his marriage settlement he shut himself off from any interest therein after her death. He and the offspring of himself and wife, Desdemona S., who are plaintiffs here, are at arm's length from each other. In other words, this is a family fight (always to be deplored), in which the children are on one side and the father on the other side. One of Mrs. Law's children—Mrs. Caldwell—received a deed from Mrs. Law in 1879 for 77 acres of the Stony Point plantation, in consideration of love and affection, upon the condition and limitation, among others, that she or her issue shall account for the gift of said land at a fair valuation as a part of her distributive share of her (Mrs. Law's) estate. Mrs. Law died intestate. This land having been conveyed to her as her absolute estate, was held by Mrs. Law freed from the control of any one, subject to the repayment of the trust funds invested in its purchase, and the payment to her husband, Charles C. Law, of the money he had loaned her, which was secured by her mortgage. The decree of Judge Izlar fixed these facts, and from them there is no appeal. It is very evident that there will remain nothing for partition of the proceeds of sale of this land. It cost \$5,000. The trust estate is due therefrom \$1,875, and interest from 29th December, 1878, and Charles C. Law is to receive nearly \$4,200, with interest from 6th May, 1893. The place only realizes a rent of 1,000 pounds of lint cotton. So, therefore, from any standpoint as an heir at law of the estate of Mrs. Law, her husband, Charles C. Law, can hope for nothing from the proceeds of the sale after the payment of these debts. What interest can he have in the estate of his deceased wife as an heir at law, so far as the portion of the land—77 acres—conveyed by his wife to Mrs.



Caldwell is concerned? The very instrument he sets up—the mortgage from his wife to himself—by its very terms denies him any rights in the 77-acre tract for the payment of his mortgage. "Exclusive of the amount of land given by me to my daughter M. D. Caldwell," is its language. Mr. Law is not the guardian ad litem of any infant plaintiffs. He certainly does not represent any of the adult plaintiffs. He is a volunteer, therefore, except as to his mortgage debt, in the questions suggested by these exceptions. These exceptions, being alone presented by Mr. Law, and in no wise affecting his interests, as we have already seen, must be overruled.

We need only say as to the sixth exception that our disposition of the first exception relieves us of the necessity of doing more than declaring it overruled.

The seventh exception complains that interest was allowed on the \$1,875 of the trust estate invested in the lands from the death of Mrs. Law, 29th December, 1887, and that no interest was allowed on the value of the 77 acres conveyed to Mrs. Caldwell from the same time. The circuit judge could not have held that the \$1,875 bore interest during the lifetime of Mrs. Law, for by her deed in marriage settlement the usufruct of the trust estate was reserved for her own use. By the same instrument the usufruct was transferred, after her death, to her children. Such being the case, of course this \$1,875 bore interest from the date of her death. Now, as to whether the circuit judge should have required the heirs at law of Mrs. Caldwell to pay interest on the value of the 77 acres of land in their possession from the death of Mrs. Law, we do not care to volunteer any opinion, as no such question is raised here by any one save a volunteer. Let this exception be overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

McIVER, O. J., concurs.

(94 Ga. 735)

CENTRAL TRUST CO. OF NEW YORK  
et al. v. THURMAN et al.

ROUNTREE v. CENTRAL TRUST CO. OF  
NEW YORK et al.

(Supreme Court of Georgia. Oct. 4, 1894.)

RAILROAD COMPANY—APPOINTMENT OF RECEIVER  
— DISTRIBUTION OF ASSETS — PREFERENTIAL  
DEBTS—PRIORITY OVER MORTGAGE — EXPENSES  
OF RECEIVERS—COUNSEL FEES.

1. The lien laws of Georgia are embodied in the Code, together with statutes enacted since the adoption of the Code. These liens and no others are contemplated by section 3149 et seq. of the Code and the acts amendatory thereof, touching the distribution of the assets of an insolvent corporation or trader. The same rule as to the preservation of liens prevails in the case of railroad corporations as in the case of other corporations or of traders in general. If the equitable doctrine recognised by some courts,

that there are preferential debts within a so-called "six months' rule," which will take priority over a mortgage upon a railroad, can be recognized in this state at all, it certainly cannot be when the proceeding is under the above-cited sections of the Code, and when the mortgagee does not intervene as a plaintiff, but comes in to make defense only.

2. Where a railroad is operated by a receiver, all his legitimate expenses, including the fees of his counsel, are chargeable upon the fund produced by a sale of the railroad made under a decree rendered in the cause, if there is no other fund under the control of the court out of which these expenses can be paid. Income would be chargeable before corpus, but as a last resort the charge would fall on the latter.

3. Counsel fees in a proceeding under section 3149 et seq. of the Code and the acts amendatory thereof against an insolvent corporation may be allowed for bringing the fund into court, but the scheme of the statute is that these fees, as a part of the expense of the litigation, shall be borne in some just proportion by all who come in to claim the fruits of the proceeding. No suitor can rightly take any of these fruits without bearing his due proportion of such fees, and even a voluntary party defendant, who ultimately shares in the fund which is realized, and takes it by the judgment or decree finally rendered, is chargeable the same as he would be had he intervened as a coplaintiff.

4. A receiver of a state court is not chargeable with expenses incurred by a receiver of the federal court while the property was in the hands of the latter, or for the hire of property which the latter used on a contract of hire made by him.

5. The constitution puts damage done to private property and the taking of it for public use on the same footing. Consequently, damage done to land by taking a portion of it for the way of a railroad ranks with the amount allowed for the right of way itself in competition with a mortgage upon the railroad to secure other indebtedness of the company.

6. Where a statute, such as section 3149a et seq. of the Code, extends the equitable jurisdiction of the superior court to new cases, the mode of trial in such cases is governed by ordinary equity practice, and the trial of facts by master or auditor instead of by jury is subject to the will of the legislature.

(Syllabus by the Court.)

Error from superior court, Fulton county; John L. Hopkins, Judge pro hac vice.

Petition by E. W. Marsh and others against the Atlanta & Florida Railroad Company for the appointment of a receiver. T. W. Garrett was appointed receiver, and the Central Trust Company of New York, trustee under the mortgage on the property of the railroad, was made a party defendant. There was a judgment allowing priority over the mortgage to certain claims against the railroad, and the trust company and another bring error. Daniel W. Rountree files a cross bill of exceptions. Modified.

Glenn & Maddox, for plaintiff in error Rountree. H. B. Tompkins, Chas. Z. Blalock and W. B. Farley, for other plaintiffs in error. Payne & Tye, Gustin, Querry & Hall, Dorsey, Brewster & Howell, H. Douglas, P. F. Smith, H. Jackson, Hall & Hammond, A. W. Smith, A. A. Meyer, Harrison & Peoples, and R. H. Wright, for defendants in error.

JENKINS, J. It appears from the record in this case that on January 13, 1892, E. W. Marsh and others filed their equitable petition in Fulton superior court against the Atlanta & Florida Railroad Company. It was alleged in the petition that the defendant was insolvent, and unable to pay its debts; that petitioners were unsecured creditors; that since the maturity of the debts owing to petitioners respectively payment had been demanded and refused; that the indebtedness was contracted in the conduct of the defendant's legitimate business, etc. Among other things, petitioners prayed the appointment of a receiver, with power to convert into money, under order of the court, all of the property of the defendant, and to disburse the same. On February 9, 1892, the Honorable Marshall J. Clark appointed T. W. Garrett temporary receiver, with full power and authority to take charge of the property of the defendant, consisting chiefly of its railway, and to manage and control same, under direction of the court, until further order. On the same day R. H. Plant was also appointed receiver of the defendant's property under a bill filed by other creditors in the United States circuit court for the southern district of Georgia. A somewhat spirited controversy between the two receivers touching the possession of the defendant's property followed, which, on March 8, 1892, was quieted by an order of Judge Clark directing Garrett, as receiver, to deliver to Plant the possession of the property, said order containing further direction to Garrett to set up title to the property by a petition addressed to the United States court, and to adopt and pursue such further legal proceeding as might be necessary to a final adjudication upon such title in the courts of the United States. After much litigation, which reached the circuit court of appeals,<sup>1</sup> a decree was rendered in the federal court restoring the property to the possession of Garrett, who, on June 17, 1892, was, by order of Judge Clark, appointed permanent receiver of the defendant corporation, and of all of its assets of every kind and character. He was authorized and directed to operate the railroad of the company and carry on its business as a common carrier, and to that end was authorized to make such contracts as might be necessary, to employ such agents, engage such counsel, and retain or discharge such employees as might seem to him necessary and proper. It is needless here to recite all the details of the litigation which followed.

On July 2, 1892, the Central Trust Company of New York, alleging itself to be a trustee under a mortgage or deed of trust made by the Atlanta & Florida Railroad Company on the 1st day of November, 1889, for \$840,000, with semiannual interest, payable on the 1st day of May and 1st day of November of each year, was, on its own pe-

titution, made a party defendant. This mortgage was referred to in the original petition of Marsh and others, and a copy attached thereto. By reference to the terms of this mortgage it will be seen that it created a lien in favor of the holders of the bonds of the company upon the entire property, rights, and assets of the defendant. It was recorded December 5, 1889. The purpose of the Central Trust Company in becoming a party defendant, as the record makes clear, was not to further the ends of the litigation in the state court, but to defeat the same entirely. By divers proceedings it sought to accomplish its purpose. It denied the necessity for the appointment of a receiver, asked that the order appointing him be annulled, sought to remove the litigation to the circuit court of the United States for the northern district of Georgia, etc. On April 3, 1893, on the intervention of William A. Wright, comptroller general for the state of Georgia, Garrett, the receiver, was by order of the superior court directed to sell, free from all liens, mortgages, deeds of trust, judgments, and incumbrances of every character whatever, on the first Tuesday in May thereafter, the railway of the defendant company, together with its franchises, rolling stock, and other property. The order of sale fixed the minimum price at which the property might be sold at \$500,000, of which sum \$100,000 should be paid in cash and the remainder when the sale should be confirmed, with privilege to the bondholders to pay the deferred sum of \$400,000, in bonds of the company should they become the purchasers. In pursuance of this order the receiver sold the property of the company, at public outcry, to Adam Dutenhofer, for the bondholders, at \$500,000, receiving \$100,000 in cash and remainder in bonds, which sale was reported to the court, and which was duly confirmed. Various creditors of the Atlanta & Florida Railroad Company, not hereinbefore named, by intervention before or after the sale, became parties plaintiff to the litigation.

It appearing that there were conflicting claims to the fund in the hands of the receiver, and controversies as to the priorities of debts, on May 24, 1893, upon the petition of Houser and others, the cause was referred, by order of the court, to William T. Moyers, as auditor, to take and hear evidence, and report on all matters of law and fact involved in the cause between the plaintiffs and defendants. He was also directed to report what would be reasonable compensation for the receiver, what would be reasonable compensation for the attorneys of the receivers for services and advice rendered him as such, what amount should be allowed complainants' solicitors who filed the petition under which the fund was brought into court, and to report what should be allowed the attorney of the Atlanta & Florida Railroad Company for services rendered since the appointment of the receiver. On

<sup>1</sup>Atlanta & F. R. Co. v. Western Ry. of Alabama, 1 C. C. A. 676, 50 Fed. 790.

June 3, 1893, Adam Dutenhofer, as chairman of the committee of bondholders, intervened, and was by order of the court made a party to the cause. He alleged that as such chairman he would be entitled to receive from the receiver whatever surplus might remain of the \$100,000 paid on the purchase of the property after paying claims made against the fund which should be adjudged prior in right to the lien of the mortgage before referred to. On June 17, 1893, the auditor filed his report. From this report it appears that the auditor found, among other things, that certain unsecured debts, contracted before the appointment of the receiver, were, under a so-called "six-months rule," entitled to priority over the mortgage of the bondholders. In his report we find this language: "He [the auditor] concludes that the court clearly has authority, either at the appointment of the receiver or when distributing the fund, to direct payment of certain unsecured debts of the defendant in preference to mortgagees' claims out of the fund realized from the sale of the property covered by mortgage. The auditor concludes that claims entitled to such preference are those for labor, for necessary improvements, and for such supplies and for such service of other railroad and expenses as were necessary to keep the road a 'going concern,' which claims must have originated in so short a time before the appointment of a receiver as to leave no doubt of their benefits accruing to the mortgagees." The several claims belonging to this class, adjudged by the auditor to be prior to the mortgage of the bondholders, aggregate quite a considerable sum, and to this allowance of priority the plaintiffs in error, the Central Trust Company and Adam Dutenhofer, duly excepted. On October 23, 1893, the judge presiding approved the report of the auditor, except as to a finding in favor of W. H. Horne, and dismissed all the exceptions to the auditor's report save the one referring to Horne's claim, and at a later date—November 1, 1893—directed the jury to render a verdict sustaining and confirming and finding in favor of the auditor's report in all respects except as to the claim of Horne. The verdict so rendered was on the last-mentioned day made the decree of the court. To the judgment of the court the Central Trust Company and Adam Dutenhofer excepted, and assign same as error.

1. One of the questions presented in the case is, did the court err in holding, in effect, that unsecured debts of a certain class should be paid out of the fund arising from the sale of the mortgaged property in preference to the mortgage debt? Though of modern origin, there can be no question that the doctrine of equitable preference given to unsecured debts contracted before the appointment of a receiver over the lien of a mortgage holder, when distributing the fund arising from the sale of the mortgaged property,

has been frequently recognized. Except in those states, however, where specific provision has been made by statute for this priority, the doctrine rests upon the decisions of certain courts,—chiefly the circuit courts of the United States. But it must be admitted that the doctrine has been recognized also by the supreme court of the United States in several of its rulings. This court has never ruled this question. Preferential debts, it is said, are those which have aided to conserve the property of the railroad, thus resulting in benefit to the bondholders, and which have been contracted within a reasonable time prior to the receivership. While the doctrine or rule under which such debts have been given priority over mortgage liens is sometimes designated as the "six-months rule," as if to indicate that the preferred debt must have been created within six months of the appointment of a receiver, an examination of the authorities upholding the rule discloses the fact that no such designation is authorized. In one instance priority was given to a debt contracted three years before the appointment of a receiver, in another the debt was contracted eleven months prior thereto, in another eight months, in another twelve months, and so on. See *Hale v. Frost*, 99 U. S. 389; *Burnham v. Bowen*, 111 U. S. 776, 4 Sup. Ct. 675; *Douglass v. Cline*, 12 Bush. 608; 9 Am. Ry. R. 386. The language of the various and varying decisions recognizing and sustaining the doctrine of preferential equities need not be quoted. Suffice it to say that in some of them the courts have gone to great lengths in giving preference over mortgage liens to unsecured debts, contracted before the appointment of a receiver, for labor, materials, and the like. See *Hale v. Frost*, 99 U. S. 389; *Fosdick v. Schall*, Id. 235; *Kneeland v. Trust Co.*, 136 U. S. 89, 97, 10 Sup. Ct. 950; *Railroad Co. v. Wilson*, 138 U. S. 501, 11 Sup. Ct. 405; *Railroad Co. v. Humphreys*, 145 U. S. 82, 12 Sup. Ct. 787; *Thomas v. Car Co.*, 149 U. S. 95, 13 Sup. Ct. 824. It is worthy of notice that in none of these rulings is it claimed that the right of priority rests upon any lien, legal or equitable. Such priority rests entirely upon a supposed superior equity. But while it is true that the federal courts have in some instances gone quite far in recognizing the doctrine referred to, their rulings show that they have not been uniformly so. Thus in *Railroad Co. v. Cowdrey*, 11 Wall. 459, it is said: "The principle applicable to maintain cases which give priority of lien to the last creditor furnishing supplies and repairs for the conservation of the ship or voyage does not apply to railroads. As to them, the common-law rule prevails, 'fui prior est in tempore, fortior est in jure.'" And in *Kneeland v. Trust Co.*, 136 U. S. 89, 10 Sup. Ct. 950, cited above, the court says: "Upon these facts we remark: First. That the appointment of a receiver vests in the court no absolute

control over the property, and no general authority to displace vested contract liens. Because in a few specified and limited cases this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preferences to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So, when a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell to a railroad company, or to work for it; and whoever has dealing with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception, and not the rule, that such priority of liens can be displaced. We emphasize the fact of the sacredness of contract liens for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in the matter of the displacement of vested liens." But, regardless of the reasoning of the federal courts for or against so-called preferential equities we are satisfied the doctrine has no place in this litigation, if, indeed, it can be invoked at all under the laws of this state. As has already been stated, this court has never ruled the question, and we are aware of no statutory or other express law of force in this state upon which the doctrine can be vested.

The petition of Marsh and others was evidently filed under the insolvent traders' act (Code, § 3149d), by the express terms of which it is provided that, "upon the appointment of a receiver, no creditor shall acquire any preference, by any judgment or lien, or any suit or attachment under proceedings commenced after the filing of the bill, and all assignments and mortgages to pay or secure existing debts made after the filing of said bill shall be vacated, and the assets divided pro rata among the creditors, preserving all existing liens." We think the intention of the legislature was clearly expressed in this pro-

vision of our law, and that its purpose evidently was to preserve, and not to destroy, liens when distributing the assets of an insolvent trader, firm, or corporation. In *Blanchard v. Vansyckle*, 70 Ga. 233, it was held that: "Whilst it is true that under the act of 1881 pre-existing liens are not to be interfered with, nor are parties with such liens to be hindered and delayed in the exercise of their usual common-law remedies, yet if they voluntarily come in, and ask to be made parties defendant to a bill filed under this act, and submit their liens to that investigation which a court of equity may exercise over them, and they are assailed for invalidity, or cast under such a suspicion as to induce the chancellor to put the property they are seeking to sell in the hands of a receiver, they must abide by his judgment. But still, if the liens are valid, they must be preserved, and it will be the duty of the chancellor, under the law, to see that this is done." The same rule as to the preservation of liens prevails in the case of railroad corporations as in the case of other corporations or of traders in general.

We think the court erred in not sustaining the exceptions filed to the report of the auditor where the exceptions were based upon the allowance of unsecured debts over the mortgage lien of the bondholders, and such allowance rested on no higher right than springs out of the doctrine of preferential equities. Under this view of the question, we think the following named claims should not have been given preference over the mortgage lien of the Central Trust Company of New York, and the judgment of the court in so far as it gives this preference is reversed: Southern Railway Equipment Company, \$750; Buda Iron Works, \$70; Charles Scott Spring Company, \$90.28; A. H. Benning, \$36; J. P. Baker, \$60; Hammett & Word, \$107.63; Joseph Thompson, transferee, etc., \$691; James P. Harrison & Co., \$192.85; J. B. Wilson, for the use, etc., \$659.75; R. L. Robinson, \$678.02; Western & Atlantic Railroad Company, \$767.79; Receivers East Tennessee, Virginia & Georgia Railway Company, \$5,029.86; S. A. Fletcher & Co., \$1,590. Speaking for myself in what is said further on this subject, I think that the entire doctrine of preferential equities as applicable to railroads, except where it rests upon statutory enactment, has been justly styled "court-made law." It is a doctrine well calculated to destroy all confidence in the sacredness of contracts to cause those who have parted with their money upon the faith of recognized liens to look with distrust upon the law, and to doubt the protection of the courts. It seems to rest upon no firmer basis than the power of courts of last resort to violate the integrity of contracts, which power is to be exercised according to the individual opinion of the particular chancellor within whose jurisdiction the given case may happen to fall. It was argued by counsel representing some

of the unsecured creditors that "various rules are relied on to sustain the position of the courts which resolve themselves into an elastic rule depending upon the breadth of mind of the tribunal determining the matter." The elasticity of the rule renders it a very uncertain one. And further it was argued that "there is no more difficulty in overcoming our statutory requirements than that which must have presented itself to the supreme court of the United States when they made ordinary debts superior to the dignity, rank, and power of a common-law mortgage." The difficulty, I am persuaded, in "overcoming our statutory requirements," is not greater than that encountered by the supreme court of the United States "when they made" ordinary debts superior in rank to a mortgage; but the courts of this state have uniformly adhered to those fundamental principles upon which our political system rests, an important one being that all of the departments of the government are distinct. I confess to an inability to see wherein a party who furnishes to a railroad an article which is consumed in its use before a receiver is appointed has an equity superior to the party who furnished the money with which the road itself was created, the fund to be distributed arising from the sale of that identical road. The auditor found that the defendant railroad company was indebted to the Central Car Trust Company in the sum of \$960, besides interest, and that the debt so owing was superior to the mortgage of the Central Trust Company of New York. It appears from the evidence that the Central Car Trust Company sold to the Atlanta & Florida Railroad Company three caboose cars for \$2,400, and that the debt found to be owing, \$960 and interest, was a balance due on the purchase price of the cars. It also appears that the Central Car Trust Company reserved title to the cars until the full purchase price should be paid, and that the reservation of title was duly recorded. The receiver sold these cars with the other property of the railroad company, and they contributed in this way to the fund in court. Garrett, the receiver, having used the cars during the time he operated the road, and having then sold them with the other property, thus appropriating them to the defendant company, the transaction may be treated as a purchase by him, and consequently as a part of the expenses of the receivership. The judgment of the court allowing this balance priority over the bondholders' mortgage was right, and is affirmed.

2. Where a railroad is operated by a receiver, all his legitimate expenses, including the fees of his counsel, are chargeable upon the fund produced by a sale of the railroad made under a decree rendered in the cause, if there is no other fund under the control of the court out of which these expenses can be paid. Income would be chargeable before corpus, but as a last resort the charge would

fall on the latter. This is the well-settled general rule.

3. Counsel fees in a proceeding under section 3149a of the Code against an insolvent corporation may be allowed for bringing the fund into court, but the scheme of the statute is that these fees, as a part of the expenses of the litigation, shall be borne in some just proportion by all who come in to claim the fruits of the proceeding. No suitor can rightly take any of these fruits without bearing his due proportion of such fees, and even a voluntary party defendant, who ultimately shares in the fund which is realized, and takes it by the judgment or decree finally rendered, is chargeable the same as he would be had he intervened as a coplaintiff. It is provided by section 3149c of the Code that "any creditor may become a party to said bill, under an order of the court, at any time before the final distribution of the assets, he becoming chargeable with his just proportion of the expenses of the previous proceeding." It will be observed that the statute just quoted makes no distinction between those who become parties to the proceeding, whether as plaintiff or defendant, and places upon each the obligation to pay his just proportion of the expenses. And this has been held to mean a just proportion of the expenses up to the time of becoming a party, and a like proportion to the end of the litigation. See *Banking Co. v. Abbott*, 87 Ga. 134, 13 S. E. 204. We think that counsel fees were properly allowed in this case as a part of the expenses of the litigation, and that there is a preponderance of evidence in favor of the several amounts allowed; but we think it was error to so award the payment of the fees for bringing the fund into court as to cause the burden to fall entirely upon the mortgage or the bond holders. We therefore affirm the judgment of the court below allowing counsel fees, and also affirm the judgment as to the several amounts allowed, with direction that the court, by proper proceeding, direct the payment of the allowance for bringing the fund into court in some just proportion by all of the parties to the cause who claim and participate in the funds of the proceeding. The apportionment is not intended to apply to fees allowed the receiver's counsel for services rendered at his instance, nor to the allowance made to Mr. Rountree for services rendered during the receivership. The court had a legal discretion to compensate for these services, on the ground that they were beneficial to the receivership, although Mr. Rountree was not employed by the receiver.

4. It appears further from the record that the auditor found in favor of the Southern Railway Equipment Company, one of the interveners, a balance of \$2,367.68 for rental of 100 cars for four months at \$7.50 per car per month. Of this sum the auditor found that \$1,617.68 was a lien upon the fund in court superior to the lien of the bondholders; be-

cause it was owing for rental of cars under a contract made by Plant, as receiver, under authority of the United States circuit court for the southern district of Georgia. The cars were used by Plant, as receiver, under the contract so made between himself and the Southern Railway Equipment Company. The remainder of said sum of \$2,367.68, to wit, \$750, the auditor found to be superior to the mortgage, because owing for car rental, and because the indebtedness was contracted within six months of the appointment of a receiver. What has already been said concerning preferential equities will dispose of the finding of the auditor as to the \$750 claim. Nor do we think that the auditor should have allowed the claim for \$1,617.68. A receiver of a state court is not chargeable with expenses incurred by a receiver of a federal court while the property was in the hands of the latter, or for the hire of property which the latter used on a contract of hire made by him. Especially is this true where the appointment by the federal court was void for want of jurisdiction. The judgment allowing the \$1,617.68 is reversed, and the judgment as to \$750 is reversed in so far as it gives priority over the mortgage debt.

5. On October 14, 1892, Benjamin Thurman obtained judgment in the city court of Atlanta for \$600, being \$300 for right of way and \$300 as consequential damages. These sums the auditor allowed in his report, and they were likewise allowed by the judgment of the court. These were no exception to the allowance of \$300 for right of way. The exception relates solely to the preference given the \$300 as consequential damages. By article 1, § 3, par. 1, of the constitution of the state it is provided that "private property shall not be taken, or damaged, for public purposes, without just and adequate compensation being first paid." It will thus be seen that the constitution puts damage done to private property and the taking of it for public use on the same footing. Consequently damage done to land by taking a portion of it for the way of a railroad ranks with the amount allowed for the right of way itself, in competition with a mortgage upon the railroad to secure other indebtedness of the company. The finding in favor of Thurman's priority for consequential damages was right, and the judgment of the court with reference thereto is affirmed.

6. It is insisted by the plaintiffs in error that the original petition in this cause, having been filed under the insolvent traders' act (Code 3149a et seq.), was not a cause of original equity cognizance, and that the court erred in not submitting the questions of fact raised in the report of the auditor upon exceptions thereto to the finding of a jury. Where a statute, such as section 3149a et seq. of the Code, extends the equitable jurisdiction of the superior court to new cases, the mode of trial in such cases is governed by ordinary equity practice, and the right of

trial of facts by master or auditor instead of by jury is subject to the will of the legislature. Acts 1884-85, p. 98; *Mahan v. Caverder*, 77 Ga. 118; *Poullain v. Brown*, 80 Ga. 27, 5 S. E. 107; *Mackenzie v. Flannery*, 90 Ga. 590, 16 S. E. 710. It follows that the court did not err in refusing to submit the questions of fact to the finding of a jury after overruling the exceptions to the finding of the auditor on the facts.

Judgment reversed in part and in part affirmed.

JENKINS, J., presiding in lieu of LUMPKIN, J., disqualified.

(84 Ga. 750)

**SPARKS v. CENTRAL TRUST CO. OF NEW YORK et al. (two cases).**

(Supreme Court of Georgia. Oct. 4, 1894.)

These cases are controlled by the decision in *Trust Co. v. Thurman* (this day announced) 20 S. E. 141.

(Syllabus by the Court.)

Error from superior court, Fulton county; John L. Hopkins, Judge pro hac vice.

Writs of error by W. B. Sparks, receiver of the Macon & Birmingham Railroad Company, to a judgment in favor of the Central Trust Company of New York and others, and by W. B. Sparks, receiver of the Georgia Southern & Florida Railroad Company, to a judgment in favor of the said trust company and others. Affirmed.

Gustin, Guerry & Hall, for plaintiff in error. O. Z. Blalock, H. B. Tompkins, and Payne & Tye, for defendants in error.

PER CURIAM. Judgment affirmed.

JENKINS, J., presiding in lieu of LUMPKIN, J., disqualified.

(90 Va. 778)

**WESTERN UNION TEL CO. v. BRIGHT.<sup>1</sup>**

(Supreme Court of Appeals of Virginia. Sept 10, 1894.)

TELEGRAPH COMPANY—NONDELIVERY OF MESSAGE—PENALTY—RECOVERY BY MOTION.

1. Section 1292, Code 1887, which allows the receiver of a telegram to recover a penalty of \$100 from the telegraph company for a failure to deliver a message as soon as practicable, is not in conflict with the interstate commerce clause of the federal constitution.

2. Section 3211, Code 1887, which enacts that "any person entitled to recover money by action on any contract, may on motion before any court \* \* \* obtain judgment for such money after 15 days' notice," does not authorize the recovery by motion of a statutory penalty for failure to deliver a telegram as soon as practicable.

Error to circuit court, Franklin county.

Proceeding by motion, wherein George M. Bright was plaintiff and the Western Union

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

Telegraph Company was defendant. The judgment being adverse to the defendant company, it obtained a writ of error. Reversed.

Robt. Stiles, for plaintiff in error. Anderson & Hairston, for defendant in error.

LEWIS, P. This was a motion in the court below to recover a penalty of \$100, provided by section 1292 of the Code, for the failure of the defendant company to deliver as promptly as practicable a certain dispatch, transmitted from Abingdon to Rocky Mount (points within this state), and addressed to the plaintiff. Section 3211, under which the proceeding was had, enacts that "any person entitled to recover money by action on any contract, may, on motion before any court which would have jurisdiction in an action, otherwise than under section thirty-two hundred and fifteen, obtain judgment for such money after fifteen days' notice, which notice shall be returned to the clerk's office of such court ten days before the commencement of the term," etc. The defendant company appeared, and moved to dismiss the motion on the ground, among others, that the circuit court had no jurisdiction to entertain it, which motion was overruled; and, all matters of law and fact having been submitted to the court, judgment was given for the plaintiff.

1. The point was also made, and is repeated in the petition for appeal, that section 1292 of the Code is repugnant to the commerce clause of the constitution of the United States. But the point, while sufficient to give this court jurisdiction of the case, although the matter in controversy is less in amount than \$500, is not well taken. The dispatch in question was a private, domestic dispatch, and therefore not within the purview of the federal constitution, for the rule is well settled, as declared in *Telegraph Co. v. Texas*, 105 U. S. 460, that the regulation of such dispatches belongs as exclusively to the state in which they are transmitted as does the regulation of interstate commerce to congress. Nor does the fact that the defendant company also does an interstate business, and is therefore an instrument of interstate commerce, affect the case. *Leloup v. Port of Mobile*, 127 U. S. 640, 647, 8 Sup. Ct. 1380; *W. U. Tel. Co. v. Alabama State Board*, 132 U. S. 472, 10 Sup. Ct. 161; *Postal Tel. Cable Co. v. City Council of Charleston*, 153 U. S. 692, 14 Sup. Ct. 1094. In the recent case of *Telegraph Co. v. Tyler* (Va.) 18 S. E. 280 (decided since the present appeal was taken), it was held that section 1292 is valid, even as applied to a dispatch sent from another state, in the absence of any conflicting regulation on the subject by congress; and to that ruling, without restating the reasons upon which it was founded, we adhere.

2. But that the circuit court was without jurisdiction to entertain the motion is, we think, clear. Section 3211, Code, authorizes

the remedy by motion only in those cases in which the plaintiff is entitled to recover money by action on a contract; and here the proceeding is founded, not upon contract, but upon a tort, i. e. a wrongful violation of a public duty. The case of *Telegraph Co. v. Pettyjohn*, 88 Va. 296, 13 S. E. 431, is a sufficient authority upon this point. It is true an action of debt lies for a statutory penalty, but this is because the sum demanded is certain, and not because the cause of action arises *ex contractu*. *Chaffee v. U. S.*, 18 Wall. 516. The principle laid down by *Blackstone* (3 Comm. 159), that every man impliedly agrees to obey the laws of the state, and consequently to pay all penalties incurred under any act of the legislature for a violation of its provisions, is altogether too broad for a case like the present, for upon the principle of an implied contract to obey the laws, and not to injure one's neighbor, *assumpsit*, if not debt, would lie for an assault and battery, or for arson, or for any other like offense, which would hardly be seriously contended for. Accordingly, in *Zeigler v. Gram*, 13 Serg. & R. 102, it was held that a justice of the peace, whose jurisdiction, under the statutes of Pennsylvania, was confined to those causes of action arising from contract, express or implied, had not jurisdiction of an action to recover a statutory penalty for not entering satisfaction of a judgment; and *Gibson, J.*, speaking for the court, said: "When a statute imposes a penalty, but prescribes no method of recovery, recourse may doubtless be had to the action of debt; and every debt is said to arise out of a contract, either express or implied. But in jurisprudence the word 'contract' is generally used to denote a bargain or agreement; and it is plain that in these acts of assembly it was used in that sense by the legislature, who had in view those contracts that arise immediately out of a course of dealing between the parties, and not that sort of contract that arises remotely out of the compact of government." The same view was taken by the New York court of appeals in *McCoun v. Railroad Co.*, 50 N. Y. 176. Another case in point is *Telegraph Co. v. Taylor*, 84 Ga. 408, 11 S. E. 396. There the jurisdiction of justices' courts being limited by the constitution of Georgia to "civil cases arising *ex contractu*, and cases of injuries or damages to personal property," the question was whether they could be invested by the legislature with jurisdiction over actions to recover a penalty imposed by statute upon telegraph companies for undue delay in the transmission and delivery of messages; and it was held that they could not, on the ground that the penalty was for a violation of a public duty, and not for a breach of contract. That was an action by the person to whom the message was addressed; and, in answer to the suggestion of counsel that there was a contract between the sender of the message and the defendant company which would support the action, the

court said: "The penalty is not given, in whole or in part, as compensation in damages for a violation of that contract. On the contrary, both the sender, with whom the company had a contract, and the person to whom the telegram was addressed, and with whom the company had no contract, are left in full possession of all their rights, outside of penalty, in every respect. That the penalty is imposed solely for the wrongful violation of a public duty is manifest, and it seems to us to make no difference that this particular instance of that duty had its origin in contract." It follows that the plaintiff in the present case is not entitled to recover the penalty sued for by virtue of "any contract," and consequently that the judgment of the circuit court must be reversed, and such order entered here as that court ought to have entered.

(90 Va. 775)

**RICHMOND CITY & S. P. RY. CO. v. JOHNSON.**<sup>1</sup>

(Supreme Court of Appeals of Virginia. Sept. 10, 1894.)

**SET-OFF AND PAYMENT—PLEADING.**

Under Code 1887, § 3298, providing that, "in a suit for any debt, the defendant may at the trial prove and have allowed against such debt, any payment or set-off which is so described in his plea \* \* \* as to give the plaintiff notice of its nature, but not otherwise," defendant cannot prove a set-off or payment under a plea of nil debet or non assumpsit, unless he files with his plea such a descriptive account as said section 3298 requires.

Error to circuit court of city of Richmond.

Action of debt by A. L. Johnson against the Richmond City and Seven Pines Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

F. M. Conner and Benj. H. Nash, for plaintiff in error. W. C. Preston and Meredith & Ceeke, for defendant in error.

**LEWIS, P.** This was an action of debt on a written order drawn by one Child on the defendant company, payable to the plaintiff, for \$2,000, and accepted by the company. The plea was nil debet, and there were a verdict and judgment for the plaintiff. The single question in the case is as to the exclusion at the trial of certain evidence offered by the defendant. It appears that the company contracted with Child to build its road from a point within the city of Richmond to its eastern terminus, about seven miles outside of the city. Child sublet the work to Thomas Barry & Co., and employed the plaintiff, a civil engineer, to locate the road and to supervise its construction. At the trial, the defendant offered evidence to prove that the order was given and accepted to pay for work done by Barry & Co., and that the defendant afterwards paid Barry &

Co. for the work; but the evidence was excluded, to which ruling the defendant excepted. It is contended that the evidence ought to have been admitted, because, under the plea of nil debet, payment or any other defense is admissible that tends to deny an existing debt; and this is undoubtedly so at common law. 4 Minor, Inst. 641; Insurance Co. v. Buck, 88 Va. 517, 13 S. E. 973. But this rule, so far as respects the defense of payment, has been modified in Virginia by statute. In 1705, it was enacted by the general assembly that, "when any suit shall be commenced and prosecuted in any court within this colony for any debt due by judgment, bond bill or otherwise, the defendant shall have liberty upon tryall thereof to make all the discounts he can against such debt, and upon proof thereof, the same shall be allowed in court." 3 Hen. St. 378. Under this act, it was the practice to allow offsets to be given in evidence under the plea of nil debet or non assumpsit, and this without previous notice. 5 Rob. Pr. 1000; 2 Tuck. Bl. Comm. 108. But, at the revisal of 1819, a change was made, in regard to both payment and offsets, by enacting that, "in every action in which a defendant shall desire to prove any payment or set-off, he shall file with his plea an account, stating distinctly the nature of such payment or set-off, and the several items thereof; and in failure to do so he shall not be entitled to prove before the jury such payment or set-off, unless the same be so plainly and particularly described in the plea as to give the plaintiff full notice of the character thereof." 1 Rev. Code 1819, p. 510. Under this statute, it was held in Johnson v. Jennings, 10 Grat. 1, that, in the absence of such an account as the statute contemplated, evidence was not admissible to prove a specific payment under the plea of non assumpsit; and the statute as it now stands in the Code is, in this respect, substantially the same as it was in the Revised Code of 1819. It enacts that, "in a suit for any debt, the defendant may at the trial prove and have allowed against such debt, any payment or set-off which is so described in his plea, or in an account filed therewith, as to give the plaintiff notice of its nature, but not otherwise." Code 1887, § 3298. It will thus be seen that, as respects notice, the statute (as was said by Moncure, P., in Allen v. Hart, 18 Grat. 722, 734) puts payment and set-off on the same footing; so that, to entitle the defendant to prove payment under the plea of nil debet, he must file with his plea such a descriptive account as section 3298 requires. 1 Bart. Law Pr. (2d Ed.) 492, 496. This requirement not having been complied with in the present case, the evidence in question was rightly excluded; and, as there is nothing in the record to warrant a new trial on the ground that the verdict was contrary to the evidence, it follows that the judgment must be affirmed. Judgment affirmed.

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.



**KARN et al. v. BLACKFORD et al.**

(Supreme Court of Appeals of Virginia. June 14, 1894.)

**COMPOSITION WITH CREDITORS — RIGHTS OF PARTIES—NOVATION.**

1. Where, after the acceptance of a note, the payee, in a composition of the creditors of the maker, agrees that the note shall be paid according to the terms of a trust deed, one who acquires the note after maturity holds the same subject to the provisions of the trust deed, though the deed was not recorded when the note was acquired.

2. Where, in settlement of the debts of an insolvent firm, a creditor accepts the individual note of the partner appointed to wind up its affairs, and the firm debts are secured by a trust deed to him of the assets, there is not a novation so as to release the firm assets from the debt evidenced by the note.

3. Where, in a composition of the creditors of a firm, one of the members is appointed to carry on the business, and to pay the creditors out of the proceeds, the expenses of carrying on the business should be paid before the creditors are entitled to receive any part of the proceeds.

Appeal from chancery court of Richmond; W. J. Leake, Chancellor.

Action by W. M. Parish against C. M. Blackford and others to determine the respective rights of the creditors of the Richmond Brick Company and Sneed & Scott. From a decree of the chancery court, defendants Karn and Hickson appeal. Affirmed.

The following is a copy of the opinion of the chancellor, and made a part of the record in the case of Karn and Hickson against Blackford, trustees:

"Karn & Hickson claim that they are the holders of negotiable paper for value without notice of the equity of the deed of January 8, 1885, and that, therefore, they are not bound by the provisions of that deed. Let it be conceded that Karn & Hickson are holders of such paper for value and without notice, yet, as the notes purchased by them were overdue, and had been protested, they must hold the notes subject to the equities existing at the time the notes were purchased, whether they had notice thereof or not. Judge Moncure, in *Davis v. Miller*, 14 Grat. 5, says: 'In the case of the transfer of an overdue note, the holder takes it as a dishonored note, subject to all the defenses and equities to which it was subject in the hands of his immediate indorser, whether he has notice thereof or not. He receives nothing but the titles and rights of such indorser.' 14 Grat. 5, 6. But it is contended that this doctrine thus stated by Judge Moncure does not apply where the equities are collateral, and do not attach to the note itself. In this case the equities do attach to the note itself, and do not arise out of any collateral matter. When the notes were purchased the deed of January 8, 1885, had been executed, and the payment of these notes by said deed had been postponed until all the debts in the first class had been paid. W. B. Sneed, the payee of these notes, could not have enforced their

payment against the property conveyed in the deed, except subject to its provisions; and Karn & Hickson, purchasing from him after the dishonor of said notes, could only take what he could have taken. Mr. Daniel, in his work on Negotiable Instruments, treating of this subject, says that the indorsee of overdue paper takes it subject to two defenses: '(1) That it was affected in its inception with some inherent vice,—as, for instance, fraud, illegality or duress; or (2) that the consideration failed, or that payment had been made, or that there had been accord and satisfaction at the time of the indorsement, or that there was some equitable defense arising out of the transaction in which the paper was given which disabled his indorser, in whole or in part, to recover. Any of these defenses is called an equity attaching to the instrument.' 1 Daniel, Neg. Inst. 725. No one can doubt that these notes in controversy, held by Karn & Hickson, were indorsed by the Richmond Brick Company in the transaction which culminated in the dissolution of that firm, and the execution of the deed of January 8, 1885, although the notes may have been dated a few days prior thereto. This being true, the equity here attached to the notes themselves, and Karn & Hickson take them subject to such equity. But Karn & Hickson further claim that the deed of January 8, 1885, is void as to the debt due them by these notes, because it was unrecorded at the time they purchased the notes. This position cannot be sustained. The deed of January 8, 1885, may have been void as to the notes when Karn & Hickson purchased them, because it had not been recorded, yet when it was recorded it became valid as to all creditors who had not obtained specific liens on the property during the interval between the execution and recordation of said deed. It follows, therefore, that the rights of the parties were fixed by the deed of January 8, 1885, and they could not be changed by any subsequent deeds or agreements of the grantors in said deed, except by the consent of all parties interested. The deeds of February 6, 1886, and of December 11, 1886, were made for the manifest purpose of giving effect to the deed of January 8, 1885, and for the purpose of hastening the execution of its provisions. These deeds contain no unreasonable conditions, and nothing of which Karn & Hickson have any right to complain.

"This brings us to the construction of the deed of January 8, 1885, for by it the rights of all parties must be determined. Karn & Hickson contend that their debt is embraced in the first class of creditors provided for in the deed of January 8, 1885. I think a proper construction of the deed excludes and negatives any such position. If their debt of \$8,711.37, evidenced by these notes, was included in the first class of debts, why provide for its payment in the second class of debts, and also provide that it shall be paid after all the debts of the first class have

been paid? If it has been paid as a first-class debt, it ceased to have any existence, and could not be paid again as a second-class debt. But Karn & Hickson claim that the debts of the parties claiming under the deed of January 8, 1885, have been novated, because after said deed was made the parties surrendered the notes of Snead & Scott and took the individual notes of W. B. Snead in the place thereof. There could be no novation of these debts in the manner claimed, because the partners, by the deed of January 8, 1885, authorized W. B. Snead to conduct the business in his own name, and in any manner he deemed best, and to pay off these debts as first-class debts. The creditors holding notes of the firm were fully justified, under the terms of said deed, to exchange their notes of Snead & Scott for notes signed or indorsed by W. B. Snead alone. In fact it was a matter of indifference to either of the grantors in the deed, or to the creditors secured therein, how the indebtedness was evidenced. Williams and Scott were insolvent, and had conveyed all of the firm assets to W. B. Snead for the payment of the firm debts, and nothing Williams, Scott, or Snead might do could change the relations of the creditors to the property conveyed by the deed. The cases referred to by counsel for Karn & Hickson establish a doctrine that is not controverted, namely, that where one accepts a higher or negotiable security for a debt from one of the partners in satisfaction of the debt of the partnership, there is a novation of the debt, and the other partners are released. This doctrine rests upon the intention of the party. If he prefers to take, and does take, in full satisfaction of his debt, a higher security from one partner, it would not be equitable for him to claim the right to pursue the partnership property and the individual property of one partner at the same time. None of the cases cited, however, hold that, where the partnership assets have been conveyed to one of the partners for the purpose of paying the creditors in the order named, surrendering the notes of the firm and taking the note of the partner closing up the business of itself alone operated as a novation of the debt. The leading case, perhaps, in Virginia on this subject is *Niday v. Harvey*, 9 Grat. 466, in which Judge Daniel says: 'It may, however, I think, be stated as the well-settled doctrine of this court that whilst the mere acceptance of such higher security by a creditor from one member of a firm for a partnership debt due by simple contract destroys the right of the creditor to proceed at law against the member who was not a party to the giving of such higher security, yet that a court of equity will look at the original character of the debt, and will not withhold relief against the member not uniting in the higher security merely because of the merger and destruction of the legal remedy against him, but will treat

that simple contract as still subsisting in *foro conscientia*, unless it is shown that the creditor, by accepting such higher security, intended to abandon all recourse upon his original demand.' If, by taking such higher security, it was not the design of the partners that the social debt should be extinguished, equity will still hold all the partners bound. The evidence in the case at bar negatives any idea or intention of the parties to extinguish the social debts. The creditors have been claiming the social assets, and the partners have been all the time acknowledging their liability. The People's National Bank of Lynchburg may have lost their remedy at law against the other partners by proceeding to judgment against W. B. Snead alone, but they have not lost their rights in equity against the property conveyed in the deed for their benefit. A merger acts in personam, but not in rem. The partners may be released personally, but the partnership's assets are never released; certainly not, when a deed of trust has been given upon them to secure the debt. On this subject, in 2 Jones, Mortg. p. 926, it is laid down that a mortgage secures the debt, and not the note or bond or other evidence of it. No change in the form of the evidence, or mode or time of its payment,—nothing but actual payment of the debt, or an express release,—will operate to discharge the mortgage. The mortgage remains a lien until the debt it was given to secure is satisfied, and it is not affected by a change of the note, or by the giving of a different instrument as evidence of the debt, or by a judgment at law on the note, merging the original evidence of indebtedness, or by a recognizance of record taken in lieu of the mortgage debt. 2 Jones, Mortg. p. 926.

"The expense of conducting the business and executing the trust in this case, Karn & Hickson contend, should not be paid until all the debts of the firm secured in the deed of January 8, 1885, have been paid. From the very nature of the transaction involved, such a position cannot be sustained. Under the deed, W. B. Snead was to conduct the business, and out of the proceeds and profits pay off the debts, etc. It would be inequitable for the creditors—all of whom acquiesced in his management of the business—if they should be allowed to receive the proceeds and profits, and yet require that the debts of those who labored or furnished goods by which the profits were realized be postponed. I think, under a reasonable construction of the deed, the expenses are first to be paid. The next position taken by Karn & Hickson is that the debts of the plaintiff never were the debts of the Richmond Brick Company, and should not, therefore, be paid out of the funds derived from the sales of the property under the deeds. They contend that these debts are the old debts of Snead & Scott, incurred prior to the time that Williams became a partner in the Richmond Brick Com-

pany. The evidence shows that in 1883 W. B. Snead and J. P. Scott were engaged in brick making, under the firm name of Snead & Scott; that in 1884, H. W. Williams bought for the sum of five thousand three hundred and thirty dollars and thirty-three cents one-third interest in the brickyard and fixtures; that under the agreement of partnership Scott was to manage and control the making of bricks; that H. W. Williams was to sign all notes and checks, and keep the books of the firm, and W. B. Snead was to have ten per cent. on all work done and sales made by him, and the firm name was to be called the Richmond Brick Company. Soon after this agreement was made, Williams was taken sick, and became unable to attend to business, and left Richmond. Before he left he turned over all papers, books, and money belonging to the firm to J. P. Scott. After the delivery of the books, etc., the business by and with the knowledge and consent of all the parties was conducted in the name of Snead & Scott, and the accounts, assets, and affairs of the two firms were so commingled that neither of the partners knew, or seemed to care to know, anything about the status of the two firms, or the respective rights of the several partners therein. The property of the two firms was treated as the property of the Richmond Brick Company, and the partners in both firms, by the deed of January 8, 1885, recognized it as such. Under the circumstances the Richmond Brick Company became liable for the debts of Snead & Scott, contracted before the formation of the Richmond Brick Company. But, if the court is wrong in this position, the evidence shows beyond question that the creditors of the old firm (Snead & Scott), by and with the consent of the Richmond Brick Company, which was then conducting business under the firm name of Snead & Scott, novated their debts by taking other notes from Snead & Scott representing the Richmond Brick Company; all parties intending thereby to transfer the indebtedness from the one firm to the other. But, even should the court be in error in holding that the Richmond Brick Company became responsible for the old debts of Snead & Scott by conveying the assets, etc., or by the novation of said debts as aforesaid, yet upon another ground the debt of Karn & Hickson must be subordinated to the debts mentioned in the first class of the deed of January 8, 1885. Under the claim asserted and the position taken by Karn & Hickson, there can be no doubt of the fact that their notes, so far as they represent the advancements made by the firm of Snead & Scott, have been novated, and now represent a debt only against the Richmond Brick Company. Now if, on the other hand, the debts of the creditors other than Karn & Hickson have not been novated and become the debts of the Richmond Brick Company, then they still remain as the debts of the old firm of Snead & Scott. If, then, there has been no such com-

mingling of the assets, accounts, and affairs of the two firms as to hold the Richmond Brick Company responsible for the debts of Snead & Scott, and there has been no novation of such debts by which the Richmond Brick Company is liable for such debts, still it must be remembered that at the formation of the Richmond Brick Company the firm of Snead & Scott owned certainly \$16,000 worth of assets, besides the vacant lot in Manchester, which went into the business of the Richmond Brick Company, out of which the debts of the old firm should be paid. Now, if the accounts, assets, and affairs of Snead & Scott can be separated from those of the Richmond Brick Company, will not a court of equity take the money derived from the sale of the brick yard and fixtures and the vacant lot in Manchester and the proceeds of all other assets of Snead & Scott, as well as enough of the assets of the Richmond Brick Company to pay Snead & Scott, and apply them to the payment of the debts of the plaintiffs in preference to those of Karn & Hickson? This equitable disposition will as effectually postpone the payment of the debt due Karn & Hickson as does the deed of January 8, 1885. Now, if the Richmond Brick Company must pay to Snead & Scott the value of the property of that firm, appropriated to its use and in its possession at the time of the execution of the deed of January 8, 1885, before it can pay any of its other debts, then, of course, all the debts of the plaintiffs will be paid, and nothing will be left to satisfy the claim of Karn & Hickson. This discussion has been based upon the assumption that the claims of the plaintiffs were debts of Snead & Scott, and not debts of the Richmond Brick Company. The evidence, I think, shows that a large portion of these debts were contracted by the Richmond Brick Company.

"The objection of Karn & Hickson to the claim of H. M. Smith & Co. because \$1,512 of the notes indorsed by them was for their own benefit, and that \$1,616 was for the individual benefit of W. B. Snead, cannot be sustained. Commissioner Guy has not allowed H. M. Smith & Co. any part of the \$1,512, and the evidence of W. B. Snead proves that the \$1,616 was used in the Richmond business, and not for his individual benefit. The objection to the \$425 item in account with C. H. Page must also be overruled, because the testimony shows that C. H. Page used said amount for the benefit of the Richmond Brick Company, and not for his own benefit.

"The other question of fact in the case has been decided in favor of the plaintiff by the commissioner, and, after a careful examination, I see no reason for disturbing his conclusions. A decree may be entered confirming the commissioner's report."

Christian & Christian, for appellants. Meredith & Cocke and Courtney & Patterson, for appellees.

**PÉR CURIAM.** This is a contest between creditors of the Richmond Brick Company and of Snead & Scott for priority. The case was fully examined and reported upon by the master to whom the cause was referred, both as to the facts and law of the case, and the report was confirmed by the court in a written opinion, which was filed with, and made a part of, the record. Upon an examination of the case and the report and opinion aforesaid, we are of opinion that the conclusions reached by the lower court are right, and that its decree must be affirmed, for the reasons stated in the said opinion. Decree affirmed.

(90 Va. 785)

**MYERS v. COMMONWEALTH.<sup>1</sup>**

(Supreme Court of Appeals of Virginia. Sept. 10, 1894.)

**CRIMINAL APPEAL—SUFFICIENCY OF RECORD—ABSENCE OF VENIRE FACIAS—WAIVER OF DEFECTS—STATUTE—RETROSPECTIVE EFFECT.**

1. Apart from statute, a record in a felony case which does not show that there was a writ of venire facias is fatally defective, and will not sustain a conviction, and the failure of the accused to object to the want of a venire before swearing the jury, does not cure the error.

2. Section 3156, Code 1887, requiring objections to a writ of venire facias in civil cases to be made before the swearing of the jury, and extended to criminal cases by Act Jan. 18, 1888, only cures irregularities in the venire facias, leaving untouched felony cases in which there is no venire at all.

3. Acts 1893-94, p. 494, providing that, "no judgment shall be reversed for the failure of the record to show that there was a venire facias, unless made a ground of exception in the trial court before the jury is sworn," does not control an appeal in a felony case, pending when the act was passed.

Error to Caroline county court; E. C. Moncure, Judge.

James Myers was convicted of a felony, and brings error. Reversed.

J. H. Dejarrette and R. G. Moncure, for plaintiff in error. R. Taylor Scott, Atty. Gen., for the Commonwealth.

**LEWIS, P.** The prisoner was indicted and convicted in the county court of Caroline county for housebreaking with intent to commit larceny. Of the several assignments of error it will be necessary to consider one only, and that is the first, which is founded on the fact that the record does not show that there was a writ of venire facias in the case. This is a fatal defect. As this court has often decided, a venire is an indispensable process, both at common law and under the statute, to authorize the sheriff to summon a jury in a felony case, although, as was said in *Spurgeon's Case*, 86 Va. 652, 10 S. E. 979, the writ itself is not a part of the record, unless made so by bill of exceptions or otherwise. In the appendix to Chitty's *Blackstone* (Ed. 1865, vol. 2) is given

the form of a record in a felony case, in which, after the indictment, the arraignment, the plea, and issue, follows the order for a venire, or the "award of jury process," as it is technically called, which begins in these words: "Therefore let a jury thereupon here immediately come," etc., after which follows the recital that "the jurors of the said jury, by the said sheriff for this purpose impaneled and returned, to wit [naming them], being called, came," etc. This is in conformity with all the old authorities, which lay it down that the first process for convening the jury is the venire facias, and that there must be an award on the roll to warrant the issuing of the writ. *Bac. Abr. tit. "Juries," B 2; 1 Chit. Cr. Law, 720.* And, while this precise formula is not followed in our practice in making up the record, yet the record must show, as one of the essential formalities in a felony case, that the jury were brought in under a venire; and independently of the recent statute, to be mentioned presently, the failure of the accused to object to the want of a venire before the swearing of the jury does not preclude him from objecting afterwards. He may even do so for the first time in the appellate court. This is so because, at common law, the record must affirmatively show compliance with all essential formalities in a felony case in order to constitute a conviction by due process of law, some of which essentials were enumerated in *Spurgeon's Case*, supra. In the present case all that the record shows in regard to the summoning of the jury is as follows: "This day came again the attorney for the commonwealth, and the prisoner was led to the bar in custody of the jailor of this court, and a panel of twenty jurors summoned by the sheriff of this county, sixteen of whom were examined by the court, and found free from all legal exception, and qualified to serve as jurors according to law. Thereupon the accused struck from the panel four of said jurors, and the remaining twelve, against whom there was no legal objection, viz. W. P. Goodwin [and eleven others, naming them], were sworn," etc. This does not show that there was any jury process in the case, nor can the defect be supplied by presumption. *Dougherty v. Com., 69 Pa. St. 286; Spurgeon's Case, supra.*

The attorney general, however, contends that, as no objection on that ground was made in the trial court, the case is within section 3156 of the Code, which provides that "no irregularity in any writ of venire facias, or in the drawing, summoning or impaneling of jurors, shall be sufficient to set aside a verdict, unless the party making the objection was injured by the irregularity, or unless the objection was made before the swearing of the jury." But this position, apart from previous decisions on the subject, is untenable. In the first place, section 3156 is a literal copy of section 25 of the act of

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

April 9, 1853, the twenty-eighth section of which act expressly provided that "nothing contained in the preceding sections" should "apply to the impaneling of juries in felony cases" (Acts 1852-53, p. 46); and not only the immediate context, but the title of chapter 152 of the Code, in which chapter section 3156 is embraced, shows that the provision relied on was intended to apply to "juries in civil cases" only. It is true that by the act of January 18, 1888 (section 3156), was extended to "all cases, criminal as well as civil." But the effect of this extension, as was held in *Jones' Case*, 87 Va. 63, 12 S. E. 226, was to cure any irregularity in the venire facias, leaving untouched any felony case in which there is no venire at all. Since the appeal in the present case was taken, the legislature has amended and re-enacted section 3156, and added thereto the following provision: "And no judgment shall be reversed for the failure of the record to show that there was a venire facias, unless made a ground of exception in the trial court before the jury is sworn," which provision is made applicable to all cases, criminal as well as civil. Acts 1893-94, p. 494. This act was not referred to in the argument at the bar, nor does it affect the present case. A sufficient ground for so holding is the general rule that statutes are to be construed to operate in futuro, unless a retrospective effect be clearly intended. *Bac. Abr. tit. "Statute."* Or, to use the language of the court in *City of Richmond v. Supervisors of Henrico Co.*, 83 Va. 204, 2 S. E. 26, "a statute is never construed to be retroactive, except the intent that it shall so operate plainly appears upon its face;" and here not only does no such intent appear, but when it is said, as the act in question does say, that no judgment shall be reversed for the failure of the record to show that there was a venire in the case, unless objection is made before the swearing of the jury, it is evident that the act was intended to operate prospectively only. If it could be fairly construed as intended to apply to a felony case pending in the appellate court at the time of its enactment, the question would arise whether, as to such a case, it would not be void as the attempted exercise of judicial functions, and also as an ex post facto law, on the ground of its altering the situation of the accused to his disadvantage. *Cooley, Const. Lim. (3d Ed.)* 87, 94; *Ratcliffe v. Anderson*, 81 Grat. 105; *Verling v. Missouri*, 107 U. S. 221, 2 Sup. Ct. 443; *Medley, Petitioner*, 134 U. S. 160, 10 Sup. Ct. 384; *Duncan v. Missouri*, 152 U. S. 377, 14 Sup. Ct. 570; 7 Am. & Eng. Enc. Law, p. 531, and cases cited. In *State v. Fleming*, 66 Me. 142, an act designed to validate pending indictments found by a grand jury not legally drawn was held void, on the principle laid down in the previous case of *State v. Dougherty*, 60 Me. 504, where, in respect to a similar statute, the court said: "It assumes retroactively to invest with the authority, force,

and effect of law, proceedings, trials, judgments, sentences, and punishments in criminal cases, which, up to the time of its enactment, were illegal and void, and which, but for it, would have remained so to this day. It is clearly within the class of subjects inhibited by the national and state constitutions as topics of legislation, and is included in the provision against passing any law to deprive any person of life, liberty, or property 'without due process of law,' or 'but by the law of the land.'" Other authorities might be cited to the same effect, but it is needless to do so, as the act in question, as we have said, was not intended to operate retrospectively. We must therefore hold, according to the rule of the common law, as it existed prior to the enactment of the statute, that the failure of the prisoner to raise the objection now insisted upon before the swearing of the jury was not a waiver of the right to object; and, consequently, that the judgment must be reversed, and the case remanded for a new trial. *Hall's Case*, 80 Va. 555; *Jones' Case*, 87 Va. 63, 12 S. E. 226.

(42 S. C. 387)

# CALHOUN v. BANK OF GREENWOOD et al.

(Supreme Court of South Carolina. Oct. 5, 1894.)

## ASSIGNMENT FOR BENEFIT OF CREDITORS — PREFERRED CLAIMS—PARTNERSHIP AND INDIVIDUAL CREDITORS.

1. Where collaterals, pledged with a bank by a firm to secure advances, are deposited with such firm in trust for collection as the property of the bank, and the proceeds are dissipated in the business of the firm, the bank has no lien for the amount collected on the assets of the firm in the hands of an assignee for creditors.
2. Where a firm is indebted to a member, and both make assignments, the assignee for individual creditors cannot share *pari passu* with partnership creditors.

Appeal from common-pleas circuit court of Abbeville county; W. H. Wallace, Judge.

Action by A. D. Calhoun, as assignee and agent for himself and other creditors of Jervay & Co., against the Bank of Greenwood and William B. Ravenel, as assignee and agent for the creditors of William O. Bee & Co., praying the aid of the court in the distribution of the assigned estate. There was a judgment for plaintiff, from which defendants appeal. Affirmed.

The following is that portion of the master's report referred to in the appeal: "This is an action brought by the assignee and agent of creditors of one of two insolvent firms, having common partners, praying the aid of this court in the distribution of the assigned estate of one of the firms, where the assignee of the other firm presented a claim and asserted a right to share in the distribution of the assets. There is some conflict of testimony, but the chief difficulty arises from the legal questions involved, and which are to be settled by the application

of the general principles of partnership to be found in the text-books and the decisions of other states, rather than upon the decisions of our own state courts. The questions involved in the case, as we have said, grow out of the mutual dealings of two mercantile firms, having common partners, to wit, William C. Bee & Co., factors and commission merchants of Charleston, S. C., and Jervey & Co., 'dealers in general merchandise and farm supplies, and buyers of cotton,' of Greenwood, S. C. The firm of William C. Bee & Co., prior to January, 1887, consisted of Theodore D. Jervey, E. P. Jervey, and Lewis S. Jervey. At that date, Theodore D. Jervey retired from the firm, and the business was continued by the other two partners, until January, 1890, when E. P. Jervey retired, with a large indebtedness to the firm. From January, 1890, until 2d January, 1892, Lewis S. Jervey was the sole member of the firm of William C. Bee & Co., and at the latter date made an assignment, in his individual capacity and as a member of the firm, of all his property owned by him in this twofold capacity, to William B. Ravenel, as assignee, and at a meeting of creditors, subsequently held, was appointed as their agent. Prior to this time, however, and whilst E. P. Jervey and Lewis S. Jervey composed the firm of William C. Bee & Co., to wit, on the 15th of September, 1887, they advanced each \$1,000 to establish a mercantile and cotton business at Greenwood, S. C.; and this copartnership continued until the retirement of E. P. Jervey from the firm of William C. Bee & Co., when he also retired from the firm of Jervey & Co. From January, 1890, to September, 1891, Lewis S. Jervey was the sole member of the two firms of William C. Bee & Co. and Jervey & Co. At the latter date, he associated with himself, in the business of Jervey & Co., R. S. Sparkman; he advancing \$2,000 to the capital stock of the new firm, being two-thirds of the same; Sparkman advancing \$1,000, being the other one-third. This one-third, according to the testimony of Sparkman, was placed to his credit on the books of the firm, but was only partly paid. By the agreement between them, which was a verbal one, Sparkman was to receive one-third of the profits of the concern, and in any event was guaranteed \$75 per month, as his share, and was to assume his share of the liabilities of the old firm. Sparkman had been the active manager of the business of Jervey & Co. from the establishment of the firm, in 1887, conducting its mercantile business, borrowing money, buying, selling, and shipping cotton for the firm; and, according to the testimony of both Jervey and Sparkman, the business of the new firm was to continue as before. According to the testimony of Jervey, there was no contract for the shipment of cotton to William C. Bee & Co., but there were large advances of money to the Greenwood firm in 1890 and 1891, up to September, 1891, which

was covered by drafts and shipments of cotton, as far as possible. Jervey then believed the Greenwood firm to be solvent, as he made advances to it. In its behalf \$4,500 had been raised on the Hottinger note, drawn by Jervey & Co., indorsed by William C. Bee & Co., and secured by an assignment to Hottinger of a mortgage of E. P. Jervey, given to the Charleston firm, and held by it as collateral, to secure a debt of E. P. Jervey to the firm. In the meantime, during the continuance of the old firm of Jervey & Co., and also after the entrance of Sparkman, large sums were borrowed from the Bank of Greenwood, on mercantile and cotton accounts, the former secured to the bank by liens and chattel mortgages, and the rest paid in part by cotton drafts. Cotton was shipped to New York, Boston, Norfolk, and other points; and, with a fall in prices, heavy losses were sustained by Jervey & Co.; and, following the example of the Charleston firm, it also made an assignment ten days after the other assignment, to wit, on the 22d of January, 1892. A. D. Calhoun was made the assignee, and afterwards appointed as the agent of the creditors, and now seeks the aid of this court to decree between the conflicting claims, preferred by Ravenel, the assignee of William C. Bee & Co., and the Bank of Greenwood, upon the assigned estate."

Parker & McGowan, for plaintiff and Ravenel, assignee. M. P. De Bruhl, for defendant, Bank of Greenwood.

POPE, J. The plaintiff, A. D. Calhoun, as assignee and agent of creditors of a firm known as Jervey & Co., composed of Lewis S. Jervey and R. S. Sparkman, merchants at Greenwood, in Abbeville county, in this state, under an assignment made by such firm for the benefit of their creditors under the laws of this state, exhibited his complaint in the court of common pleas for Abbeville county, in December, 1892, wherein he made the Bank of Greenwood and William B. Ravenel, as assignee, etc., of William C. Bee & Co., parties defendant; and in his complaint the said plaintiff, being on the equity side of the said court of common pleas, sought a decree whereby his duty as such assignee and agent of creditors of Jervey & Co., so far as the conflicting claims of the two defendants named above might be determined. As in the report of the case there will appear so much of the report of William A. Lee, Esq., as special master herein, as covers a detailed statement of the facts leading up to and setting forth the history of the contention here, we will not reproduce the same. The cause came on to be heard by his honor, Judge Wallace, at the October term, 1893, of the court of common pleas for Abbeville county, upon exceptions to the report of the special master, Mr. Lee; and, after a consideration thereof, the said circuit judge filed his decree, wherein he sustained that exception to the report which alleged error in that conclusion of law

of the special master by which he sustained the payment by the plaintiff, as assignee and agent, of the sum of \$1,431.35 to the defendant, the Bank of Greenwood, from the assets of said assigned estate; but he overruled that exception of the defendant William B. Ravenel, as assignee and agent of the creditors of the assigned estate of William C. Bee & Co., to said report, because the special master, Mr. Lee, refused to recognize the claim of such assignee and agent of the assigned estate of William C. Bee & Co. to have the sum of \$8,688.65 and interest thereon from 31st July, 1891, as a legal claim upon the assigned estate of Jervey & Co. The Bank of Greenwood now appeals from said decree, alleging error therein touching the circuit judge's conclusion in regard to the sum of \$1,421.35; and, on the other hand, William B. Ravenel, as assignee and agent of William C. Bee & Co., assails said decree touching the circuit judge's conclusion as to his alleged claim of \$8,688.65 and interest thereon.

We will first consider the appeal of the Bank of Greenwood. Briefly, these are the facts: Jervey borrowed money from the Bank of Greenwood, pledging to the bank, as collateral security, certain notes, mortgages, agricultural liens, etc., received by them from their customers. In the early fall of 1891, the bank deposited these collaterals with Jervey & Co., in trust for their collection as the property of the bank. During the year 1891 the firm of Jervey & Co. collected \$1,421.35 from these collaterals, but neglected to turn this sum, or any part thereof, to the bank. Really, the firm paid out this sum in the course of their business to other parties. When the firm of Jervey & Co. made their assignment for the benefit of their creditors, on the 12th January, 1892, they only had in cash the sum of \$10.68. The assignee and agent, Mr. Calhoun, paid from the moneys belonging to the assigned estate of Jervey & Co. to the Bank of Greenwood the sum of \$1,421.35, under what he conceived the advice of counsel, but in which opinion it is clearly established he made an honest mistake. The judge decides that the Bank of Greenwood must pay back this sum to the assignee and agent, the plaintiff. The Bank of Greenwood alleges that this was error (1) because such assignee and agent knew all the facts of the transactions when he paid this money; (2) because the notes, mortgages, and other securities upon which the said sum of \$1,421.35 was collected had been assigned by Jervey & Co. to the Bank of Greenwood, to secure a debt, and the bank had, by such assignment, acquired a specific property in said securities, which was not lost by their being redelivered to Jervey & Co. for collection, the debt being still unpaid, and the money collected upon them being the specific property of the bank; (3) because such money (\$1,421.35) was voluntarily paid to the bank by the plaintiff, was not made under a mistake of fact, such plaintiff well knowing all the

facts connected with the transactions of Jervey & Co. with the bank in relation to these collaterals.

We do not think the circuit judge erred. There can be no doubt but that if Jervey & Co. had not collected this sum of \$1,421.35, and paid it away before their assignment, on the 12th January, 1892, the owner of these collaterals, the Bank of Greenwood, would have been entitled to such collaterals while in the hands of such firm, for this firm, Jervey & Co., could only convey by their deed of assignment their own property; or if the plaintiff, Calhoun, had found those collaterals uncollected when he took charge of the assigned estate, and he had collected the \$1,421.35 on such collaterals, then this sum would have belonged to the bank, and would have properly been payable to them by the plaintiff, as assignee. But the truth is, not one dollar of the money in the hands of the plaintiff as belonging to the assigned estate has been derived from these collaterals, nor a dollar of the \$1,421.35, paid by the plaintiff to the Bank of Greenwood, was derived from collection by such assignee of said collaterals. Reference is made by the appellants to the case of *Bank v. Jennings* (S. C.) 17 S. E. 16; but an examination of this reported case will disclose that its facts and those of the case at bar are very dissimilar. The firm of which the defendant Jennings was a partner, to secure their indebtedness to the National Bank of Greenville, had assigned to that bank certain choses. The Bank of Greenville, upon an agreement that such firm would collect these collaterals, and pay such collections to the bank, turned these collaterals over to Jennings' firm. Jennings and his partners collected these collaterals, and diverted the proceeds when collected to their own use. This court held that such conduct was a fraud, for which the partners could be arrested. There were in that case no assigned assets in question. Indeed, the rights of third parties were in no wise involved in that case. The fight was between the bank, on the one side, and Jennings and his partners, on the other. In the case at bar no one gainsays the proposition that Jervey & Co. committed a breach of trust when they collected and used for their own purposes money which, when collected on choses placed in their hands in trust by the Bank of Greenwood, was held by them in trust for that bank. All that is contended for here is that such Bank of Greenwood, because of such breach of trust, has no lien, to the exclusion of the other creditors of the firm of Jervey & Co., upon that firm's assigned estate, of which the said collaterals form no part.

We will next consider the appeal presented by William B. Ravenel, as assignee of William C. Bee & Co. Without being tedious, we may state the facts of this contention thus: In July, 1891, Lewis S. Jervey owned and operated two mercantile houses, —the one located in Charleston, where he

did a cotton factorage and rice factorage business, and was so conducted by him, calling himself William C. Bee & Co.; the other located in Greenwood, S. C., where he conducted a general merchandise business, wherein he included the purchase of cotton, and was so conducted by him, calling himself Jervey & Co. It seems that Lewis S. Jervey, as William C. Bee & Co., made advances to himself as Jervey & Co. These transactions were entered upon the books of Jervey, as William C. Bee & Co., as transactions with Jervey & Co.; and, in their turn, such transactions were entered upon the books of Jervey & Co., at Greenwood, S. C., as transactions with William C. Bee & Co., of Charleston, S. C. On the 31st July, 1891, by the books of William C. Bee & Co., Jervey & Co., at Greenwood, owed the sum of \$8,688.65 to said Lewis S. Jervey, styling himself William C. Bee & Co. Included in this last amount was the sum of \$4,500, borrowed by Lewis S. Jervey, as Jervey & Co., on a note signed by himself as Jervey & Co., and indorsed by himself as William C. Bee & Co., from one O. Fritz Hottinger, which note the said Lewis S. Jervey secured by an assignment to Hottinger of a mortgage he held, while styling himself William C. Bee & Co., on one Eugene P. Jervey. On the 1st September, 1891, the said Lewis S. Jervey and R. S. Sparkman entered into mercantile partnership, under the firm name of Jervey & Co., it being the same mercantile business he (Lewis S. Jervey) had carried on at Greenwood, S. C., in the name of Jervey & Co. By the partnership agreement of Lewis S. Jervey and R. S. Sparkman, the latter was to contribute \$1,000 in cash, and become an owner to the extent of one-third of the assets of the business at Greenwood, and to assume his share of the liabilities of the mercantile venture of Lewis S. Jervey, styling himself Jervey & Co., at Greenwood, S. C. The public was advertised of this partnership between Lewis S. Jervey and R. S. Sparkman. The said R. S. Sparkman admits that he knew of all of the liabilities he thus assumed. We might add that the said R. S. Sparkman was the manager of the business of Lewis S. Jervey at Greenwood, which was there conducted by the said Lewis S. Jervey, styling himself Jervey & Co. Lewis S. Jervey, as William C. Bee & Co., made an assignment of his estate, including therein his two-third interest in the firm of Jervey & Co., at Greenwood, for the benefit of his creditors, on the 2d day of January, 1892, to William B. Ravenel, as his assignee. On the 12th day of January, 1892, the firm of Jervey & Co., at Greenwood, made an assignment to A. D. Calhoun, as assignee, for the benefit of their creditors, in accordance with laws of this state. Among the claims presented to the said A. D. Calhoun, as assignee of Jervey & Co., was that of William B. Ravenel, as assignee of Lewis S. Jervey, styling himself William C. Bee &

Co., for \$8,688.65, including therein what was known as the Hottinger debt, for \$4,500, which latter had been paid after the 2d January, 1892, from the proceeds of a mortgage on the property of Eugene P. Jervey, which had been assigned in 1890 to said Hottinger by Lewis S. Jervey, styling himself William C. Bee & Co., to secure said debt of \$4,500. As before stated, Judge Wallace disallowed this claim. Appellants' attorneys, in their effort to overthrow this conclusion of the learned circuit judge, have resorted to a very ingenious process of reasoning to convince this court that the entity of the said William C. Bee & Co. was distinct from that of Lewis S. Jervey, who alone constituted such commercial venture. We cannot adopt their views. The law wisely regards substance, not shadows. As long as Lewis S. Jervey was the only member of the commercial venture wherein he was styled William C. Bee & Co., the assets and liabilities of such concern were those of Lewis S. Jervey. It is quite true that a man engaging in different forms of business may give fancy names to his several business ventures; but, after all, the assets and liabilities of such different business ventures are those, respectively, of the single owner thereof.

Under the repeated decisions of the court of last resort in this state, the following propositions of law may be said to be firmly established: Partnership assets are primarily liable to the payment of partnership debts. No partner has any interest in partnership assets until all the partnership debts are paid. The individual debts of a separate partner can only be paid from that partner's share of partnership assets which remain after the full payment of the partnership debts. Partnership creditors have the right to participate in the distribution of the assets of each individual partner, along with the individual or separate creditors of the estate of each partner; due regard, however, being paid to liens thereon. Separate creditors of an individual who, as a partner, is also indebted to partnership creditors, have an equity to compel partnership creditors to first exhaust partnership assets before participating with such individual creditors in the assets of the individual debtor. The principles may be found stated in *Hutzel v. Phillips*, 26 S. C. 136, 1 S. E. 502; *Blair v. Black*, 31 S. C. 346, 9 S. E. 1033; and the many cases cited in the first of these cases. These propositions of law being accepted as true, we cannot see how the creditors of the assigned estate of Lewis S. Jervey, styling himself William C. Bee & Co., can present their demand of \$8,688.65 against the partnership of Jervey & Co., which firm is insolvent, to the exclusion of, or in equal right with, the creditors of said partnership of Jervey & Co. The only part of this claim of \$8,688.65 which has caused us serious concern is the sum of \$4,500, and interest, arising



ing from the debt contracted by Lewis S. Jervey, styling himself Jervey & Co., with Hottinger. When Lewis S. Jervey and R. S. Sparkman associated themselves in business as the firm of Jervey & Co. (this was on 1st September, 1891), one of the stipulations of said firm was that such firm would assume the payment of all the obligations of Lewis S. Jervey connected with his business as a merchant at Greenwood. This agreement, when properly construed, meant that all the obligations to others would be so assumed, and not what Lewis S. Jervey owed himself. At that time this debt of \$4,500 was owing to Hottinger; and this claim having been paid, after the assignment of Lewis S. Jervey, out of his individual assets, already assigned, might have presented some nice questions of law if it had not been for the fact that its payment to Hottinger was from the proceeds of the mortgage which Lewis S. Jervey had assigned to Hottinger in 1890, when the Hottinger debt was contracted, and nearly two years before Jervey made his assignment. This being true, the assigned estate of Lewis S. Jervey, while styling himself William C. Bee & Co., has not been injured by the Hottinger debt being so paid. We must overrule the grounds of appeal presented by William B. Ravenel, as the assignee of Lewis S. Jervey, styling himself William C. Bee & Co.

It is the judgment of this court that the judgment of the circuit court be affirmed, and the case be remanded to the circuit court for such further proceedings as may be necessary.

McIVER, O. J., concurs.

(42 S. C. 348)

#### GASTON v. BRANDENBURG.

(Supreme Court of South Carolina. Sept. 25, 1894.)

**LIEN FOR CROP SUPPLIES — ESTOPPEL OF LIENOR — LIEN WARRANT — EXECUTION AND FILING.**

1. One who contracts under seal to pay to another the value of supplies furnished for the cultivation and handling of his crops, giving a lien on the crops for the payment thereof, is estopped, in an action to enforce the lien, to deny that cotton furnished under the contract was converted into money, and used in the cultivation of such crops.

2. Where the doctrine of estoppel applies to a case, any testimony at variance with its full application thereto becomes incompetent.

3. A lien warrant will not be set aside on the ground that the affidavit therefor was not filed in the clerk's office, where it does not appear that the paper is not in the possession of the clerk, though not marked "Filed."

4. The bond given to secure a lien warrant need not be witnessed and probated before being filed.

Appeal from common pleas circuit court of Spartanburg county; Ernest Gary, Judge.

Action by A. W. Gaston against W. D. Brandenburg to establish a lien on crops. A motion was made by Brandenburg, at common pleas, to set aside a lien warrant issued

to Gaston by the clerk of the circuit court. From an order vacating the lien warrant, plaintiff appeals. Reversed.

Bomar & Simpson, for appellant. S. M. Pilgram and Duncan & Sanders, for respondent.

POPE, J. At the January term, 1894, of the court of common pleas for Spartanburg, in this state, a motion was made by W. D. Brandenburg, before his honor, Judge Ernest Gary, to set aside and vacate a lien warrant which had been issued by T. R. Trimmier, as clerk of the circuit court for Spartanburg county, against the crops grown by said Brandenburg during the year 1891, upon the application for said lien warrant by A. W. Gaston. At the hearing, Judge Gary signed an order vacating and setting aside such lien warrant on the ground that it appeared from the evidence submitted that the lien in question was given to secure the purchase money of four bales of cotton furnished after the execution of said lien, but not for the purpose of expending said cotton on the crop to be made. From this decision, A. W. Gaston has appealed to this court, alleging that the circuit judge erred (1) in holding that the lien in this case was not a valid lien; (2) in holding that the advances made by Gaston to Brandenburg were not such as he could furnish under the laws of this state relating to agricultural liens, and the lien was therefore void; (3) in not holding that Brandenburg was and is estopped from taking the position that the articles advanced to him were not such articles as could be advanced under the lien law. The respondent gave notice that, in the event this court could not sustain the judgment on the grounds on which it was based, he would ask that it be sustained on the additional grounds (1) that his honor should have held that it was necessary to file the affidavit on which the warrant was issued in the office of the clerk of the circuit court, and that a failure to do so was sufficient ground to vacate and set aside the warrant; (2) that his honor should have held that it was necessary for the bond or undertaking of Gaston to be witnessed and probated before it could be filed, and that a failure to do so was sufficient ground to vacate and set aside the warrant.

We are inclined to think that when the lienor signed, under seal, the obligation set out in the case, wherein he stipulated: "On or before the 11th day of November, 1891, I promise to pay to the order of A. W. Gaston, at Reidville, one hundred and ninety-four and 72/100 dollars, for value received, in supplies to be advanced and furnished me by A. W. Gaston, farmer, at Reidville, in the said state and county, for use in the cultivation of crops on the plantation or farm cultivated by me and my tenants on lands belonging to myself and A. F. Crosswell \* \* \* during

the year 1891, which advances, not to exceed one hundred and ninety-four and 72/100 dollars, the said A. W. Gaston [the lienee] agrees to make from time to time during the year,"—and both lienor and lienee signed the same, stipulating for the usual lien upon such crops for the sum aforesaid, the minds of the two certainly met in the creation of a contract easily understood. When the lienor comes to testify (and it may be remarked that his is the only testimony offered), he says that he went to see Mr. A. W. Gaston, early in the year 1891, to borrow money, but Mr. Gaston replied to such request that he had no money, and that, although he had cotton, he did not wish to sell till May 1st of that year, when he thought cotton would be worth 10 cents per pound; that he told Mr. Gaston that he wanted the money to make his crop with; that he would take his cotton at 10 cents a pound, and sell it for the money upon which to make his crops that year, and that he preferred this course to buying goods at the store at credit or "on time" prices; that, although he did use a greater part of the money realized from a sale of the cotton in the payment of antecedent debts, still he did not tell Mr. Gaston of that fact, or of such an intention. These four bales of cotton were not delivered to him until after he had signed the lien.

Now, the serious question in this case occurs in this wise: Here is a lienor, not any other person, for it is not alleged that there is any other person affected one way or the other by this transaction between Brandenburg and Gaston— We repeat it, here is this lienor, Brandenburg, seeking to avoid his admissions in writing under his hand and seal, duly recorded as required by law, whereby he induced Gaston, the lienee, to part with his property under the stipulation that he (Gaston) would apply such advances so made to the making of a crop by himself and his tenants during that year 1891, on lands specifically enumerated. Can he do it? We think he ought not to be allowed to do so. There is such a thing in law as an estoppel by conduct which will prevent such an injustice, and this principle of law is enforced in the courts of this state. *Phinney v. Johnson*, 13 S. C. 29; *City Council v. Caulfield*, 19 S. C. 201. Is this principle applicable to the present state of facts? Let us see what is required. The rule requires (1) a false representation or concealment of facts; (2) such representation must have been made with a knowledge of the facts; (3) the party to whom such representation was made must have been ignorant of the truth of the matter; (4) the representation must have been made with the intention that the other party should act upon it; and (5) the other party must have been induced to act upon it. *Bigelow, Estop.* (3d Ed.) 434. It clearly appears from the testimony that Brandenburg represented to Gaston that the cotton was to be converted into money to be used in the cul-

tivation of crops on lands in Spartanburg during the year 1891 by himself and his tenants, and that he would secure such advances by a lien on such crops. When Brandenburg made this or these representations, he had knowledge of the facts. Very clearly, Gaston would not have allowed his money or cotton to be used by Brandenburg, except used for the cultivation of crops on lands in Spartanburg county during the year 1891, and its repayment secured by a lien on such crops, and that he was in ignorance of the purpose of Brandenburg to divert such advances from their appropriation to the making of such crops. It is equally certain that Brandenburg intended that Gaston should act upon his representations, and, finally, that Gaston was induced to act upon such representations. It seems to us that the case makes all these matters clear and distinct. When it is remembered that, whenever it is determined that the doctrine of estoppel applies to a case, any testimony at variance with such full application becomes incompetent, and, hence, as the other grounds of appeal are based upon such incompetent testimony alone, no further consideration of them need be entered into.

It remains for us to consider the grounds suggested by the respondent upon which the judgment of the circuit court could be sustained in the event we sustained appellant's grounds of appeal. The respondent suggests, in the first place, that because the affidavit of Gaston, upon which Trimmer, as clerk, issued the lien warrant, was not filed in the office of the clerk of court, such lien warrant should be vacated. It is thus seen that it is not contended that Gaston failed to make the affidavit required by our statutes as a condition precedent to the issuing from the clerk of the lien warrant, but only that such affidavit was not filed in the clerk's office. This filing is done by the clerk himself. It would seem that it would be quite a hardship to visit upon Gaston any penalty for an omission of duty by the clerk. Under the circumstances of this case, we will decline to make Gaston responsible for this oversight of the clerk, especially as it is not alleged that such affidavit is not among the papers connected with this proceeding in the clerk's office, but merely that it is not marked "Filed."

In the second place, the respondent suggests that the bond exacted of Gaston by the clerk before he issued the lien warrant should have been witnessed and probated before it was filed. It seems that the said Gaston entered into the bond before the clerk of court, such clerk signing his name thereto as a witness. This bond was to protect Brandenburg. Suit thereon would have been at his instance. Could Gaston have successfully defended such suit because of such trivial irregularity? We think not. These suggestions of respondent are overruled.

It is the judgment of this court that the judgment of the circuit court be reversed, and the cause remanded to the circuit court with directions to formulate a judgment dismissing the motion of Brandenburg.

McIVER, C. J., *concura*.

(42 S. C. 205)

LATIMER v. LATIMER et al.

(Supreme Court of South Carolina. Sept 17, 1894.)

CONTINUANCE—SOUND DISCRETION—APPEAL.

The continuance of a case by the trial judge when an order of his predecessor directing an assignment of plaintiff's claim to defendant is called to his attention is not an abuse of discretion, nor an order involving the merits, or affecting the substantial right of the parties, and an appeal therefrom will be dismissed.

Appeal from common pleas circuit court of Greenville county; W. H. Wallace, Judge.

Action by James H. Latimer against Joseph P. and John H. Latimer, executors of the last will of Hewlett Sullivan, deceased. From an order granting defendants' motion for a continuance, plaintiff appeals. Affirmed.

The following are the exceptions to the order appealed from: "Because his honor erred in continuing said cause upon the grounds stated in such order for the following reasons: (a) Because the order made by Judge Izlar, upon which Judge Wallace based his order for continuance, was not before the court for its consideration, the same not having been set up in the answer of the defendants by a supplemental answer, as required by law. (b) Because, if such order could have been considered by his honor, Judge Wallace, the objection to trial came too late, the jury having been impaneled, and the trial being ordered without objection on the part of the defendants. (c) Because the order made by his honor, Judge Izlar, had not been complied with by the plaintiff herein, and no assignment of the claim sued upon in this action had been made by plaintiff. Plaintiff was therefore yet the legal owner of said claim. (d) Because, even if such assignment had been made by plaintiff as required by said order, this action could still proceed in plaintiff's name for the benefit of the assignee thereof, the order for assignment being made subsequent to the commencement of this action. (e) Because by said order made by Judge Izlar the plaintiff was required to show cause why such order had not been complied with, and no opportunity had yet been given him to make such return. It is therefore submitted that until such return plaintiff must be deemed the legal owner of said claim. (f) Because by the terms of the order of Judge Izlar the plaintiff was required first to pay to the defendants the sum of fifteen hundred dollars, adjudged by his honor to be in the possession

of plaintiff, and then to assign so much of the claim sued upon in this action as was necessary after the application of such amount to satisfy the judgment procured by defendants' testator against the firm of P. D. Huff & Co.; and, it not appearing that such sum had not been paid as required by said order, and it also not appearing what balance, if any, remained unpaid on said judgment, and what amount, if any, of said claim it was necessary for plaintiff to assign according to said order, it is submitted that plaintiff had a right to proceed in the trial of his action.

Jos. A. McCullough, Lewis W. Parker, and A. Blythe, for appellant. Earle & Mooney, for respondents.

GARY, J. The action in this case is to recover the sum of \$2,250 alleged to be due to the plaintiff by the estate of Hewlett Sullivan, deceased. After the commencement of this action the respondents instituted proceedings supplementary to the execution against the appellant in the case of Hewlett Sullivan v. P. D. Huff & Co. These proceedings resulted in an order made by Judge Izlar on the 11th day of July, 1893, by which the appellant was required to pay to the respondents the sum of \$1,581.23 within 10 days after the service of said order upon him, and that, after paying the same and costs, he do assign to the respondents so much of said claim of \$2,250 as may be sufficient to satisfy said judgment. In default of such payment or assignment the said order required the plaintiff to show cause why he should not be attached for contempt. The payment and assignment were not made, and plaintiff made his return to the rule to show cause why he should not be attached. Upon the calling of this case no objection was made to trial. Before reading the answer, defendants' attorneys objected to the trial of the case at this time, and read to the court the order made by Judge Izlar against the objection of the plaintiff's attorneys, and informed the court that the said James H. Latimer had not complied with said order, taking the position that this trial could not proceed in consequence of the order made by Judge Izlar. Judge Wallace, after hearing argument of counsel on both sides, then made the following order: "The case was called for trial before me, both parties announcing themselves ready for trial. The jury was impaneled, and the complaint read. Thereupon counsel for defendants stated that before reading their answer, or going further in the case, they desired to call my attention to an order made by Judge Izlar at the previous term of court, and proceeded, against the objection of plaintiff's counsel, to read this order. It appeared from statements of counsel and an exhibit of the record that Hewlett Sullivan, defendants' testator, had in his lifetime obtained a judg-

ment against the plaintiff and other parties, members of the firm of P. D. Huff & Co. That some time ago the defendants, as executors of Hewlett Sullivan, had procured an order for the examination of James H. Latimer under supplementary proceedings, a return of nulla bona upon the execution of the said judgment having been returned to the sheriff. The said James H. Latimer had been examined, and the testimony submitted to the court. Upon review of the testimony, Judge Izlar had ordered the claim sued on in this action to be transferred and assigned by James H. Latimer to the defendants within ten days after the date of such order. The order also provided that, in the event that this be not done, the said James H. Latimer show cause before the judge of this court on the first day of the succeeding term why he should not be attached for contempt. The plaintiff's counsel objected to the consideration of this order, because, if it was to be considered, the issue should have been made by supplemental answer on the part of the defendants. They also contended that the effect of this order was not, as claimed by defendants, to make a change of title to said claim; but they also contended that, even if the assignment was made, the action could proceed in the plaintiff's name, the order of assignment being made subsequent to the commencement of this action and the filing of the answer herein. In view of this order, I do not see how that the plaintiff can proceed, and it is ordered that this case be continued." The plaintiff appealed from this order upon numerous grounds, which will be set forth in the report of this case.

Continuances are within the discretion of the circuit judge, as shown by the case of *State v. Atkinson*, 33 S. C. 106, 11 S. E. 693, in which Chief Justice McIver says: "The \* \* \* grounds imputing error to the circuit judge in refusing a motion for continuance certainly cannot be sustained in the face of an unbroken line of decisions for a great length of time that such a motion is addressed to the discretion of the circuit judge." It is also a matter of discretion with the circuit judge as to when he will grant the continuance, even during the trial of the cause, as shown by the case of *Trustees, etc., v. Orr*, 33 S. C. 275, 11 S. E. 830, in which the court says: "We think the order of Judge Fraser was clearly one of those administrative orders which, from the nature of the case, must be left to the discretion of the trial judge, who is personally present, and informed of all the circumstances of the case." See *Cook v. Cottrell*, 4 Strob. 61; *Wilson v. Dean*, 21 S. C. 327; *Lowndes v. Miller*, 25 S. C. 122. In the case stated of *Wilson & Co.*, "during the reading of a commission it was discovered that the cross interrogatories had not been propounded, whereupon, on objection made by the defendant, and sustained,

the circuit judge, on plaintiffs' motion, withdrew the case from the jury, and ordered a continuance. Held, that such order was within the judge's discretion, and that his discretion was properly exercised." The only limitation upon this discretionary power of granting a continuance is that the discretion must not be abused. The grounds of appeal from an order granting a continuance will only be considered for the purpose of determining whether there has been an abuse of this discretion in the light of all the circumstances attending the case. We do not think there was an abuse of discretion in this case. The case was continued because an order of Judge Wallace's predecessor was brought to his attention, which might affect very materially the judgment to be rendered in this case.

The appellant contends that the order appealed from must be considered "an order affecting a substantial right made in an action, when such order in effect determines the action, and prevents a judgment from which an appeal might be taken" (Code Civ. Proc. § 11, subd. 2); but that, if it does not come within the terms of that subdivision, it is embraced in the provisions of subdivision 1 of said section, which speaks of "any intermediate judgment or decree involving the merits." We cannot accept this view of the case. The order was made upon a motion simply for a continuance, and not when the merits of the case were under consideration. Being an order made upon a motion simply for a continuance, it cannot be construed or in any respect be regarded as "involving the merits," or "affecting a substantial right," etc. In the language of Chief Justice McIver, speaking for the court in the case of *Garlington v. Copeland*, 25 S. C. 44: "Any order or judgment that may then be made or rendered will depend entirely upon the conclusion that may be reached by the court after a consideration of the merits, wholly uninfluenced by the interlocutory order from which this appeal was taken;" which shows that when this case comes up again for trial in the court below it is not to be considered as affected by the order of Judge Wallace.

Plaintiff's exception to the order of Judge Wallace on the ground that the order made by Judge Izlar, upon which Judge Wallace based his order for continuance, was not before the court for its consideration, the same not having been set up in the answer of the defendants by a supplemental answer, as required by law, might be urged with force and effect if the case had been heard upon its merits; but it is the common practice upon a motion for a continuance for the court to take into consideration matters not embraced in the pleadings. It is the judgment of this court that the appeal be dismissed, and the order appealed from affirmed.

McIVER, C. J., and POPE, J., concur.

(42 S. C. 342)

**SHAW v. ROBINSON et al.**

(Supreme Court of South Carolina. Sept. 24, 1894.)

**DEED—CONSTRUCTION—RULE IN SHELLEY'S CASE.**

A conveyance in trust for the use of H. and the heirs of her body during her life, and then to her heirs, creates a life estate in H. and her children, with remainder in the heirs of H., the rule in Shelley's Case being inapplicable because the remainder is not limited to the heirs of the same persons to whom the life estate is given.

Appeal from common pleas circuit court of Anderson county; I. D. Witherspoon, Judge.

Action by Louvinia E. Shaw against R. B. A. Robinson and others for the construction of a trust deed, and to recover the lands described in such deed. There was a judgment for defendants, from which plaintiff appeals. Reversed.

Tribble & Prince, for appellant. Murray & Watkins, for respondents.

McIVER, O. J. The question presented by this appeal turns upon the proper construction of a deed executed on the 8th of February, 1853, by Robert Parker, the grandfather of the plaintiff, to Jasper P. Parker, whereby the land in controversy, in consideration of the sum of \$800, was conveyed to the latter upon certain trusts declared in said deed, in the following words: "This conveyance is made to the said J. P. Parker for the sole use and behoof as trustee for Nancy Hawkins, my daughter, the trustee accounting to my estate out of the share that my daughter Nancy Hawkins would be entitled to the sum of eight hundred dollars as above stated. And said tract of land to be kept for her use and the heirs of her body in trust to my son Jasper P. Parker during her life, and then to her heirs, and not subject to the debts and contracts of Andrew C. Hawkins, or any future husband she may have." It is admitted that Nancy Hawkins, during her lifetime, and after birth of issue, the present plaintiff, conveyed the land to her sister Tamartha A. Robinson in fee simple, who immediately reconveyed the same in fee to the said Nancy Hawkins. This was done, probably upon the theory that said Nancy Hawkins took an estate in fee conditional under the deed from her father, with a view to vest the fee in her, so that she might dispose of the same by will. At all events, soon after this transaction the said Nancy Hawkins made her will, whereby she gave to the defendant R. B. A. Robinson "the use, income, and possession of her land for the year 1893, except certain patches which she willed to the defendant John C. Pruitt," and in the ninth clause of her will devised the land in controversy to her nephew the defendant Robert Parker Robinson, the son of her said sister Tamartha Robinson. On the — day of April, 1893, Nancy Hawkins died, leaving her only child as her sole heir at law, the plaintiff

herein, and, her will having been duly admitted to probate, the defendants took possession of the land; and this action has been brought by the plaintiff to recover possession of the same, as well as damages for the use and occupation of the premises. The defendant John C. Pruitt did not answer, and the trustee, Jasper P. Parker, filed a formal answer admitting the allegations of the complaint, and disclaiming any personal interest in the land. The other two defendants demurred upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The circuit judge, after setting out the clause of the deed from Robert Parker to Jasper P. Parker, above copied, sustained the demurrer upon the ground that the plaintiff "did not take a vested remainder under the said deed." The plaintiff appeals upon the several grounds set out in the record, which need not be repeated here, as the whole case turns upon the inquiry, what estate Nancy Hawkins took under the deed from her father. To determine this question it is necessary to examine carefully the terms of this very inartistic deed, with a view to ascertain, if possible, what was the intention of the grantor, which, when ascertained, must be carried into effect, unless in conflict with some settled rule of law. In pursuing this inquiry it is necessary that the whole instrument should be considered, and effect must, if practicable, be given to every clause and word in it. Again, the language of the instrument must be interpreted in its natural and ordinary sense, and where technical words are used they must receive their technical signification, unless the context requires that some other interpretation should be given to such words. These principles of interpretation and construction are too well settled to need the citation of any authority to support them, and therefore we will proceed to inquire, in the light of these principles, what is the proper interpretation to be given to the words used in the deed, and what is the proper construction of the language, thus interpreted, as used by the grantor?

It will be observed that this deed was executed some time prior to the adoption of the present constitution, and if the object of the grantor was to create a separate estate in his daughter, who appears from the terms of the deed to have been then a married woman, such object, under the law as it then stood, could best be accomplished by the appointment of a trustee to hold such estate for the sole and separate use of the married woman, free from the debts and contracts of her husband. That this was one of the objects intended to be accomplished by the grantor is manifest from the most casual inspection of the terms of the deed. But the important inquiry is, was this the sole object? We cannot think so. If that was the case, then the object would have been fully accomplished if the deed had read in this

way: "This conveyance is made to the said J. P. Parker for the sole use and behoof as trustee for Nancy Hawkins, my daughter, and not subject to the debts and contracts of Andrew C. Hawkins, or any future husband she may have." But the deed contains other intervening words, as follows: "And said tract of land to be kept for her use and the heirs of her body in trust to my son Jasper P. Parker during her life, and then to her heirs." These words must have been inserted for some purpose, and they cannot be discarded without violating one of the fundamental rules of construction. Now, what was that purpose? To answer this question it is necessary first to determine what is the proper interpretation of the words "heirs of her body" and "heirs," found in the clause under consideration. While these words have a well-defined technical significance, they also sometimes have a popular signification, synonymous with the word "children." Inasmuch as Nancy Hawkins was alive at the time this deed was executed, it is very clear that the words "heirs of her body" could not have been used in their technical sense, in the connection in which they are found, for "nemo est haeres viventis," and hence they must have been used in the sense of "children." See *Holeman v. Fort*, 3 Strob. Eq. 66; *Bailey v. Patterson*, 3 Rich. Eq. 156; *Lott v. Thompson*, 38 S. C. 38, 15 S. E. 278. But no such reason exists for deflecting the meaning of the word "heirs" from its proper technical signification, and hence it must be interpreted in that sense. Under this interpretation of these words, it seems to us that the true intent of the grantor was to make a conveyance to the trustee of the land in question, "to be kept" by him for the joint use of Nancy Hawkins and her children during her life, "and then"—that is to say, at her death—the estate was to go to her heirs, free and discharged from any further trust.

The next inquiry is whether such intention conflicts with any rule of law which will prevent its being carried into effect. It is earnestly urged that the rule in *Shelley's Case* forbids the execution of such intention, and the question is whether such rule applies to this case. There can be no doubt that, while the rule in that celebrated case may be applied to executed trusts, it does not apply in cases of executory trusts. *Porter v. Doby*, 2 Rich. Eq. 49. So that it is necessary to inquire whether the trust in this case was executed by the operation of the statute of uses. The test is whether any duty was imposed upon the trustee which rendered it necessary that he should retain the legal estate in order to enable him properly to perform such duty. While it may be true that, up to the time of the adoption of the present constitution, it was necessary for him to retain the legal estate in order to protect the property from the marital rights of the husband, such a necessity no longer existed after the adoption of the present constitution,

as the terms of that instrument afford ample protection to the separate estate of the wife. It seems to us, therefore, that the trust must now be regarded as executed. So that this deed must now be read as if it contained a direct conveyance of the land in question to Nancy Hawkins and her children for and during the term of her natural life, with remainder to her heirs. Thus reading the deed, it will be observed that, while the precedent life estate is given to Nancy Hawkins and her children, the remainder is not to the heirs of the same persons to whom the life estate is given, but only to the heirs of Nancy Hawkins. This forbids the application of the rule in *Shelley's Case* to this case, for, as is said in 2 Washb. Real Prop. bk. 2, c. 4, § 8, par. 8: "The subsequent limitation to the heirs must be to the heirs of the ancestor who takes the particular estate. Thus, where the estate was limited to the wife for life, remainder to the heirs of the bodies of the husband and wife, the freehold being in the wife alone, the limitation over would be a remainder, and their heirs would take as purchasers." Indeed, the very terms in which the rule is stated in the original case, as well as in the more extended statement of the rule in 1 Preston on Estates, both quoted in *Porter v. Doby*, supra, necessarily imply that the rule only applies where the limitation is to the heir or heirs of the body of the same person who is named as the first taker. Without pursuing the discussion of this interesting and somewhat difficult subject further, it is sufficient for us to say that in our opinion the proper construction of the deed from Robert Parker to Jasper P. Parker is that the estate thereby conveyed vested in Nancy Hawkins and her children for the term of her natural life, with remainder to her heirs, and that plaintiff, being the sole heir, is entitled to recover possession of the land in controversy, together with such rents and profits as she may be able to prove on a new trial. The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial.

POPE, J., concurs.

(115 N. C. 5)

HINTON v. GREENLEAF et al.  
(Supreme Court of North Carolina. Oct. 9, 1894.)

"CASE" ON APPEAL.

Where exceptions to a case on appeal are allowed, and the court orders that the case be as stated by appellant, with the amendments proposed incorporated therein, a case containing appellant's statement, the appellee's exceptions, and the order sustaining the exceptions, is defective.

Appeal from superior court, Pasquotank county; Brown, Judge.

Action by John L. Hinton against H. F. Greenleaf and others. Judgment was rea-

dered for plaintiff, and defendants appeal. Remanded, to have case on appeal redrafted.

This was a civil action tried before Brown, J., and a jury at special term, 1894, of Pasquotank superior court. In this court the plaintiff's counsel moved to dismiss the appeal for want of a "case." It appears that the appellants served their statement of the case on appeal. The appellee filed exceptions thereto. The case was settled by the judge allowing the amendments proposed by the appellee, and ordering "that the case on appeal be as stated by the defendant, with said five amendments incorporated therein." Thereupon the clerk sends up the appellants' statement, the appellee's exceptions, and the judge's order sustaining the exceptions.

Grandy & Aydlett, for appellants. W. J. Griffin and Pruden & Vann, for appellee.

MacRAE, J. There is, in contemplation of law, no "case settled on appeal," and we might dismiss the appeal for want of a case. *Mitchell v. Tedder*, 107 N. C. 353, 12 S. E. 193. We prefer, however, that the matter should be disposed of upon its merits, and will direct that it be remanded, in order that the case on appeal may be redrafted according to the order of his honor below. This is necessary, because the principal point before us was an objection to his honor's charge upon the presumption of law and burden of proof. In the statement of the case presented by the appellants the exception is stated to the charge of his honor, setting out the language objected to. In the exceptions of appellee the whole of his honor's charge is set out. This differs from that portion objected to by appellants. We are uncertain whether his honor intended that the charge as stated by appellants was to be amended by the addition of that stated in appellee's exception as the judge's charge, or whether the amendment was to be inserted in place of that set out in the appellants' statement. What the presiding judge did instruct the jury upon the point in question will of course have an important bearing upon the determination of the question involved in the appeal. Remanded.

(115 N. C. 1)

#### AYDLETT v. SMALL et al.

(Supreme Court of North Carolina. Oct. 9, 1894.)

#### CONSTRUCTION OF WILL.

1. A bequest of all my "undivided interest and property" in the estate of the late C. does not carry money paid to testator by the executor of C.'s estate after the execution of the will, since, as the will speaks as of the time of testator's death, by such payments her "interest and property" in the estate were reduced pro tanto.

2. Such bequest, though, does carry that part of the proceeds of land belonging to C.'s estate which remained in the hands of C.'s executor at testator's death.

Appeals from superior court, Pasquotank county; Armfield, Judge.

Action by E. F. Aydlett, administrator of Mary E. Overman, against James W. Small and others. From the judgment, defendants George O. Burgess and another appeal, and also defendants James W. Small and others appeal. Affirmed.

Grandy & Aydlett, for appellants George and P. P. Burgess. J. H. Sawyer, for appellants Small and others.

BURWELL, J. These appeals require us to construe the will of Mary E. Overman, which was written in 1888. She died in December, 1891. It must be considered as speaking at the date of her death, when it took effect, there appearing in the will no reason why the words used by the testatrix should not be so interpreted. Code, § 2141. The words to be construed are these: "All my undivided interest and property in the estate of the late George W. Charles." The testatrix was one of the heirs at law and devisees of said Charles. It does not seem to us that any property that she had actually received and appropriated from the estate can be said, with any propriety, to be a part of her "interest and property" in the estate of the late George W. Charles." Whenever an administrator pays to a distributee of the estate a part of his share, the distributee's "interest and property" in the estate is reduced pro tanto. When he has paid all the share the distributee's "interest and property" in the estate is destroyed. Prior to the payments the right to demand and receive the distributive share belonged to the estate of the distributee. The money belonged to the estate of the intestate. As soon as the payment was made the money became, eo instanti, a part of the estate of the distributee, and ceased to be a part of the estate of the intestate. Hence the sum of money (\$943.95) which the testatrix had to her credit in bank at the time of her death, when, as stated above, her will speaks, constituted no part of her "interest and property" in the estate of the late George W. Charles." It had been paid to her because she was one of the heirs and devisees of said Charles, but when paid it ceased to be in any sense a part of the Charles' estate. This seems clear. And it seems even more evident that this sum, after it was received by her, constituted no part of her "undivided interest and property" in that estate. True, it is very evident that she got this particular money from the Charles estate. But the phrase under consideration cannot be held to include it.

We think, however, that those words do cover that portion of the proceeds of the sale of the Charles land which had not been collected by the commissioner at the time of her death, and which was thereafter paid to her executor. She had consented that

the land might be sold for partition; that it might be sold, and the proceeds divided among the heirs and devisees of George W. Charles. The sale had been made, but the division of the proceeds was not finished. Had she lived, she would have taken a share of the balance of the purchase money in her character as heir and devisee of George W. Charles. Speaking at her death by her will, she declared her intention as to all her "undivided interest and property in his estate." The words include whatever property her executor could lawfully demand only because his testatrix was one of the heirs or devisees of Charles. His title to the money in the bank (\$943.45) needed no other support than the fact that he was the executor of her will. His right to demand of the commissioner a share of the proceeds of the sale of the land rested necessarily on two facts,—his executorship, and the fact that she was an heir and devisee of Charles. Affirmed on each appeal.

(115 N. C. 7)

**HINTON v. WALSTON et al.**

(Supreme Court of North Carolina. Oct. 9, 1894.)

**RIGHT OF MORTGAGOR TO SEVERED CROPS—EJECTMENT.**

1. Where crops are severed before entry by the mortgagee, the title thereto is in the mortgagor.

2. Where a person in adverse possession of land severs crops before recovery in ejectment by the owner, the title thereto is in the former.

Appeal from superior court, Camden county; Armfield, Judge.

Action by John L. Hinton against William P. Walston and another. There was a judgment for defendants, and plaintiff appeals. Affirmed.

W. J. Griffin and Pruden & Vann, for appellant. Grandy & Aydlott, for appellees.

**SHEPHERD, C. J.** Conceding, for the purposes of the argument, that the relationship substantially of mortgagor and mortgagee still exists between the plaintiff and the defendant Walston, it is clear that the plaintiff, as mortgagee, cannot recover the crops which are the subject of this controversy. These crops were grown by the mortgagor while in possession, and were actually severed before the entry of the mortgagee. In *Killebrew v. Hines*, 104 N. C. 182, 10 S. E. 159, 251, it was held that the mortgagee is not the owner of the growing crops of the mortgagor in possession, and that, if they are severed before entry, the mortgagee cannot recover them. It is true that it was suggested in the opinion that, as between the parties, the crops, although severed, might, before removal, be charged in equity upon the insolvency of the mortgagor and the inadequacy of the land as security; but it is plain that equity would never extend such re-

lief to the prejudice of third persons who have acquired interests in the crops, and especially as against one like the defendant Guirkin, who has not only, it seems, acquired the legal title by virtue of his chattel mortgage and actual severance of the crops, but also a superior standing in equity by reason of his having supplied the means necessary for the production of the same. So, even, independent of Act 1889, c. 476 (which, it is argued, applies only to formal agricultural liens), the plaintiff could not invoke equitable relief. *Carr v. Dall*, 114 N. C. 284, 19 S. E. 235. In this case, however, no equitable relief is asked; and even as against the mortgagor it could not be granted if prayed for, as there is nothing in the case to show the insolvency of the mortgagor or the inadequacy of the security. The plaintiff, then, relying strictly upon his alleged legal rights, could not recover as against the mortgagor; a fortiori, he could not recover as against the defendant Guirkin. On the other hand, if we treat the case as if the relationship of mortgagor and mortgagee had ended, the plaintiff would be equally unfortunate, as it is well settled that when one in the adverse possession of land severs the crops before recovery the owner of the land cannot assert any legal claim thereto. *Faulcon v. Johnston*, 102 N. C. 264, 9 S. E. 894. His remedy pending an action of ejectment in case of insolvency is by injunction, or the appointment of a receiver, who collects the rents in order that the right to the mesne profits may not be defeated. *Killebrew v. Hines*, supra. No such interlocutory relief was invoked by the plaintiff, and, even if granted, it would not, for the reasons above given, have affected the rights of Guirkin. This is a purely legal action, but, even if equitable relief had been prayed for, the plaintiff, as we have seen, could not have recovered. The conclusion of his honor, therefore, in any point of view, was correct, and the judgment must be affirmed.

(115 N. C. 16)

**BRAY et al. v. CARTER et al.**

(Supreme Court of North Carolina. Oct. 9, 1894.)

**CROPS GROWN ON WIFE'S LAND—RIGHTS OF MORTGAGEE.**

One claiming under a chattel mortgage executed by a husband on crops grown on the land of the wife cannot, in the absence of evidence of her knowledge or assent thereto, or that she had leased her land to her husband, or had given him any proprietary use or interest therein, maintain replevin for the crops.

Appeal from superior court, Currituck county; Armfield, Judge.

Replevin for crops by William H. Bray and others against W. E. Carter and others. From a judgment for plaintiffs, defendants appeal. Reversed.

W. J. Griffin, for appellants. Grandy & Aydlott, for appellees.



**SHEPHERD, C. J.** This is an action in the nature of replevin to recover a crop of corn cultivated on the land of the feme defendant. The plaintiff claims under a chattel mortgage executed by her husband, but there is no evidence tending to show that she knew of or assented to the execution of the said mortgage, or that she had leased her land to her husband, or had given him any proprietary use or interest in the same. The case is therefore clearly within the principles laid down in *Wells v. Batts*, 112 N. C. 283, 17 S. E. 417, and *Branch v. Ward*, 114 N. C. 148, 19 S. E. 104, and it was error in holding that the plaintiff was entitled to recover any part of the crop. New trial.

(115 N. C. 10)

### WOOL v. TOWN OF EDENTON.

(Supreme Court of North Carolina. Oct. 9, 1894.)

**RIPARIAN OWNER — RIGHT TO LAND COVERED BY WATER—WHARF LINE — REGULATION BY TOWN — MANDAMUS.**

1. A riparian owner has a qualified right in the land covered by water on his front, to the line where the stream becomes navigable.

2. Mandamus lies by a riparian owner of land within the limits of an incorporated town, and bordering on navigable water, to compel the corporation to "regulate the line of deep water to which wharves may be built" as required by Code, § 2751, subsec. 1, as amended by chapters 17, 349, Laws 1893.

3. A petition by a riparian owner for mandamus to compel a town corporation to regulate the line of deep water to which wharves may be built, alleging a demand on the corporation for a regulation of such line, need not allege a formal entry of the land covered by water on his front.

Appeal from superior court, Chowan county; Armfield, Judge.

Mandamus by Jacob Wool against the town of Edenton to compel the corporation to regulate the line of deep water bordering petitioner's land. From a judgment of nonsuit, petitioner appeals. Reversed and new trial ordered.

C. M. Busbee and Grandy & Aydlett, for appellant. W. M. Bond and Pruden & Vann, for appellee.

**AVERY, J.** The second paragraph of subsection 1 of section 2751 of the Code amended by chapters 17 and 349 of the Laws of 1893 is as follows: "And when any such entry [of land in front of a riparian proprietor on navigable water, and extending to the deep-water line] shall be made in front of the land in any incorporated town, the town corporation shall regulate the line on deep water to which wharves may be built, provided that this act shall not effect existing entries, existing rights or pending suits." Prior to the passage of the two amendatory acts in 1893, it had been held that, until it appeared affirmatively that the authorities of an incorporated town situated upon navigable water had marked out the line of deep

water, the secretary of state might refuse to issue a grant under the provisions of the Code, § 2751, to the riparian owner of the land covered by water, and extending out to the channel on his front. *Wool v. Saunders*, 108 N. C. 729, 13 S. E. 294. Under the law now in force, it is made the duty of the authorities of the incorporated town, "when any such entry is made," not in terms to fix the line of deep water to which entries may extend, but to "regulate the line of deep water to which wharves may be built." The plaintiff, Wool, has, and had before he made an entry, a qualified property in the land covered by water, and extending on his front out to the line where it became navigable. *Bond v. Wool*, 107 N. C. 139, 12 S. E. 281; *Zimmerman v. Robinson*, 114 N. C. 39, 19 S. E. 102. It was formerly the duty of the councilmen to regulate the line on deep water for the purpose of locating entries. The duty of locating still subsists, but it is now enjoined for the purpose of indicating the line along which wharves may be built. The legislature has the power, through the authorities of a town, as agents, to regulate in a reasonable manner the location of the navigable water, whether to mark the boundary of entries or the points for building wharves. *Bond v. Wool*, supra. And the plaintiff would have had the right to build a wharf on the deep water in his front if the legislature had conferred no such power of regulation, or if his land had been situated outside of an incorporated town. *Id.* The law, as amended, makes it now his duty to demand the location of the line on which he may build a wharf in front of the town of Edenton, before proceeding to build, just as the provision of the section cited from the Code made the location of that line necessary in order to subject the land to entry. The plaintiff, as a riparian owner, could not build a wharf, and avail himself of the benefit of his qualified property, except subject to the regulations prescribed by the legislature, and therefore it became necessary that he should demand that the line be designated. On the 7th of March, 1893, the plaintiff submitted this demand in the shape of a respectful petition, and alleges in his complaint that the town refused to act upon it. He likewise avers that it is the duty of defendants to regulate the line of deep water, and that they have attempted but failed to so locate it that he may be able "to enjoy the use of his riparian rights." He prays that defendants be compelled "to locate the line of deep water in front of his said property." It is true that in the second paragraph of the complaint he alleges that he has the right to make entry of the land on his front, but he would have been entitled to any relief that the facts warranted him in demanding, without making the formal prayer referred to. Having alleged his right to have the councilmen act, and their refusal to discharge the duty imposed by law, it was not material

whether he incorporated in his complaint the fact that he had made an entry, or gave no explicit reason therein for making the demand, other than that he was a riparian owner. The courts are presumed to know that the refusal to act deprived him of the use of his property for a most important purpose.

But it is insisted in effect that, if the plaintiff has alleged in the complaint that he made the proper demand, the proof does not sustain the allegation. In his petition he asks for two things—First, that the board relocate the line of entry fixed by them on a former occasion; and, second, that the town shall "make a general line on the deep water of said sound and bay in front of the highland of the town of Edenton, so designated that each of the owners of the highland may know the line so established." It was not essential that he should notify the board of his purpose to proceed immediately to erect a wharf. They were presumed to know that it was his right to build it, and their duty, on demand, to indicate to him where he should build. When this case was before us at the fall term, 1893 (113 N. C. 33, 18 S. E. 76), we were not advertent to the fact that the law had been amended, but the amended act leaves the same duty incumbent on the defendants, though it declares that it shall be done to attain a different end; and since the plaintiff shows that they still owe that duty to him, and have refused, on demand, to discharge it, it is manifest that mandamus will lie to compel compliance with the statute by designating the deep-water line on which the plaintiff may build a wharf, just as, under section 2751, the defendants could have been made to locate the outer line of an entry. 113 N. C. 35, 18 S. E. 76; Koonce v. Com'rs, 106 N. C. 192, 10 S. E. 1038. The plaintiff has a clear legal right, which he cannot exercise until the defendants perform a positive duty imposed upon them by statute, and which they have refused to discharge. There being no other adequate remedy, mandamus lies. State v. Justices, 2 Ired. 430. The judgment of nonsuit must be set aside, and a new trial granted. New trial.

(115 N. C. 23)

**HALE et al. v. WHITEHEAD.**

(Supreme Court of North Carolina. Oct. 9, 1894.)

**APPRAISEMENT OF HOMESTEAD.**

Appraisers appointed to allot a homestead, under Code, § 502, need not be freeholders.

Appeal from superior court, Halifax county; Graves, Judge.

Action by Hale Bros. against B. F. Whitehead. Judgment was rendered for plaintiffs, and an execution issued thereon. On proceedings to allot defendant a homestead, issues as to the regularity thereof were sub-

mitted to a jury. On their verdict, judgment was rendered for plaintiffs, and defendant appeals. Affirmed.

The following issues were submitted to the jury: (1) Did appraisers allot to defendant, as his homestead, land of less value than \$1,000? (2) Was the appraiser L. M. Alston a freeholder? (3) Was the appraiser L. M. Alston excepted to before he was sworn? The jury answered the first issue, "No," the second, "No," and the third, "Yes." Thereupon the defendant asked judgment upon the verdict that the return of the appraisers be set aside because no proper homestead had been allotted him according to law, in this: that the appraiser L. M. Alston was not a freeholder and a proper person to act as such appraiser. The motion was refused. Judgment for plaintiffs, and appeal by defendant.

Day & Harrison, for appellant. Thos. N. Hill, for appellees.

OLARK, J. The appraisers to allot the homestead are required by Code, § 502, to be discreet persons, "qualified to act as jurors." The plain import of this language is that they shall have the qualifications of regular jurors. These are not required to be freeholders. Tales jurors are required by Id. § 405, to be taken from bystanders qualified to serve as jurors, and by Id. § 1733, such tales jurors are further required to be freeholders, and must not have served on the jury within that court within two years. This shows that these extraordinary jurors must not only be "qualified to serve as jurors," but must have the additional qualifications of being freeholders, and of non-service in same capacity for two years. State v. Whitley, 88 N. C. 691. The reason of this was to prevent professional jurors who might be "qualified to act as jurors," from monopolizing the jury box. Neither the reason nor the letter of the law applies to appraisers, who need not be summoned hastily, nor usually from a crowd of bystanders. There is no requirement that they shall have the qualification of being freeholders, as is the case with extraordinary or tales jurors, but simply that they shall be "qualified to act as jurors,"—i. e. as ordinary or regular jurors. No error.

(115 N. C. 24)

**ULMAN et al. v. MACE et ux.**

(Supreme Court of North Carolina. Oct. 9, 1894.)

**HUSBAND AND WIFE—CHARGE ON WIFE'S ESTATE—PLEADING.**

A complaint in an action to have liability for a joint contract of husband and wife declared a charge on the wife's separate estate must describe the property sought to be charged. Jones v. Craigmiles, 19 S. E. 638, 114 N. C. 613, followed.

Appeal from superior court, Craven county; Graves, Judge.

Action by Nathan Ulman and W. A. Oppenheim, copartners, against W. S. Mace and Ella Mace, trading as Mace & Co., for goods sold and delivered. Judgment for plaintiffs, and defendants appeal. Reversed.

O. H. Guion, for appellants. C. R. Thomas, for appellees.

**PER CURIAM.** His honor was probably unaware of the unreported case of *Jones v. Craigsmiles*, 114 N. C. 613, 19 S. E. 638, in which it was held that the property should be described. Reversed.

(115 N. C. 606)

**FARRIS v. RECEIVERS OF RICHMOND & D. R. CO.**

(Supreme Court of North Carolina. Oct. 9, 1894.)

**WRITS—SERVICE ON RECEIVER—APPEALABLE ORDER.**

1. Code, § 217, providing that, when an action is against a corporation, service of summons can be made on a local agent, applies to a receiver of a railroad company.

2. An order denying a motion to dismiss a complaint for defective service of the summons is not appealable.

Appeal from superior court, Mecklenburgh county; Boykin, Judge.

Action by Walter Farris against Samuel Spencer and others, receivers of the Richmond & Danville Railroad Company. From an order denying a motion to dismiss the complaint, defendants appeal. Appeal dismissed.

G. F. Bason and F. H. Busbee, for appellants. Walker & Cansler, for appellees.

**CLARK, J.** This is an action against "S., H., & F., receivers of R. & D. R. Co." It is not an action against them individually. It is in fact an action against the corporation. The recovery, if any, must be paid out of the property of the corporation. The receivers are named only because they are temporarily in management of the corporation in the place of its regular officials. The Code, § 217, provides that, when an action is against a corporation, service of summons can be made on a local agent. Here, service was upon the station agent at Charlotte. He could as readily notify the receivers as he could the president, if the latter had been in charge, and he was as truly the local agent of the corporation as the corporation is in fact the real defendant. Whether any judgment recovered might or might not be paid in preference to other debts of the corporation does not affect this question. In *Eddy v. Lafayette*, 1 C. C. A. 441, 49 Fed. 807, it is held that the act of congress (24 Stat. 554, §§ 2, 3, March 3, 1887), authorizing suits to be brought against receivers without special leave, "placed receivers on the same plane with railroad companies, both as respects liability to be sued for acts done while oper-

ating the railroad, and as respects the mode of obtaining service," and hence upheld the sufficiency of service on a local agent as in our case. The same service was held sufficient in *Central Trust Co. v. St. Louis & A. T. Ry. Co.*, 40 Fed. 428.

We have decided the question of practice, but it must be noted that the appeal was improvidently taken. No appeal lies from a refusal to dismiss, as has been repeatedly held. The defendants should have had their exception noted in the record, and have proceeded on the merits. This is pointed out in *Gulford Co. v. Georgia Co.*, 109 N. C. 810, 13 S. E. 861. Appeal dismissed.

(115 N. C. 15)

**MULLEN v. NORFOLK & N. C. CANAL CO.**

(Supreme Court of North Carolina. Oct. 9, 1894.)

On rehearing. Denied.

For original opinion, see 19 S. E. 106.

**PER CURIAM.** This is a petition to rehear a case in which the opinion was filed last term. 114 N. C. 8, 19 S. E. 106. It does not appear that it was decided hastily, nor that any material point of fact or law, or any direct authority, was overlooked. The petition must therefore be dismissed. *Hudson v. Jordan*, 110 N. C. 250, 14 S. E. 741, and cases cited in *Clark's Code* (2d Ed.) 712. Petition dismissed.

(115 N. C. 21)

**DELAFIELD et al. v. LEWIS MERCER CONST. CO. et al.**

(Supreme Court of North Carolina. Oct. 9, 1894.)

**APPEAL—SERVICE OF CASE.**

Under Code, § 910, as amended by Act 1885, c. 180, providing that the court shall be held until the business is disposed of, the term ends when the judge leaves, and the time within which a case on appeal can be served must be computed from the day he leaves.

Appeal from superior court, Craven county; Graves, Judge.

Action by Clarence Delafield and others against the Lewis Mercer Construction Company and others. Judgment was rendered for plaintiffs, and defendants appeal. Affirmed.

W. D. McIver, for appellant Chattanooga Foundry & Pipe Works. Iredell Meares and C. R. Thomas, for other appellants. O. H. Guion and W. W. Clark, for appellees.

**CLARK, J.** There was once, to some extent, an idea prevalent that the term of a court extended to the last Saturday of the one, two, or three weeks for which it might be held, although the judge might have left. This idea of a court in session without a judge is not warranted by law. Equally by the Code, § 910, and by the amendatory act of 1885 (chapter 180), it is provided that the

court shall be held "and continue in session" for each county, for one week or more (as is there specified) "unless the business is sooner disposed of." Thus the session or term is not for the week or weeks specified, but only "until the business is disposed of." While this makes it the judge's duty to continue the session the full time allotted, unless all the business is transacted, yet when he leaves the session or term is at an end, for no more business can be "disposed of." He cannot hear matters of either a civil or a criminal nature out of the courthouse, except by consent, unless it is "chambers" and not "term" business. Const. art. 4, § 22, requiring the courts to be always open, must be construed in connection with section 11, and, except for matters requiring a jury, does not apply to the terms of courts and matters connected therewith. *McAdoo v. Benbow*, 63 N. C. 461. In *Foley v. Blank*, 92 N. C. 476, and *Branch v. Walker*, Id. 87, this idea of a "constructive" term of the court till the end of the week or two weeks was negatived, and it was pointed out that the court actually adjourned when the judge left for the term; and the evils were referred to which would result from recognizing as valid the filing of any pleadings, or anything else done, after the judge left. In that case, as in this, his honor had directed that the court "should remain open and expire by limitation," under the mistaken impression that the court could be constructively open after he had left. The judge, when he leaves the bench for the term, should cause due notice to be given by the crier of the final adjournment. This is regular and orderly, and will give notice to any having undisposed business to be brought to the attention of the court. But should the judge omit to do this, or even mistakenly direct, as in above cases, that the court should remain open till "the term expire by limitation," still there is an actual adjournment when he leaves the bench for the term. There is no court when there is no judge to hold it, and there can be no constructive session after he has left. Hence in all the cases since, as to the time within which notice of appeal or case on appeal is to be served, the time has been computed from the "actual" adjournment, meaning the time when the judge left the court, and not the constructive expiration of the term which had been negatived. *Turrentine v. Railroad Co.*, 92 N. C. 642; *Walker v. Scott*, 104 N. C. 481, 10 S. E. 523. In the latest case (*Rosenthal v. Roberson*, 114 N. C. 594, 19 S. E. 667) it is expressly held that "the time allowed, whether by statute or consent, for service of the case on appeal, is to be counted, not from the last day of the two weeks during which the court could have been held, but is to be computed from the day of the actual adjournment." In the present case the judge left the county and district on the 8th day of June, and the case on appeal was not served till June 19th. This was more than the stat-

utory time of "ten days from entry of appeal taken," such appeal having been taken during the term. There must be some time prescribed and observed, a delay beyond which to serve the case on appeal will forfeit the right to do so. The legislature has extended that time to 10 days. The appellant not having served his case on appeal within that time, there is no case on appeal legally before us. This does not entitle the appellees to dismiss the case, but, there being no errors in the record proper, we will affirm the judgment. *Cummings v. Huffman*, 113 N. C. 267, 18 S. E. 170. It is not improper to add that, if the "case" were properly before us, there are no merits in the appeal. The judge finds as a fact that the property sold for a full and fair price. As to the averments in affidavits of the interest of the commissioner in the purchase, the objection was overruled by the judge, and the appellant did not ask that the facts be found. *Millhiser v. Balsley*, 109 N. C. 433, 11 S. E. 314. Judgment affirmed.

(115 N. C. 559)

#### HUNTT v. VANDERBILT et al.

(Supreme Court of North Carolina. Oct. 9, 1894.)

##### PLEADING AND PROOF—VARIANCE.

Where the complaint alleges that the act complained of was done by B., "under the superintendence, control, management, and direction of defendant," and the evidence shows that B. was acting as an independent contractor, plaintiff cannot recover.

Appeal from superior court, Buncombe county; Armfield, Judge.

Action by J. E. Hunt against George W. Vanderbilt and others. There was a judgment for defendants, and plaintiff appeals. Affirmed.

Chas. A. Moore, for appellant. M. E. Carter and J. H. Merrimon, for appellees.

SHEPHERD, C. J. We have given this case a very careful consideration, but in view of the variance between the allegations and the proof, which in itself affords a sufficient ground for the intimation of his honor, we have concluded to refrain from the discussion of the interesting questions so elaborately argued by counsel, and which go to the merits of the controversy, when they shall be properly presented to the court. Although we are prepared to pass upon these questions, yet, as the case is of a peculiar character, and another action may be brought in which the testimony may present new or varying phases of fact, we have concluded that the course indicated is the safer one to pursue in the disposition of this appeal. After the testimony of the plaintiff was introduced, the court intimated that the plaintiff could not recover. As there was no motion to amend, we must, of course, assume that the intimation was made with reference to the cause of action stated in the complaint.

and, if we turn to that pleading, it will be seen that it is repeatedly alleged that the act of Britt, for which the defendant is sued, was committed "under the superintendence, control, management, and direction of the defendant." This language is so used that it distinctly qualifies and controls any matter alleged in the nature of inducement or explanation, which sometimes, under the very liberal construction of code pleading, is held sufficient to avoid a variance; and it clearly imports that the defendant is sued for the conduct of Britt as the defendant's servant, and not otherwise. The testimony discloses that Britt was not the servant of the defendant, but an independent contractor; and as the principles of law upon which the defendant may be liable for the conduct of Britt in these distinct capacities are in some very essential particulars widely different, and really constitute different causes of action, we have but little hesitation in deciding that the evidence fails to sustain the cause of action set forth in the complaint. *Abernathy v. Seagle*, 98 N. C. 553, 4 S. E. 542; *Pendleton v. Dalton*, 96 N. C. 507, 2 S. E. 759; *Willis v. Branch*, 94 N. C. 142; *Browning v. Berry*, 107 N. C. 231, 12 S. E. 195; *Brittain v. Daniels*, 94 N. C. 781. Doubtless, his honor would have allowed an amendment, but as the plaintiff did not ask for it, and was content to rest his case upon the present complaint, we think the intimation that the plaintiff could not recover was correct, and that the judgment should therefore be affirmed.

(115 N. C. 633)

KAHN v. ATLANTIC &amp; N. C. R. CO.

(Supreme Court of North Carolina. Oct. 16, 1894.)

CARRIERS—PASSENGERS' EFFECTS—LIABILITY FOR—BURDEN OF PROOF.

1. Whether a carrier used ordinary care to protect a passenger's baggage while in a warehouse after it had reached its destination is for the court, rather than the jury, where the facts are undisputed.

2. In an action against a carrier for baggage burned in a warehouse after it had reached its destination, the burden is on plaintiff to show want of ordinary care by defendant.

3. Where a passenger's baggage is placed in the baggage room after it has reached its destination, the carrier is only liable, as warehouseman, for want of ordinary care.

Appeal from superior court, Craven county; Bynum, Judge.

Action by Joseph Kahn against the Atlantic & North Carolina Railroad Company for the value of a trunk and its contents, which was destroyed by fire while in the baggage room, awaiting delivery, after it had reached its destination. Plaintiff had judgment, and defendant appeals. Reversed.

The court charged the jury that defendant, if liable at all on the testimony, was liable as a warehouseman, and not as common carrier; that, it being admitted that defendant had received the property of plaintiff, and

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had failed to deliver it on the demand of plaintiff, the burden was on defendant to satisfy the jury by a preponderance of testimony as to the reason of the failure to deliver the said property when demanded, or that the said property, if lost or destroyed, had not been lost or destroyed through the negligence of defendant or its employés. The court also charged the jury that defendant was required to use ordinary care for protecting said property, and that ordinary care was such care as an ordinarily prudent man would have used in the protection of his own property.

W. W. Clark and P. M. Pearsall, for appellant. P. H. Pelletier, for appellee.

SHEPHERD, C. J. There was error on the part of the court in leaving the question of ordinary care to be determined by the jury upon no other instruction than that "ordinary care was such care as an ordinarily prudent man would have used in the protection of his own property." This is obnoxious to the ruling in *Emry v. Railroad Co.*, 109 N. C. 589, 14 S. E. 352; *Knight v. Railroad Co.*, 110 N. C. 58, 14 S. E. 650, and the long line of decisions cited in the opinions in those cases. The well-established practice in this state is that, "if the facts are undisputed, it is for the court to decide. If they are controverted, or if the inferences to be drawn from them are doubtful, the jury must find such facts or inferences, and the court must instruct them as to the law applicable to the same." *Emry's Case*, supra.

There was also error in so much of the charge as states that the burden was on the defendant to show that the property had not been lost or destroyed by reason of the defendant's negligence. It very clearly appears that the defendant's liability as a common carrier had ceased when the property was destroyed by fire, and that it was liable only as a warehouseman for a want of ordinary care. *Hilliard v. Railroad Co.*, 6 Jones (N. C.) 343; *Neal v. Railroad Co.*, 8 Jones (N. C.) 482; *Chalk v. Railroad Co.*, 85 N. C. 433. "The rules of law require, in an action for damages resulting from the negligence of the defendant, or his agents and employés, while engaged in his service, that the plaintiff shall prove the negligence as a part of his case" (*Doggett v. Railroad Co.*, 81 N. C. 461); and we see nothing in the record to show that the present case falls within any of the exceptions to this general principle. New trial.

(115 N. C. 18)

LOWE et al. v. UNITED STATES MUT. ACC. ASS'N.

(Supreme Court of North Carolina. Oct. 16, 1894.)

APPEALABLE ORDERS—ACCIDENT INSURANCE—CONDITIONS—TERM OF SUING.

1. An appeal does not lie from a refusal to dismiss, it not being final.

2. A condition in an accident policy that no action thereon shall be brought unless commenced "within a year" from the accidental injury, is not in contravention of Code, § 3076, which forbids any person licensed to do insurance business to limit the term within which suit shall be brought "to a period less than one year."

3. In the absence of a waiver of such condition on the part of the insurer, it is valid as a reasonable agreement.

Appeal from superior court, Chowan county; Armfield, Judge.

Action by William S. Lowe and others against the United States Mutual Accident Association. From a refusal to dismiss, defendant appeals. Appeal dismissed.

J. S. Manning, for appellant. Pruden & Vann, for appellees.

AVERY, J. It has been repeatedly held by this court that, while an appeal lies from an order dismissing an action, a refusal to dismiss does not "determine the suit, or prevent a judgment from which an appeal may be taken," and is not reviewable in the appellate court without further proceedings in the cause. *Plemmons v. Improvement Co.*, 108 N. C. 614, 13 S. E. 188, and other cases cited in Clark's Code, pp. 559, 560. But as we can see that the ends of justice may be subverted in this particular case by passing upon the main question involved in the controversy, we have concluded that it is proper to do so. The stipulation in the policy which gave rise to the action in *Muse v. Assurance Corp.*, 108 N. C. 240, 13 S. E. 94, was that "no suit or action against this corporation for the recovery of any claim by virtue of this policy shall be sustained," etc., "unless such suit or action be commenced within twelve months next after the loss shall occur." The condition of the policy sued on is that "no suit or proceeding in law or equity shall be brought, or arbitration required, to recover any sum under this policy unless the same is commenced within one year from the time of the alleged accidental injury." In *Muse's Case* it was held that the word "month" must be construed to mean a calendar month, and therefore that 12 months was the same as one year. It would follow that the stipulation in our case fixes precisely the same limit as was prescribed in *Muse's Case*, and is not, therefore, an agreement in contravention of the statute. The fourth condition of the policy, the material portion of which we have quoted, being, as was declared in *Muse's Case*, a contract, and not a statute of limitation, and if it is not illegal because contrary to some principle of the statute or common law, it must be valid and enforceable. We see no force in the suggestion that the statute does not apply to a "person licensed to do" accident insurance business as well as to issue policies upon lives or to cover losses by fire. Conceding that it applies to all persons engaged in taking risks of either kind, the terms of the policy sued upon prescribe

the same limit as that fixed in the law, and it is therefore, for the reason we have stated, valid. The "accidental injury" (the drowning of the insured) occurred on September 28, 1889, and the first action was instituted by issuing summons dated October 3, 1889. Judgment of nonsuit was entered on April 20, 1892, at the spring term, 1892. This action began by summons issued April 20, 1893, more than 12 months after the judgment of nonsuit, from which there was no appeal, was rendered, and more than 3 years from the time of the accidental injury on September 28, 1889. In the absence of any proof tending to show a waiver of the benefit of this stipulation on the part of the defendant company, we must hold that it is binding upon the plaintiffs, and operates to defeat the action, not as a statute of limitations, but as a reasonable agreement insisted on by the defendant in order to avoid the danger incident to making defense after the lapse of long time intervening between the loss or injury and the institution of suit. The appeal is premature, and must be dismissed. Appeal dismissed.

(115 N. C. 46)

JONES v. ALLSBROOK, Sheriff, et al.  
(Supreme Court of North Carolina. Oct. 16, 1894.)

EXEMPTIONS — WHO ENTITLED — RESIDENTS — WRONGFUL SALE — MEASURE OF DAMAGES.

1. Under Const. art. 10, § 1, exempting certain personal property of residents from sale under execution, and Code, § 507, providing for an appraisal when personal property of a resident shall be levied on, one who was a resident at the time of levy, but not at the time of sale, is not entitled to such exemption.

2. On an issue as to whether plaintiff had lost his residence, so as to forfeit exemptions, by removal into another state, he may be asked whether he had removed to engage in business in such other state.

3. The amount paid by the owner to recover exempt property, which had been sold under execution, is the measure of damages in an action against the sheriff for such wrongful sale.

Appeal from superior court, Halifax county; Graves, Judge.

Action by M. A. Jones against B. I. Allsbrook, sheriff, and others, to recover damages for a wrongful sale under execution of property claimed to be exempt. There was judgment for plaintiff, from which defendants appeal. Reversed.

Robt. O. Burton, for appellants. Thos. N. Hill, for appellee.

MacRAE, J. It is a resident of this state who is entitled under section 1, art. 10, of the constitution to have his personal property, to the value of \$500, exempted from sale under execution. To carry out this provision of the constitution, section 507 of the Code was enacted, under the provisions of which section, whenever the personal property of any resident of this state shall be levied upon, and the owner shall demand that the same, or

any part thereof, "shall be exempt from sale under such execution," appraisers are provided to lay off the exemption, "which articles shall be exempt from said levy." First, the levy; then, the demand for the appraisal; next, the appraisal; and last, the exemption from the levy theretofore made, and consequently from sale under the execution, of the property set apart. In *Pate v. Harper*, 94 N. C. 23, it was said: "We think the debtor is entitled to have his exemption ascertained up to and just before the process is executed by a sale. While the process is in the officer's hands, in full activity, the preliminary action of the appraisers is not conclusive, but remains in fieri, capable, at their instance, under the call of the officer at least, of correction and amendment. If property has been omitted which ought to have been put on the list, but was not known at the time to belong to the debtor, so that it could be done, the appraisers ought to have the power, and we think do have it, to enlarge the exemption, so that none which should be exempt shall be sold from him. The mandate of the statute is that the officer shall make his levy upon the entire personal estate subject to seizure under execution, but, before he sells, to have so much of it set apart for the debtor, within the limited value, as he may select, and when insufficient, all being below the value, such selection is unnecessary." Surely, the reason of the opportunity given to the judgment debtor up to the last moment to have his exemption set apart will apply with equal force to the judgment creditor; so that, if it be made to appear at the sale that the debtor is entitled to no exemption, the same will not be allowed. It follows that the issue tendered by defendant was the proper one, and should have been submitted; the duty of the sheriff to levy being plain, but the question being whether he should have taken the proper steps, on request of the defendant in execution, to have laid off to her the personal property exempt from sale by the laws of the state.

It being ascertained, then, that the time at which the exemption operated was that of the sale, the next question was whether the defendant in execution was at that time a resident of this state. She testified that, at the time of the levy, she was a resident of this state; that she never went to Suffolk, Va., to live; that she and her husband did not go there at all until three or four months after the levy (it is not stated whether this was before or after the sale), and then stayed only eight months, and returned to Edgecombe county, in this state, where they now reside. The cross-examination was directed to the question whether she had not abandoned her residence in North Carolina, and started to Virginia to engage in business. On objection, his honor would not require her to answer as to her purpose in going to Virginia. In this exception is to some ex-

tent involved the meaning of the word "resident," as used in the constitution, supra, and at what time and under what circumstances one ceases so to be. In *Munds v. Cassidey*, 98 N. C. 558, 4 S. E. 353, 355, upon the question whether H. C. Cassidey was entitled to a personal property exemption, he having been absent from the state for seven or eight years, employed upon a steamboat plying in the waters of Florida, expecting in the future to return to Wilmington, the court said: "Our constitution and statute do not extend to such a case. The person must be a resident, actual, and not constructive, to be entitled to the exemption." In *Fulton v. Roberts*, 113 N. C. 422, 18 S. E. 510, in relation to the laying off of a homestead, the definition by the trial judge of the word "resident" having been disapproved, as confounding "residence" with "domicile," the court said: "We must conclude that the right of exemption ceases here when, by reason of a change of residence, it begins in another state, or when a similar occupancy of a place of residence by one coming from a sister state to this state would entitle such person to the benefit of section 2, art. 10, of our constitution." It will not be necessary to trouble ourselves with the distinction, sometimes very plain, and at others most shadowy, if, indeed, there be any, between "residence" and "domicile." It is well understood that a "domicile" is, in its strict legal sense, one's true, fixed, and permanent home, to which, whenever he is absent, he has the intention of returning. *Horne v. Horne*, 9 Ired. 99. And the word "residence," while often a word of not so restricted a meaning, in some instances in no respect differs from "domicile." There may be an actual and a constructive residence. In *Lee v. Moseley*, 101 N. C. 311, 7 S. E. 874, the word "resident," as employed in section 2, art. 10, of the constitution, is restricted to the former class, and simply means one who has his permanent home in this state. The same term is used in the first section as well as the second of article 10, to designate the persons entitled to homestead and to personal property exemptions. In order to determine whether one is a resident of this state in this sense, it is necessary in some instances to ascertain the intent of the party. When one has been such a resident, a removal from its limits, with intent not to return, will at once deprive him of the privileges incident to his residence here. But the absence may be intended to be of such a temporary nature as to avoid the consequence above,—it is for the jury to determine,—in which case it may be important to learn the purpose of the party and the circumstances of the removal. Was it for the purpose of engaging in business? The kind of business? Did he take with him all of his property? These may be circumstances which the jury should consider. In this view, the question whether this plaintiff did not intend to engage in business in Suffolk

was pertinent to the inquiry whether at the time of the sale, if she were then actually in Virginia, or were on her way there, with all her property, she had then abandoned her residence in North Carolina.

As it is evident that there must be a new trial, we will not consider the other exceptions, only as to the instructions given by his honor upon the measure of damages. If, on another trial, it should be found that the plaintiff was a resident of this state, having here her home, at the time of the sale of her personal goods, in disregard of her rights of exemption, it will be necessary to consider the measure of the damage to which she will be entitled under the law. This would be full compensation for the loss sustained by her as the result of this disregard of her rights and the sale of her property, which, according to the evidence, was of less value than \$500,—not the value of the property at the time of the levy, but the actual loss sustained by her. If she regained the property upon the payment by her of the amount of the judgment debt, or any other fixed sum, this would be the measure, and it might be augmented by any further actual expense to which she might have been subjected by the sale of her property. In *Winburne v. Bryan*, 73 N. C. 47, where the sheriff, having an execution in his hands against A., sold the land of A. without serving upon him the written notice, as required by law, before the sale of land under execution, the judge below held that plaintiff, suing the sheriff, was only entitled to nominal damages, unless he proved that the property sold for less than it would have sold for if the notice had been given. "The execution was for only about \$20. The land was worth \$300 in cash. The plaintiff, a short time after the sale, gave the purchaser \$100 for his bid; that is, paid up the execution costs and \$100 over and above. The plaintiff is out of pocket \$100 over and above the amount of the execution by reason of the default of the defendant, and why he should not be indemnified to that extent we are unable to conceive. Indeed, we incline to the opinion that the jury might have been justified in going further, and making some allowance for the inconvenience of being compelled to raise \$100 extra, when, had the defendant done his duty, \$20 would have answered." He goes further, and intimates some reasons for punitive damages in that case, which do not apply to the present. "If the owner has recovered property taken from him by the wrongdoer, that fact will reduce the damages; but the owner is allowed compensation for his expenditure in recovering the property. Thus, where the plaintiff's property was seized and sold by the defendant, a sheriff, and was repurchased by the plaintiff from the one who bought it at the sheriff's sale, it was held that the measure of damages was the amount paid to repurchase the property." 1 Sedg. Dam. § 58.

New trial.

(115 N. C. 700)

# STATE v. GIBBS et al.

(Supreme Court of North Carolina. Oct. 9, 1894.)

## PEDDLERS—LICENSE.

A person who solicits orders for stoves similar to a sample which he carries in his wagon is not an "itinerant salesman," nor a peddler exposing for sale goods on the street or in a house temporarily rented (Revenue Act, Laws 1893, § 23), and liable for a license as such.

Appeal from superior court, Pasquotank county; Armfield, Judge.

J. U. Gibbs and another were convicted of selling goods as itinerant salesmen without a license, and appeal. Reversed.

The following are the special verdict and the judgment: "We, the jurors impaneled to try the above cause, find the following special verdict: (1) The Wrought-Iron Range Company is a corporation existing under the laws of the state of Missouri, all the officers and stockholders of which are citizens and residents of St. Louis, Mo., where said corporation has its factory for manufacture of ranges or stoves. (2) On or about — day of January, 1894, the defendant corporation furnished its agent J. U. Gibbs, one of the defendants, a wagon, team and sample range, and sent him into Pasquotank county, N. C., to canvass the sale of said ranges and to take orders for future delivery for ranges so manufactured and owned by said corporation. (3) Pursuant to said employment, for which said corporation paid him a salary, the said Gibbs, on — day of —, 1894, exhibited said sample range to one Thomas, in said county, and solicited his order for a range similar to said sample range, to be delivered in 30 days, offering to take a note therefor, to be void if the corporation failed to deliver the range within 30 days. Said Gibbs took no orders for ranges. (4) Said corporation's mode of doing business is as follows: They ship from their factory in St. Louis, Mo., a car containing 72 ranges, consigned to itself in care of their division superintendent, who is a citizen and resident of Tennessee, but temporarily located at Elizabeth City, N. C., where he has an office for correspondence with said company, and to receive and fill the orders for ranges taken by the agents canvassing the county. The ranges shipped as aforesaid are received and stored at Elizabeth City, in a warehouse rented for the purposes of storing said ranges and filling the said orders. No ranges are offered for sale or sold at warehouse, except as above stated. The ranges are sold in original packages. (5) The defendants had no license, and paid no tax to North Carolina for doing said business. If, upon said facts, the court is of opinion that the defendants are guilty, then the jury find them guilty; but if the court be of the opinion that the defendants are not guilty, upon the facts found, then the jury find them not guilty. And, the court having instructed the jury that the defendants were guilty upon the



facts found, the jury returned a verdict of guilty. Wherefore, the solicitor for the state prays judgment, and the court adjudges that the defendants pay a fine of \$50 and the costs of the prosecution. Defendants appeal."

Strong & Strong, for appellants. The Attorney General, for the State.

MACRAE, J. The warrant describes two offenses: (1) "That the defendants did, as itinerant salesmen, expose for sale, either on the street or in houses rented temporarily for that purpose, goods, wares, and merchandise, to wit, certain stoves, contrary to the statute," etc., "without a license," etc. (2) "Unlawfully and willfully did peddle goods, wares, and merchandise, to wit, certain stoves, with two mules and a vehicle, the said Gibbs and the Wrought-Iron Range Company not then and there having a license so to sell and peddle said goods," etc., "contrary to the statute," etc. It is admitted by the attorney general, on the authority of *State v. Lee*, 113 N. C. 681, 18 S. E. 713, that the defendants were not peddlers, and therefore would not be liable for the license tax imposed upon peddlers of clocks, stoves, and ranges, under section 28 of chapter 294 (the revenue act) of the Laws of 1893. But it is contended that the defendants are liable under section 23 of said act, as "itinerant salesmen." This section, after imposing a license tax upon peddlers, proceeds: "Every itinerant salesman who shall expose for sale either on the street or in houses rented temporarily for that purpose, goods, wares or merchandise, shall pay a tax," etc. The special verdict finds that defendant Gibbs, in the employment of the defendant company, with a wagon and team and a sample range, exhibited his sample to one Thomas, in said county, and solicited his order for a range similar to said sample, to be delivered in 30 days. It is not found that this exhibition was made either in the street, or in a house rented temporarily for the purpose of exposing to sale goods, wares, and merchandise. It fails to find—indeed, it finds to the contrary—that any goods were exposed to sale by defendant. The statute was evidently intended to reach that class of salesmen, who, while not strictly peddlers who carry their goods and sell from place to place, are engaged in a business of a transient nature, carried on in booths or stands upon the streets of cities and towns or in houses occupied for this temporary purpose. As the defendants were not liable either under section 23 or 28 of the revenue act for the payment of a license tax, no federal question arises upon the right of the state to impose a license tax for doing such business as was found by the special verdict to have been done in this instance. We hold that, according to the facts found in the special verdict, the defendants are not guilty. There is error. Judgment reversed.

(115 N. C. 38)

## PEEBLES v. GAY et al.

(Supreme Court of North Carolina. Oct. 9, 1894.)

## RIGHTS OF COSURETY — PAYMENT OF JUDGMENT — SUBROGATION.

Where a judgment against two sureties on a bond is paid by one of them, he is entitled to a satisfaction of the judgment as to one-half its amount, and to an assignment of the other half to a trustee for his benefit in order to enforce contribution from his cosurety.

Appeal from superior court, Northampton county; Whitaker, Judge.

Action by R. B. Peebles, trustee, against B. S. Gay, executor, and others, to determine the respective rights of defendants to a trust fund. Judgment was granted disallowing the claim of J. M. Grant, trustee, and he appeals. Reversed.

This was an action tried at December special term, 1893, of Northampton superior court, before Whitaker, J. A jury trial was waived, and the following issues were submitted to his honor: (1) Is the defendant J. M. Grant, as trustee for William Grant, entitled to the fund in controversy? (2) Is the defendant W. C. Hardy entitled to the fund in controversy? The plaintiff was trustee in two deeds of trust made to him by A. Capehart. The one, to secure a debt of \$8,000, due M. C. Cameron, was registered September 12, 1881; the other, to secure a debt of about \$18,000, due Hardy Bros., was registered May 30, 1889. A judgment was docketed in said county April 4, 1887, in favor of W. E. Spivey, trustee, against William Grant and A. Capehart, for \$3,000, to be discharged upon payment of \$940.41, with interest and costs. William Grant and A. Capehart were cosureties on a bond given by A. Grant and J. M. Grant, and the aforesaid judgment was rendered against them on said account. Alias execution issued on said judgment, and the following return was made thereon by the sheriff: "Satisfied in full, January 24, 1888." On the judgment docket were the following entries: "One-half of the principal, interest, and costs of this execution has been paid and settled by Wm. Grant, and to that extent is satisfied. W. E. Spivey, Trustee, by R. B. Peebles, His Attorney. This January 23, 1888." "This January 24, 1888, for value received of J. M. Grant, I hereby sell, transfer, and assign to said J. M. Grant, in trust for the use and benefit of Wm. Grant, his father, the balance due on the judgment mentioned within (it being one-half thereof), without recourse on me. W. E. Spivey, Trustee, by R. B. Peebles, Attorney." J. M. Grant, trustee of William Grant, claimed out of the fund arising from the sale by the trustee the sum of \$——, as still due upon the Spivey judgment. Defendant Hardy contended that the said judgment had been fully satisfied, and that he was entitled to all of the balance in the hands of the trustee after the satisfaction of the Cameron debt and expenses. The plaintiff brought this action to settle the

rights of the parties, retaining in his hands a sufficient sum to pay the Spivey judgment, should he be so directed. All further contentions are stated in the opinion.

W. W. Peebles & Son, R. B. Peebles, W. H. Day, and T. W. Mason, for defendants.

MacRAE, J. On objection of defendants' counsel that the statement of the case on appeal was not properly in this court, it not having been sent up with the transcript of the record, affidavit was made by plaintiff's counsel, and a certiorari issued, and the same treated as served and return made thereto, it being admitted that the case properly certified was now on file. There is no merit in the objection of defendants that the exception to instructions given by the court to itself is too general, and therefore ought not to be considered. It will be seen that there was but one question in the case, and that is fully presented in the second instruction of his honor: "That if the jury believed that Wm. Grant, one of the sureties, paid with his own money to Spivey, the plaintiff, with the understanding and agreement that Spivey should satisfy the judgment as to one-half, and transfer it as to the balance to J. M. Grant, as trustee, for the use and benefit of Wm. Grant, with a view to keep the judgment alive as to one-half, and that Spivey did thus transfer it, still the jury should answer the first issue, 'No,' and the second issue, 'Yes,' for the reason that in the opinion of the court one surety could not thus keep alive half of a judgment as to his cosurety." Upon general principles of equity, a surety paying the debt of his principal was entitled to be substituted to all the rights of the creditor in the premises as to collaterals, and could enforce the same in a court of equity. This is the doctrine of subrogation, and in it is included the right of the surety, on payment of the judgment, to have an assignment of the same to a trustee for his benefit. Indeed, it was early laid down by our court that the only way for a surety to preserve the lien of the judgment against his principal in his own favor was, upon payment by him of the same, to have the judgment assigned to a trustee for his use. If he permitted the judgment to be satisfied without any assignment, the remedy of subrogation was lost. *Hodges v. Armstrong*, 3 Dev. 253; *Sherwood v. Collier*, Id. 380; *Tiddy v. Harris*, 101 N. C. 589, 8 S. E. 227; *Liles v. Rogers*, 113 N. C., at page 200, 18 S. E. 104. The act of 1777 (section 2093, Code) provided him a summary method at law of obtaining judgment against his principal for the amount paid as his surety, but his equitable remedy still subsisted. *Calvert v. Peebles*, 82 N. C. 334. In some jurisdictions these equitable rights are administered without an actual assignment. 2 Brandt, Sur. 309. Upon the same principle of equity and natural jus-

tice the right of one surety to compel contribution of another exists, and might have been enforced in a court of equity; as also might the right of one surety to the benefit of an indemnity given by his principal to another surety. The act of 1807 (section 2094, Code) provides that where one or more sureties have been compelled to satisfy the contract of their principal they may sue their cosureties for their ratable part of the debt paid for the principal; and it was held that a cosurety who pays the bond debt for which the other surety is equally bound, shall be deemed a bond creditor in the administration of the estate of the deceased cosurety. *Howell v. Reams*, 73 N. C. 391. And it is broadly stated in *Brandt on Suretyship*, supra, that "a surety who pays his principal's debt is entitled to be subrogated to all the rights and remedies of the creditor against his cosurety in the same manner as against the principal." This is founded in reason and justice, and up to the adoption of our present constitution was enforced in the courts of equity. Article 4, § 1, of the constitution abolished the distinction between actions at law and suits in equity, leaving such rights and remedies to be enforced in the one court, which theretofore had administered simply legal rights. In *Rice v. Hearn*, 109 N. C. 150, 13 S. E. 895, where a cosurety, who paid the amount due upon a judgment against his principal, himself, and the other surety, had the whole judgment assigned to a trustee for his benefit, in order the more easily to obtain contribution from his cosurety, this court, through Merrimon, C. J., pronounced this assignment a legitimate transaction; and when the trustee attempted to assign the judgment for value to a third party it was held that the surety for whose benefit it was assigned could compel a due observance of his equitable rights, and have the judgment marked "Satisfied." It would not have been improper for the defendant William Grant in this case to have had the whole judgment assigned to the trustee for his benefit, as the same could only have been enforced in his favor as against his cosurety, Capehart, for his pro rata liability. The same end is accomplished by the satisfaction of one-half of the judgment and the assignment to a trustee of the other half for his benefit as against his cosurety. This court, exercising its equitable jurisdiction, will see that he retains no further security than would cover the pro rata part for which he is entitled to contribution. Thus he is afforded now just the same relief as he would have had under the former system. Principles are preserved without the necessity of resorting to different courts.

Any question as to the effect of satisfaction of the judgment being entered of record is taken away by the action of the court at a subsequent term in amending the record by striking out the entry of satisfaction.

This order has been certified from the court below, and made part of the record here without objection being made thereto, and, we presume, by the consent of all parties. Error. New trial.

(115 N. C. 706)

**STATE v. HARRISON.**

(Supreme Court of North Carolina. Oct. 9, 1894.)

**HOMICIDE—ADMISSIONS BY DEFENDANT.**

On indictment for murder, an admission by defendant, an infirm and diseased old woman, that she caused a person to do the killing, made to a detective disguised as a stove-getter, and induced by his promise that if she would tell him all about it he would give her something so that she could not be caught, is admissible in evidence.

Appeal from criminal court, Hertford county; Winborne, Judge.

Harriet Harrison was convicted of murder, and appeals. Affirmed.

The only exception relied upon by counsel in this court was that to the admissibility of the confessions of the prisoner. It was in evidence that the prisoner was an infirm and diseased old woman. The state introduced one Thomas as a witness, who testified that he was a detective, and that he went to the house of the prisoner, and represented himself as a stove-getter; and that while at the house of the prisoner she told him that she was in great trouble, because some one had killed her husband, and that she knew who had killed him; that he then said to her: "You had better tell me all about it. I am a right good old monger doctor. I can work roots and gummer folks, and if you will tell me all about it I can give you something so you cannot be caught." Thereupon she told the witness that she got Elisha Reed to kill the deceased. Objection was made to the admission of this confession made by the prisoner under the inducement offered. The court overruled the objection, and the defendant excepted, and appealed from the judgment pronounced upon the verdict.

Pruden & Vann, for appellant. The Attorney General, for the State.

**AVERY, J.** When the competency of a confession is drawn in question, the correct inquiry in every such case is whether the inducement was such as to lead the prisoner to suppose that it would be better for him to confess himself guilty of a crime he did not commit. *Rex v. Gibbons*, 1 Car. & P. 97; *Reg. v. Reason*, 12 Cox, Cr. Cas. 228; *Reg. v. Reeve*, Id. 179. The evil to be apprehended and guarded against is inducing an innocent person to confess guilt through hope or fear. When the acknowledgment of the truth of inculcating facts is not made under the impression that, whether it is true or false, the mere making of the statement will

bring some benefit to or ward off some danger from the person making it in connection with an accusation of crime against such person, there is no sufficient reason for excluding evidence of the confession. There was no pretense of any power on the part of the witness to control the conduct of the authorities of the state as to instituting or pressing a prosecution for the crime. The witness was not known to the prisoner to be a detective. She stated, without inducement, that she knew who had killed her husband; but it did not follow necessarily that she was guilty as principal or accessory before or after the fact, though the witness seemed to think so. The hope held out to her appealed to superstition, and was calculated to make her believe that the witness, in return for her confidence, would give her some dose that would save her, not from prosecution, but from detection. The rule which is generally approved is that where the prisoner is advised to tell nothing but the truth, or even when what is said to him has no tendency to induce him to make an untrue statement, his confession in either case is admissible. *Rex v. Court*, 7 Car. & P. 486; *Meinaka v. State*, 55 Ala. 47; *Russ. Crimes*, pp. 395, 396. It is not material that the witness told her a falsehood in appealing to superstition, since the words used had no tendency to make the prisoner tell what was untrue. *Rex v. Thomas*, 7 Car. & P. 345; *Reg. v. Holmes*, 1 Car. & K. 248. If the prisoner had in no way participated in the commission of the crime, she had no reason to fear a disclosure of the truth which she was invited to tell. The promise to protect, by witchery or cabalism, from being "caught," though it was an artifice resorted to to ascertain the truth, offered no temptation, in contemplation of law, to an innocent person to pretend that she was guilty. 3 *Russ. Crimes* (9th Ed.) 395; 3 *Am. & Eng. Enc. Law*, p. 481, and note 1. On the contrary, the proposition of the witness was that she should tell him "all about it" (presumably the truth), and not that she should confess her guilt; and it has been held as a rule that a request to tell the truth as to a transaction is not an inducement to an innocent person to pretend to be guilty. 3 *Am. & Eng. Enc. Law*, p. 474, and cases cited; *Meinaka v. State*, 55 Ala. 47. It is not necessary, therefore, to enter upon the discussion of the interesting questions whether, in the absence of absolute duress, the invitation to confess guilt, when given by a person not in authority, is deemed to be such an inducement as will exclude a confession as involuntary, or whether statements made to such person are admissible, if at all, under a rule different from that obtaining where the prisoner is communicating with an officer, or one connected with the administration of the law. If, in contemplation of law, no sufficient inducement is offered to tempt the prisoner to falsely pretend that he is guilty, it is immaterial whether his state-

ment is made to an officer or a private individual. The motion for a new trial was properly refused. The judgment is affirmed.

(115 N. C. 93)

CLARK et al. v. COX et al.

(Supreme Court of North Carolina. Oct. 16, 1894.)

DEED—CONSTRUCTION—NATURE OF ESTATE.

A grantor deeded land in trust for N. for life, then for such of her children as might be living at her death, and, in case of her death without surviving children, then in trust for L., A., O., and R., and their heirs, etc., and if one or more of them should die before such contingency should take place, without a surviving child or children, then to the survivors of them, "their heirs and assigns." N. survived L., A., O., and R., and died without issue. A. and R. died without leaving any child or descendant. Held, that the children and grandchildren of L. and O. took per stirpes, and not per capita.

Appeal from superior court, Halifax county; Bynum, Judge.

Action by Henry N. Clark and others against W. R. Cox and others for partition. From the judgment, plaintiffs appeal. Affirmed.

On the 13th day of January, 1807, James Smith executed a deed in trust to David Clark, containing the following provision: "To have and to hold the said tract or parcel of land, and, all and singular, the premises above mentioned, to the said David Clark and his heirs, for the uses and purposes hereinafter mentioned; that is to say, in trust for the use and behoof of the said Lucy S. Norfleet during her life, then for the use and behoof of such child or children as she, the said Lucy S. Norfleet, may have living at the time of her death, and, in case the said Lucy S. Norfleet should die without leaving any child or children living at the time of her death, then in trust for the use, benefit, and behoof of Louise Clark, Ann S. Norfleet, Olivia Norfleet, and Rebecca Norfleet, their heirs and assigns, and if one or more of them, the said Louise Clark, Ann S. Norfleet, Olivia Norfleet, and Rebecca Norfleet should die before such contingency shall take place, without leaving any child or children then living at the time of her or their death, then to the use and benefit of the survivor or survivors of them, the said Louise Clark, Ann S. Norfleet, Olivia Norfleet, and Rebecca Norfleet, their heirs and assigns, forever." Lucy S. Norfleet intermarried with Weldon N. Edwards, and died May 2, 1892, without having had any issue. Ann S. Norfleet and Rebecca Norfleet died during the lifetime of Lucy S. Edwards, née Norfleet, without leaving any child or descendant. Louise Clark died during the lifetime of Lucy S. Edwards, and her grandchildren and great-grandchildren are the plaintiffs. Olivia Norfleet intermarried with Thomas Cox, and died during the lifetime of Lucy S. Edwards, and her children and grandchildren are the defendants. A peti-

tion was filed by the plaintiffs against the defendants for a sale of the land conveyed upon trust by James Smith, for partition, and the land sold. Judgment was rendered decreeing the division of the fund among the plaintiffs and defendants per stirpes, and from this judgment the plaintiffs appealed.

R. O. Burton and E. T. Clark, for appellants. Thos. N. Hill, for appellees.

SHEPHERD, C. J. It is contended on the part of the plaintiffs that Louise Clark and Olivia Cox, née Norfleet, who died during the lifetime of Lucy S. Edwards, née Norfleet, took no interest under the deed in trust that could be transmitted by descent; that their heirs, who are the plaintiffs and defendants, took as purchasers, individually, as if they had been named in the said deed; and that the fund should therefore be divided per capita, and not per stirpes. A perusal of the deed very clearly shows that it was not made ope consilii, and the language used by the draughtsman has such a definite and legal significance that but little difficulty is experienced in arriving at the intention of the donor. It may also be observed that in limitations of a trust "the construction of limitations ought to be made according to the construction of limitations of a legal estate, unless the intent of the testator or author of the trust plainly appears to the contrary." *Fearne*, Rem. 125; *Starnes v. Hill*, 112 N. C. 1, 16 S. E. 1011. As there is nothing in the deed from which we can infer that the terms therein employed were to be understood in any other than their technical sense, we must determine the limitations under consideration according to the rules of the common law applicable to limitations of a strictly legal character. Conceding the authority of *Holmes v. Holmes*, 86 N. C. 205, commented upon in *Fulbright v. Yoder*, 113 N. C. 456, 18 S. E. 713, and treating that case as the single exception to the rule above mentioned, we have in this case a limitation to Lucy S. Norfleet for life, and a remainder in fee to such of her children as might be living at her death. As she had no children at the time of the execution of the deed, the remainder to them was contingent; and as, in the event of her dying without children, a remainder was limited to Louise Clark, Ann S. Norfleet, Olivia Norfleet, and Rebecca Norfleet, and their heirs, there was a limitation of two concurrent fees, by way of remainder, as substitutes or alternatives one for the other, the latter to take effect in case the prior one should fail to vest in interest, and this limitation is called "a limitation by way of remainder on a contingency with a double aspect." *Watson v. Smith*, 110 N. C. 6, 14 S. E. 610. It must be noted that the limitation to Louise Clark and her sisters above named was a limitation to them and their heirs, and not to those who should survive; and had there been no limitation to

the children of Lucy S. Norfleet, the life tenant, these sisters would have taken a vested remainder, subject to be divested as to those who should die without children before the death of the said Lucy,—their shares going, by way of shifting use, to the surviving sister or sisters, in fee. "Thus, on a devise to A. for life, remainder to his children, but, if any child die in the lifetime of A., his share to go to those who survive, the share of each child is said to be vested, subject to be divested by its death. But on a devise to such of his children as survive him the remainder is contingent. The distinction is that, if the conditional element is incorporated into the description of the gift to the remainder-man, then the remainder is contingent, but if, after the word giving a vested interest, a clause is added divesting it, the remainder is vested." Gray, *Perp.* 108; *Starnes v. Hill*, *supra*. So where a devise was to "A. for life, with a devise over of all property that might be left at A.'s death to the testator's four children, by name, with a provision that if any of the four children died before A. the property should be equally divided among the survivors, 'except they should leave issue,' and in that case to go to the issue, it was held to be a vested remainder in the four children. If it had been construed to be a devise to such of them as survived A., it would have been a contingent remainder. It was held, moreover, to be a devise in fee, subject to be divested upon the happening of a condition subsequent, with a limitation over upon the happening of that contingency." 2 Washb. *Real Prop.* (3d Ed.) 510.

The foregoing authorities are referred to for the purpose of showing that in contemplation of law there was no uncertainty as to the persons who were to take upon the happening of the contingency; that is, the death of the life tenant, Lucy S. Norfleet, without leaving children. This being so, it follows that each of these sisters took such a contingent interest as was transmissible by descent, as it is well settled that "executory interests in real property, which are not contingent on account of the person, descend to the heir of the person to whom they are limited, \* \* \* where they die before the contingency happens upon which they are to vest." 2 *Fearne*, *Rem.* 434. "All contingent estates of inheritance, as well as springing and executory uses and possibilities, coupled with an interest, where the person to take is certain, are transmissible by descent." 4 *Kent*, *Comm.* 262. "Where the person is ascertained who is to take the remainder if it becomes vested and he dies, it will pass to his heirs." 2 Washb. *Real Prop.* (3d Ed.) 264; *Noden v. Griffiths*, 1 W. Bl. 606; 1 *Prest. Est.* 76. This principle is fully adopted in this state, and in *Hackney v. Griffin*, 6 Jones, Eq. 384, the court said: "It is settled that where the person is known, but the event is uncertain, a contingent remainder, condition-

al limitation, or executory devise is transmissible by descent." Having seen that there was, legally speaking, no uncertainty as to the persons in whom the estate was to vest in case the life tenant should presently die without children, it must follow that Louise Clark and her said sisters took under the deed an interest that could be inherited. This interest, as we have indicated, was a fee simple, contingent alone upon the death of the life tenant without children, but the fee was subject to be divested by condition subsequent as to those who should die without leaving children before the happening of the said contingency. This contingent, defeasible fee, possessing an inheritable quality, descended to the heirs of Louise Clark and her sisters upon their death before the happening of the contingency; but, as Ann and Rebecca died without children, their interest, simultaneously with their death, shifted, by virtue of the condition, to Louise and Olivia or their heirs. The case does not disclose whether Louise and Olivia died before or after the other two sisters; but this would, under the view we have taken, be immaterial, since, as we have observed, the interests of all of the sisters were of a descendible character. The contingent interests in fee of Ann and Rebecca having shifted to Louise and Olivia, or, if then dead, to their heirs, it must follow that upon the death of Lucy S. Norfleet, the life tenant, without children, the entire inheritance vested in the heirs of Louise and Olivia; these latter having died before the life tenant, and having left children. The contention of counsel is based upon the idea that the plaintiffs and defendants take as purchasers. But it is difficult to understand how this can be so, inasmuch as there is no limitation whatever to them as the children of Louise and Olivia. The estate was limited to the sisters and their heirs, subject to be divested only upon the death of any of them without children. The reference to children was simply a part of a condition upon which the interests in fee were to shift from one or more sisters to another or others, and has not the slightest efficacy by way of conveying an interest to any one.

Having defined these limitations, it must be apparent that there is no way in which these parties can derive any interest except through their ancestors by descent. They take as heirs of their respective mothers, and, of course, must take per stirpes. The principle is "that, if the heir is to take anything which might have vested in the ancestor, the heir shall be in by descent. And, in cases where an estate is to arise to the ancestor and his heirs on a condition precedent, the performance of it after the ancestor's decease (in whom no estate at all theretofore vested) will entitle his heirs as by descent. To which we may add the rule respecting the transmissible quality of contingent remainders or executory devises to the representatives of

the ancestor dying before the estate vests." 1 Fearn, Rem. 33. If, as the plaintiffs contend, the contingent interests were not descendible, it would be perplexing to discover how they can set up any claim to the proceeds of the sale for partition. The learned brief of counsel seems to be predicated upon the idea that there was a limitation of some kind to the plaintiffs and defendants as purchasers, but, as we have seen that there was no such limitation, it is unnecessary to review the authorities cited. These are generally decisions turning upon the construction of wills, or where, as in *Williams v. Beasley*, Winst. 102, there was in effect a limitation to children (a word of purchase) after a preceding estate. For the reasons above given, we are of the opinion that the judgment must be affirmed.

CLARK, J., did not sit on the hearing of this case.

(115 N. C. 33)

#### JOHNSTON v. WILLIAMS.

(Supreme Court of North Carolina. Oct. 16, 1894.)

#### JUSTICE OF THE PEACE—JURISDICTION—SPLITTING CAUSES OF ACTION.

Plaintiff brought two actions against the same person before a justice,—one to recover possession of corn of the value of \$35, and the other to recover possession of cotton of the value of \$15, both raised on the same land. Held not an attempt to confer jurisdiction by splitting the same cause of action.

Appeal from superior court, Warren county; Graves, Judge.

Two actions of claim and delivery by W. A. Johnston against Peter Williams, commenced in justice's court, and taken on appeal by defendant to the superior court. After appeal the cases were consolidated by agreement. From a judgment overruling exceptions to the report of a referee in favor of defendant, and dismissing the action, plaintiff appeals. Reversed.

Thos. W. Hawkins, for appellant. Walter A. Montgomery, for appellee.

AVERY, J. The two actions were brought before the justice of the peace, not to enforce a contract by recovering judgment for an ascertained amount of indebtedness, but for the recovery of the possession of distinct articles of property, to wit, corn of the value of \$35, made upon certain land, in the first, and cotton and fodder raised thereon, of the value of \$15, in the second, action. The court of the justice unquestionably had jurisdiction, under the principle laid down in *Bell v. Howerton*, 111 N. C. 69, 15 S. E. 891. This is not one of the cases where an attempt has been made to give jurisdiction by "splitting up" the items of indebtedness due on a single contract, so as to bring the amount demanded in each action within the constitutional limit. The ruling of the court below sustaining the

conclusion of the referee that the magistrate's court had no jurisdiction is therefore reversed, and the cause will stand for hearing upon the report of the referee. Judgment reversed.

(115 N. C. 29)

#### BARBER et al. v. WADSWORTH et al.

(Supreme Court of North Carolina. Oct. 16, 1894.)

#### MORTGAGES—UNRECORDED RELEASE—RIGHTS OF PURCHASER.

Where a mortgagee releases the timber on mortgaged lands, but the release is never recorded, a purchaser at a subsequent sale under the mortgage takes a good title to the timber, though, before payment of the price and receipt of a deed, he learns of the existence of such release.

Appeal from superior court, Craven county; Bryan, Judge.

Action by M. M. Barber and others against Enoch Wadsworth and others. There was judgment for plaintiffs, from which defendants appeal. Reversed.

The case was heard upon the following agreed statement of facts: "(1) That R. A. Russell was the owner of the land herein-after described, and on the 1st day of November, 1884, executed a mortgage deed thereon to Susan J. Dudley, which was on the 7th day of November, 1884, duly recorded in the office of the register of deeds of Craven county, in Book No. 89, pp. 42, 43, and 44, to which reference is hereby made for a full description of the land therein conveyed. (2) That on the 23d day of April, 1888, for value received, the said Susan J. Dudley, mortgagee, executed in writing, under seal, a full release of all the timber upon said land to the said R. A. Russell, mortgagor, this release never having been recorded. (3) That on the said 23d day of April, 1888, R. A. Russell sold and conveyed the timber on said land to P. M. Barber, the testator of plaintiff, by deed duly recorded on the 5th day of May, 1888, in the office of the register of deeds of Craven county in Book No. 98, p. 110, to which reference is made for a full description of said conveyance and the timber therein conveyed; the purchase of said timber having been made by said Barber, after the release referred to in the article 2 hereof had been executed and exhibited to him. (4) That Susan J. Dudley, mortgagee, as above referred to, died on the — day of —, 1892, leaving a last will and testament, under which W. G. Brinson was duly appointed executor, qualified and entered upon the discharge of his duties as such; and, under a power of sale contained in the mortgage from said R. A. Russell to Susan J. Dudley, he sold the land and the timber thereon, as described in said mortgage, at public auction, at the courthouse door in Craven county, as prescribed by the terms of said power, announcing at such sale that the land described in said mortgage was

free of incumbrance, and the timber passed therewith, as he could find no release on record in the register of deeds office of Craven county, at which said sale the defendant Enoch Wadsworth became the purchaser, and thereafter procured the defendant J. W. Stewart to join him in said purchase; said W. G. Brinson, executor, executing the deed therefor to the defendants Wadsworth and Stewart on the 5th day of April, 1894, said deed being recorded in the office of the register of deeds of Craven county in Book No. 114, pp. 118, 119, to which reference is made for a full description of said land. (5) That, prior to the sale by the executor Brinson, the defendant Wadsworth, in contemplation of the purchase of said property, inquired of the mortgagor, R. A. Russell, if any release had been executed to him by the mortgagee of the timber on said lands; was told by said mortgagee that he could not recollect whether a release had been executed or not; that the mortgagee had promised to release the timber at the time of his sale to P. M. Barber, but he did not know whether or not it had been actually executed. (6) That shortly following said sale, and prior to the payment of the purchase money by the purchasers, the defendants, and before the execution of the deed therefor, an attorney of plaintiff, hearing of said sale, sought the defendant Wadsworth, and notified him of the existence of the release aforementioned, and exhibited the same to him for his inspection, after which said Wadsworth and his co-grantee consummated said purchase, and caused the deed to be executed to them as aforesaid. (7) That the defendant Stewart made no inquiry of the debtor or any other person as to the status or title of said property. (8) That P. M. Barber is dead, leaving a last will and testament, under which the plaintiffs are duly-qualified executors, and in whom the title, if any, to the timber above described, is vested. If, upon the foregoing facts, the court is of the opinion that the title to the timber described did not pass to the defendants under the mortgage sale as aforesaid, then shall judgment be rendered declaring the plaintiffs the owners thereof; otherwise for the defendants."

W. W. Clark, for appellants. O. H. Gulon, for appellees.

**CLARK, J.** The mortgage to Susan J. Dudley having been recorded, the purchaser of the property, or any part thereof, from the mortgagor or his grantee, took the same subject to the mortgage. Had the mortgage debt been paid, this would have discharged the mortgage by its terms; but there has been no payment in this case. The mortgage could therefore only have been released, so as to affect purchasers at a sale under the mortgage, by a cancellation on the margin of the registration thereof (Code, § 1271), or by a reconveyance of the mortgaged prop-

erty duly recorded. Neither was done. The defendants purchased at the sale under the mortgage without notice of any unrecorded release of the timber right by the mortgagee, and, of course, got a good title. That one of the purchasers subsequently, before taking the deed, had notice of an unrecorded release executed by the mortgagee as to the timber right, could not affect his rights acquired by virtue of the purchase at the mortgage sale. Indeed, had both the defendants had notice of the unrecorded release, even before the mortgage sale and their purchase thereunder, no notice, however full, would have supplied the failure to record the release. *Quinnerly v. Quinnerly*, 114 N. C. 145, 19 S. E. 99. In the latter case the unregistered conveyance was not merely, as here, a release of a part interest in the property, but a first mortgage on the whole property; and it was held, citing the authorities, that the second mortgagee, who first recorded his mortgage, obtained priority, though he had the fullest notice of the unregistered first mortgage; and this is independent of chapter 147, Acts 1885, which, copying the identical words of the Code (section 1271), makes, by its very terms, the unrecorded release by the mortgagee of April 23, 1888, of no validity as against the registered conveyance to the defendant purchasers under the mortgage sale. Upon the case agreed, judgment should have been entered in favor of the defendants. Reversed.

(115 N. C. 721)

#### STATE v. GORHAM.

(Supreme Court of North Carolina. Oct. 16, 1894.)

INTERSTATE COMMERCE—LICENSE TAX—LIGHTNING ROD VENDOR.

1. One acting as agent in North Carolina for the sale of lightning rods manufactured in another state, and who puts up the rods without extra charge whenever the purchaser requests it, is an "itinerant putting up lightning rods," within the meaning of Acts 1893, c. 294, § 27, providing for a license tax on such itinerant.

2. Section 27, c. 294, Acts 1893, providing for a license tax "on every itinerant who puts up lightning rods," imposes no burden on interstate commerce.

Appeal from superior court, Wilson county; Bynum, Judge.

W. O. Gorham was adjudged not guilty of unlawfully putting up lightning rods, and the state appeals. Reversed.

The judgment was upon the following warrant and special verdict:

"Warrant. J. W. Crowell, being duly sworn, complains and says that at and in said county and in Wilson township, on or about the 1st day of September, 1893, W. O. Gorham did unlawfully and willfully put up lightning rods on the house of James E. Rountree without having paid the tax imposed by section 27, Revenue Act of 1893, against the form of the statute in such case

made and provided, and contrary to law and against the peace and dignity of the state." Subscribed and sworn before J. W. Lancaster, J. P., June 2, 1894.

Special Verdict. "Cole Brothers were, on and prior to October 1, 1891, and up to the 4th day of June, 1894, and still are, citizens and residents of the town of Greencastle, in the state of Indiana. They were on said 1st day of October, 1891, and now are manufacturers of and dealers in lightning rods, fixtures, ornaments, etc., and prosecuted said business in the several states through their agents, selling and delivering lightning rods and fixtures, by attaching the same to dwellings and other houses and buildings of their customers. In the department of selling and delivering they employ soliciting agents in the several states, who travel on railroads and in buggies from place to place, and house to house, for the purpose of soliciting and taking orders for lightning rods by samples thereof, and catalogues illustrating the same. That when orders are received from persons desiring to purchase rods the same are delivered or forwarded by such soliciting agent to the said Cole Brothers, and the same are filled by the shipment of rods so ordered to some convenient and accessible point, from which they are delivered to the person ordering the same. The said Cole Brothers have no place of business in North Carolina. The said Cole Brothers, on the 1st day of October, 1891, for the purpose of introducing their goods into the state of North Carolina, entered into a contract with the defendant, W. C. Gorham, whereby they appointed him their agent and manager to conduct for them in said state the business of selling by sample and delivering lightning rods so manufactured by them. That such sale and delivery included the putting up of said rods whenever the purchaser so requested, for which no extra charge was to be made. That the said defendant, W. C. Gorham, was authorized to and did employ salesmen and others to assist him in the prosecution of said business. That all orders taken by the defendant, W. C. Gorham, for lightning rods and fixtures were in the form of Exhibit A, hereto attached. That on the — day of —, 1893, the said W. C. Gorham, acting as the agent of Cole Brothers, at and in the town of Wilson, county aforesaid, took from Jas. E. Rountree an order in accordance with a sample for rods to be attached to his dwelling house in said town, in the form and language of Exhibit A, hereto attached. That said order, together with other orders of like character, taken from other persons, was forwarded by the said defendant to said Cole Brothers at their said place of business in the state of Indiana, and the same was filled by shipment of the rods so ordered. That said rods were received by the said W. C. Gorham, and by him, through his servants and employés, attached to the dwelling house of the said Jas. E. Rountree in accordance

with the terms of said order. That the shipment of said rods was made at the same time, and as a part of a shipment of other rods to fill other orders so taken by the said defendant and forwarded to the said Cole Brothers. That the defendant had not, at the time of taking said order and delivering said rods, paid the tax in Wilson county imposed by section 27, c. 294, Acts 1893, and had not, at the time of the issuing of the warrant herein, paid said tax. If upon the foregoing facts the court shall be of opinion that the defendant is guilty, the jury say that he is guilty; otherwise they say the defendant is not guilty." The court being of opinion that the defendant is not guilty, the jury so find, and it was adjudged that the defendant be discharged. The solicitor for the state appealed.

"Exhibit A. Order for Lightning Rods: Mess. Cole Bros.—Sirs: Erect or deliver at your earliest convenience your improved lock-screw lightning rods, manufactured by your Franklin Lightning Rod Co., at or on my —, in the county of —, state of —, viz., — points, — ground rods, in accordance with the scientific rules asprinted on the back of this order, and I agree to settle for the same by cash, or note due —, at 47½ cents per foot for the rod, and the price of five feet of rod for each brace, \$3.50 for each point, \$2.50 for each ball, and \$4.00 for each arrow; no extra charge for putting up rods. If this order is revoked by me, or if through any fault or refusal on my part the rods are not erected, I agree to pay as liquidated damages therefor a sum equal to one-half of the cost of material necessary for the work, at prices quoted in the order. It is expressly understood by the signer of this order that he signs the same on his own judgment, after due deliberation by him, without any undue influence having been used, or relying on any representation made by any agent or person other than what is written or printed on this blank. Given the — day of —, 189—."

The Attorney General and W. J. Peele, for the state. Perrin Busbee and H. G. Connor, for appellee.

MacRAE, J. Section 27 of chapter 294 of the Acts of 1893, being a part of Schedule B, the taxes in which are imposed as license taxes for the privilege of carrying on business or doing the act named, is as follows: "On every itinerant who puts up lightning rods, \$50 annually for each county in which he carries on business." There is nothing in the words of the statute to indicate a purpose to levy a tax in any form upon, or to impose a restriction in any manner upon, citizens or inhabitants of other states from engaging in business connected with the commerce between the states, which is protected from state legislation by the constitution of the United States. The right of a state



legislature to tax trades, professions, and avocations within the borders of the state has never been disputed. It is earnestly contended, however, by the learned counsel that the defendant was not an itinerant engaged in the business of putting up lightning rods, but that his business was that of selling, in which, of course, is included the delivery, an article manufactured in another state; that it appears by the special verdict that such sale and delivery included the putting up of said rods whenever the purchaser so requested, and for which service no extra charge was to be made; and therefore that the imposition of a license tax upon defendant for putting up the rods so sold by him "is an attempt to impose a tax on the business of carrying on interstate commerce." We are not disposed to question the principle so often laid down by the supreme court of the United States from *Brown v. Maryland*, 12 Wheat. 419, to *Brennan v. City of Titusville*, 14 Sup. Ct. 829, that no state has a right to lay a tax on interstate commerce in any form; neither have we any disposition to extend the application of this doctrine any further than we find it. Unless, then, there is something in this special verdict which so connects the act of defendant in putting up the lightning rods sold by him with the business of interstate commerce, it will be our duty to uphold the law of this state, and apply it to the case before us. The whole matter is in a nutshell. After finding the fact that *Cole Bros.* were manufacturers in another state, and defendant was their agent in this state for the sale of their wares, it further finds "that such sale and delivery included the putting up of said rods whenever the purchaser so requested, for which no extra charge was to be made." Under these circumstances, is the defendant liable for the license tax? It will be seen that quantities of said goods were shipped to the agent, at some convenient point in this state, in original packages, and were, after bulk broken, distributed and delivered by him to the different purchasers; that the sale was not completed by delivery until after such breaking of bulk in this state; and that the quantity of the article was not determined in the order, as will appear by reference to Exhibit A, and was to be determined after the importation of the original package. The consideration of these facts leads us to the conclusion that the present case may easily be distinguished from any of the numerous adjudications on the subject. In *Brennan's Case*, supra, the pictures were delivered, framed, direct to the purchaser. Of necessity, the goods, if many of them had been shipped to the agent for delivery, were separate and distinct from all other goods of the same character. It was not obnoxious to the interstate commerce clause of the constitution when a license tax was laid "on all peddlers of sewing machines, without regard to the place of growth or produce of

material or of manufacture," because the test is "whether there is any discrimination in favor of the state which enacted the law." *Machine Co. v. Gage*, 100 U. S. 676. "When goods are sent from one state to another for sale, or, in consequence of a sale, they become part of its general property, and amenable to its laws, provided that no discrimination be made against them as goods from another state, and that they be not taxed by reason of being brought from another state, but only taxed in the usual way as other goods are." *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592; citing *Machine Co. v. Gage*, supra, and *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091. If this license tax upon itinerants putting up lightning rods could in the slightest degree affect the sale and delivery of the article, its effect upon interstate commerce would be so incidental and remote as not to amount to a regulation of such commerce, as in *Ficklen v. Taxing Dist.*, 145 U. S. 1, 12 Sup. Ct. 810. Again, as said in *McCall v. California*, 136 U. S. 104, 10 Sup. Ct. 881, where an agent of a railroad running from another state was soliciting business, but not selling tickets, in California: "The test is, was the business a part of the commerce of the road? Did it assist or was it carried on with the purpose to assist in increasing the amount of passenger traffic on the road?" In our case the business which could not be taxed was the sale of, or the solicitation of persons to purchase, the lightning rods manufactured in another state. The avocation requiring a license is that of an itinerant putting up lightning rods. The sale and delivery of the article is not inseparable from the erection of it, any more than the shoeing of horses is from their importation into the state, or the shipping here of wheat is from its sowing in the fields. Indeed, it appears by the contract that the agent was only to put up the rods when requested so to do by the purchaser. The inference is that the purchaser might choose to employ some one else to put them up, and that a sufficient margin is allowed upon the price to fully pay the expenses of erection, and make it to the interest of the purchaser to require the seller to put it up. One who goes through the country putting up rods is none the less liable to be taxed for the privilege of exercising his avocation because he adds to this business that of soliciting the purchase of the articles to be so put up by him. If such is the law, it will not be difficult for persons whose avocations are taxed to ingraft upon their business a branch for the sale of some article of foreign manufacture, which is a necessary part of the business in which they are engaged. We may distinguish the manner of delivery of the articles named in *Spain's Case*, 47 Fed. 208, if we were bound by the opinion delivered in that case. Certain specified articles, lamps, lamp shades, etc., manufactured in West Virginia, were sold by the

agent traveling in North Carolina for his principal. Many of the articles ordered were shipped in the same box to the agent, who took out the separate articles, and completed the sale by delivery of the same to the purchasers. But here a sufficient quantity of the lightning rod material is shipped to the agent from which to fill orders theretofore taken. He selects from the bulk enough to fill the order of his customer, and delivers it. The bulk was broken, and the same became a part of the general property in the state before delivery, when the package was opened, and a part thereof, until then undistinguishable from the balance, was set apart to be delivered to a particular purchaser. The latest, as far as we have been able to ascertain, of the very numerous deliverances of the highest court of this country upon the subject we have under consideration is that of *Brennan v. City of Titusville*, supra. The defendant was the agent of a manufacturer of picture frames and maker of portraits, residing in Illinois. The defendant's business was to travel in Pennsylvania, and to solicit orders for said pictures and frames. The orders were forwarded by the defendant to his principal in Chicago, who shipped the goods direct by freight or express to the purchaser. The price of the goods was sometimes paid to the express company and sometimes to the agent. An ordinance of the city of Titusville had attempted to lay a license tax upon "all persons canvassing or soliciting within said city orders for goods, books, paintings, wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited." This was so clearly within the rulings of the *Cases of Robbins* (7 Sup. Ct. 592) and *Asher* (9 Sup. Ct. 1) that it scarcely requires an elaborate opinion. Its simple statement will show the particulars in which it differs from ours. We conclude then that his honor was in error in holding that the defendant was not guilty upon the special verdict, because: (1) The defendant was an itinerant putting up lightning rods. (2) The connection between the pursuit of this avocation and the sale of articles manufactured in another state was so remote in its effect as to impose no burden upon the business of interstate commerce. (3) The manner of sale and delivery of the lightning rods was such as to divest it of any feature of interstate commerce, the original packages being necessarily broken before the sale was completed by delivery.

There is error, and the judgment is reversed.

(115 N. C. 709)

#### STATE v. MOORING.

(Supreme Court of North Carolina. Oct. 16, 1894.)

#### ARREST—RIGHTS OF OFFICER—BREAKING INTO DWELLING.

An officer having in his possession a warrant for the arrest of a particular person for as-

sault is justified in breaking into a private dwelling to execute his warrant, if he has reasonable grounds for presuming that he will find the object of his search therein, though the owner deny the person's presence.

Appeal from superior court, Martin county; Bynum, Judge.

William Mooring was found guilty under an indictment for assault and battery with a deadly weapon upon an officer, and appeals. Affirmed.

The officer Ray had a warrant for the arrest of one Johnson for assault and battery, and, after summoning a posse, proceeded to the house of the defendant, where he demanded admittance with his posse, for the purpose of making the arrest undersaid warrant. The defendant replied that Johnson was not in his house, and forbade the officer to enter. The officer Ray then broke open the door, whereupon the defendant drew an axe upon Ray, and ordered him to leave his house. The defendant's counsel asked the court to instruct the jury that, upon this state of facts, the defendant was not guilty. The court refused to give the instruction asked, and told the jury that, if they believed the evidence, they would return a verdict of guilty. Motion for new trial for misdirection. Motion refused. Appeal by defendant.

Jas. E. Moore, for appellant. The Attorney General and W. J. Peele, for the State.

AVERY, J. It seems to be well settled by the courts both in this country and in England that, where an officer "comes armed with process founded on a breach of the peace," he may, after demand of admittance for the purpose of making the arrest and refusal of the occupant to open the doors of a house, lawfully break them, in order to effect an entrance; and, if he act in good faith in doing so, both he and his posse comitatus will be protected. 1 Russ. Crimes (9th Ed.) p. 840; 2 Hawk. P. C. bk. 2, c. 14, § 3; 1 East, P. C. p. 324, c. 5, § 88; *State v. Smith*, 1 N. H. 346; *Barnard v. Bartlett*, 10 Cush. 501; 1 Am. & Eng. Enc. Law, p. 746; *State v. Shaw*, 1 Root, 134. "The doctrine that a man's house is his castle, which cannot be invaded in the service of process, was always subject to the exception that the liberty or privilege of the house did not exist against the king." *Com. v. Reynolds*, 21 Am. Rep. 510. Hence the rules applicable where a forcible entry is effected in order to execute a capias issued in a civil action do not apply in the case at bar. 1 Am. & Eng. Enc. Law, 722. The officer did not justify the breaking on the ground that he had a search warrant, but a warrant for the arrest of a particular prisoner; and we are not called upon, therefore, to enter into a discussion of the constitutional safeguards that protect dwelling houses against undue search. If the officer have valid process in his hands, he does not become a trespasser ab initio if he fail to find the accused in the house after breaking the

door. *Hawkins v. Com.*, 14 B. Mon. 318. The learned counsel called attention to the fact that the defendant notified the officer, before the breaking, that the person against whom the *capias* had been issued was not in his house, and insisted that, in the face of this notice, the officer did not have such reasonable ground for believing he would find the person for whom he was searching as would justify the use of force in effecting an entrance. There is a general presumption of law that the officer, in the execution of process, was not moved by malice or other improper motive, but acted in good faith, with the intent and desire to discharge his duty to the state. *Lawson, Pres. Ev.* 61. This presumption is not sufficiently rebutted by the mere proof of the declarations of the defendant. It is possible that the officer had good reason to believe that the defendant bore such relation to the accused that he would be tempted to aid him in evading arrest by telling a falsehood. The right to break into houses in order to arrest criminals would be confined within very narrow limits if their comrades could give them shelter in their houses, and, by simply telling a falsehood, take from officers in pursuit of them the benefit of the presumption of law that ordinarily protects them. If the officer had the authority to break into the house, it will, of course, be conceded that the defendant was guilty of an assault in drawing an axe upon him when he entered. It was not error to tell the jury that, if they believed the evidence, the defendant was guilty. No error.

(115 N. C. 704)

## STATE v. TWEEDY.

(Supreme Court of North Carolina. Oct. 16, 1894.)

## TOWN ORDINANCE—VALIDITY—INJURY TO PROPERTY—HOGS RUNNING AT LARGE.

1. A town may enact an ordinance to prevent hogs from running at large within the town limits, and prescribe a penalty for its violation.

2. One who injures a hog running at large in violation of a valid town ordinance cannot be indicted under Code, § 1002, making it a misdemeanor for any person to "kill, maim or injure any live stock lawfully running at large."

Appeal from superior court, Martin county; Bynum, Judge.

James Tweedy was convicted of injuring live stock lawfully running at large, and appeals. Reversed.

James E. Moore, for appellant. The Attorney General and W. J. Peele, for the State.

CLARK, J. It was competent for the town to enact the ordinance that no hogs should run at large within the town limits, and to prescribe a penalty for violation of such ordinance, and it would make no difference if the owner of the hog should live outside of such limits. *Rose v. Hardie*, 98 N. C. 44, 4 S. E. 41; *Hellen v. Noe*, 25 N. C. 493;

*Whitfield v. Longest*, 28 N. C. 268. Penal statutes must be strictly construed. The Code (section 1002) applies only to the injury or killing of live stock "lawfully running at large." This hog was unlawfully running at large, contrary to a valid town ordinance, according to the special verdict. The defendant could not, therefore, have been found guilty under the Code, § 1002, as held by his honor. Besides, the indictment fails to charge the material allegation that the live stock was "lawfully" running at large, and judgment might have been arrested in this court for insufficiency of the indictment. Rule 27 of this court (12 S. E. vii.); *Whitehurst v. Pettipher*, 105 N. C. 40, 11 S. E. 369. Nor could the indictment be sustained under Code, § 1082, "Injury to Personal Property," as there is neither allegation nor finding that the injury was "willfully and wantonly" done. The words "unlawfully and on purpose" will not supply their place. *State v. Morgan*, 98 N. C. 641, 3 S. E. 927. The indictment is equally insufficient under Code, § 2482, "Cruelty to Animals." Upon the special verdict, the defendant should have been adjudged not guilty. Reversed.

(115 N. C. 36)

## WATSON v. HOLTON et al.

(Supreme Court of North Carolina. Oct. 16, 1894.)

## LOAN BY GUARDIAN—SECURITY.

A bond taken by a guardian for a loan of his ward's money, with the borrower's partner, as security in addition to the borrower, is sufficient, under Code, § 1592, allowing a guardian to loan his ward's surplus money "upon bond with sufficient surety."

Appeal from superior court, Craven county; Graves, Judge.

Action by W. M. Watson, receiver of the estate of the Holton infants, against A. R. Holton, guardian, and others, to recover money belonging to the wards, loaned by the guardian to L. H. Spier, with the latter's partner as surety. Judgment for defendants, and plaintiff appeals. Affirmed.

O. H. Gulon, for appellant.

BURWELL, J. It is charged against the defendant that he loaned out his wards' money upon bond without sufficient security, contrary to the provisions of section 1592 of the Code.<sup>1</sup> In *Boyet v. Hurst*, 1 Jones, Eq. 166, it is said that the policy of this statute "is to require the investment to be secured by the bond or note of some person in addition to the borrower." Hence it was there decided that a note signed by a firm as a principal debtor and one of the members of it as surety did not fill the require-

<sup>1</sup> Code, § 1592, provides: "When the profits of any ward's estate are more than sufficient to maintain and educate him, the guardian shall lend the surplus upon bond with sufficient surety."

ment of the law, for in such case the surety was one of the borrowers. No person "in addition to the borrower" had become responsible for the payment of the note. If the firm—the borrower—became insolvent, the pretended surety also became insolvent. This sound principle does not fit our case, for here there is a person "in addition to the borrower," who has become responsible for the loan. The borrower might become insolvent without involving the surety in his ruin. Affirmed.

(115 N. C. 81)

**STARKE v. COTTON et al.**

(Supreme Court of North Carolina. Oct. 16, 1894.)

**APPEAL FROM JUSTICE OF THE PEACE—AMENDMENT OF DEMAND.**

In an action against R. and D. before a justice, the summons stated the cause of action to be for nonpayment of \$70.80 "due by account and contract." The justice's return on appeal stated that plaintiff claimed \$70.80 for breach of contract in not delivering tobacco bought of R., and asked to subject that sum out of the proceeds of the tobacco in the hands of D., to whom R. had sold it. *Held*, that the superior court properly allowed an amendment submitting only the issue as to whether there was a breach of contract by R., and, if so, plaintiff's damages.

Appeal from superior court, Vance county; Battle, Judge.

Action by W. S. Starke against R. R. Cotton and D. Y. Cooper for breach of a contract of sale of tobacco by Cotton to plaintiff, and to subject the proceeds of the tobacco in Cooper's hands to the payment of plaintiff's damages, commenced in justice's court, and taken on appeal by plaintiff to the superior court, where there was a nonsuit as to defendant Cooper. From a judgment for plaintiff, defendant Cotton appeals. Affirmed.

T. M. Pittman, for appellant. T. T. Hicks, for appellee.

**CLARK, J.** It has been repeatedly held that if, in an action before a justice of the peace, there are two causes of action, one of which the justice has jurisdiction, and of the other he has not, the justice can proceed to try the first, treating the latter as surplusage. *Manufacturing Co. v. Barrett*, 95 N. C. 36. The jurisdiction as to such valid cause of action is not ousted because further relief is asked, which the justice has no power to grant. *Deloatch v. Coman*, 90 N. C. 186; *Ashe v. Gray*, 88 N. C. 190; *Morris v. O'Brian*, 94 N. C. 72. In the latter case it is held that the question of jurisdiction is to be determined by the summons rather than the complaint, as it depends upon the "sum demanded;" citing *Noville v. Dew*, 94 N. C. 43, to same effect. Code, § 832. In the present case there was no written complaint. The summons stated the cause of action to be for "nonpayment of the sum of \$70.80, with interest on same from January 1, 1893, due by account and contract, and demanded by

said plaintiff." This is clearly a cause of action of which the justice of the peace had jurisdiction. The justice of the peace, in making his "return to the appeal," states the verbal contention before him, from which it appears that the plaintiff claimed \$70.80 due him by the defendant Cotton for damages for breach of contract in not delivering certain tobacco bought of said Cotton, and to subject that sum out of the proceeds of the tobacco in the hands of defendant Cooper, to whom Cotton had sold it. Of this last, the justice had no jurisdiction, but this did not oust the jurisdiction as to the cause of action stated in the summons against Cotton. The Code, § 908, gives the superior court the fullest power on appeal "to amend any warrant, process, pleading or proceedings" had before a justice of the peace, "either in form or substance," and "at any time either before or after judgment," and "whether in a civil or criminal action." This has been always favored, and the only limitation recognized by the courts has been that the amendment shall not entirely change the character of the action. *State v. Norman*, 110 N. C. 484, 14 S. E. 968. His honor therefore properly allowed an amendment discarding the attempted equitable proceeding against Cooper, and submitting, as the only issues: (1) Was there a breach of the contract by defendant Cotton? (2) If so, what damage has plaintiff sustained? These the jury found in favor of the plaintiff, and assessed the damages at \$70.80. These damages the defendant Cotton had never offered to pay, but on the trial before the justice, admitting the contract, he contended that he was relieved from breach of it by nonperformance of plaintiff's part of it, and further insisted—and, as to this last, properly—that plaintiff could not subject the tobacco or its proceeds in Cooper's hands for such damages. The defendant Cooper was not adjudged by the justice to pay any costs or judgment to the plaintiff. The judgment of the superior court is only against the defendant Cotton for \$70.80 and costs, and should be affirmed. A nonsuit seems to have been taken as to Cooper. Affirmed.

(115 N. C. 645)

**EDGERTON et al. v. WILMINGTON & W. R. CO.**

(Supreme Court of North Carolina. Oct. 16, 1894.)

**EVIDENCE—COPIES OF BILLS OF LADING—DECLARATIONS OF AGENT.**

In an action by a consignor against a railroad company for failure to deliver cotton received from plaintiff for transportation, copies of the bills of lading made by defendant's agent from the stubs of the originals some time after the originals were issued are inadmissible.

Appeal from superior court, Wilson county; Bynum, Judge.

Action by G. G. Edgerton and C. W. Edgerton, partners as G. G. Edgerton & Son.

against the Wilmington & Weldon Railroad Company, to recover damages for failure of defendant to deliver certain cotton alleged to have been delivered to it at Kenly, N. C., by plaintiffs, for transportation to Norfolk, Va. From a judgment for plaintiffs, defendant appeals. Reversed.

The plaintiffs claimed that they had delivered to the defendant, at Kenly, N. C., on December 7, 1891, for shipment to Cobb Bros. & Gillam, of Norfolk, Va., 10 bales of cotton; and that the defendant had failed to deliver the same to Cobb Bros. & Gillam; and that they had delivered to the defendant, at Kenly, on December 15, 1891, 14 bales of cotton for shipment to Cobb Bros. & Gillam, at Norfolk, Va.; and that only 7 bales of said last-named shipment had been delivered by the defendant to said Cobb Bros. & Gillam. The plaintiffs contended that during the season beginning December 7, 1891, and ending some time prior to January 4, 1892, they had delivered to the defendant, at Kenly, for shipment to Cobb Bros. & Gillam, a total of 67 bales of cotton, only 50 bales of which had been delivered to said Cobb Bros. & Gillam. The defendant admitted the shipment of 50 bales shipped to said Cobb Bros. & Gillam, of which it alleged that 7 of the bales shipped on the 15th day of December, 1891, were a part. The defendant denied the delivery to it of the 10 bales alleged to have been delivered on December 7th, and denied that 14 bales were delivered to it for shipment on December 15th, alleging that only 7 bales were delivered to it for shipment on the said 15th day of December. The plaintiff C. W. Edgerton testified that he delivered to the defendant 10 bales of cotton on December 7th, and 14 bales on December 15th, and that the agent gave him bills of lading for the shipments; that he sent the original bills of lading for all his shipments to Cobb Bros. & Gillam; and that, a controversy arising between the plaintiffs and the said Cobb Bros. & Gillam as to the number of bales which had been shipped by plaintiffs to them, the said Cobb Bros. & Gillam claiming to have received bills of lading for only 50 bales, and to have received only 50 bales of cotton from plaintiffs, plaintiff C. W. Edgerton, about January 4, 1892, after all the shipments of plaintiffs to Cobb Bros. & Gillam had been made, requested the local agent of defendant at Kenly to give to plaintiffs duplicate bills of lading which had been issued up to that time, including the shipments of December 7th and 15th. He was further permitted to testify, over the objection of defendant, that the said local agent at Kenly did at that time give him duplicate bills of lading copied from the stub book from which the original bills were issued, which duplicates he afterwards found had been given to Wilson, the trace agent of defendant, to aid him in tracing the lost cotton, and which showed the delivery to the defendant of 67 bales of cotton.

Aycock & Daniels, for appellant.

BURWELL, J. Upon the argument the first exception was abandoned by defendant's counsel.

What are called in the record "duplicate bills of lading copied from the stub books from which the original bills were issued" evidently purported to be mere copies of the bills of lading made by the defendant's local agent some time after the originals were issued, the data for making them being obtained from the "stubs" of the originals. They were nothing more, in effect, than declarations of that agent that the "stubs" in the books of the defendant showed that on certain days it had received certain bales of cotton for shipment. It is well settled that declarations of an agent as to a past transaction are not evidence against his principal. *Smith v. Railroad*, 68 N. C. 107; *McComb v. Railroad Co.*, 70 N. C. 178; *Rumbough v. Improvement Co.*, 112 N. C. 751, 17 S. E. 536. The admission of this evidence was tantamount to allowing the witness to testify that, some time after the shipments were made, the defendant's local agent told him how many bales of cotton were received by the defendant. New trial.

(115 N. C. 43)

RICE v. RICE et al.

(Supreme Court of North Carolina. Oct. 16, 1894.)

WILL—CHARGE ON DEVISE—LIMITATIONS.

Under a will stating that it is the desire and intention of the testator that his son J. shall have certain land, and shall pay his brother a sum of money, J.'s personal liability to his brother for the sum named accrues as soon he takes possession of the land.

Appeal from superior court, Vance county; Battle, Judge.

Action by Robert L. Rice against James P. Rice and others, executors of John Rice, to recover a legacy. Judgment was rendered for defendants, and plaintiff appeals. Affirmed.

A. C. Zollicoffer and A. J. Feild, for appellant. T. T. Hicks, for appellee.

BURWELL, J. The will of Francis Rice contained the following provision: "It is my desire and intention that at the death of my wife my son John shall have the tract of land on which I now reside, and shall pay to his brothers, my sons William and Robert, each one-third of \$1,300." John Rice, the devisee named, was appointed executor of his father's will, and caused it to be admitted to probate, and qualified as executor thereof on the 1st day of February, 1869. The wife of the testator died in 1861. Robert, one of the sons mentioned in this item, is the plaintiff. The defendants are the heirs at law of John Rice, and the executors of his will, he having died in the year 1892. This action was be-

gun January 16, 1894. Upon the probating of the will of his father, John Rice took possession of the tract of land, and held it until his death. The defendants now hold it. The plaintiff alleges that on February 5, 1869, he and his brother John purchased from their brother William all his "right, title, and interest" in and to the real estate of their father, Francis Rice, and that thus there became due to him, under the item of the will set out above, \$650. He avers that John Rice made to him a payment on account of his said claim on the 31st of December, 1876. The purpose of this action is the recovery of the sum named (\$650 and interest), less the alleged credit of \$100. Along with other defenses, the defendants pleaded the statute of limitations. His honor decided that the plaintiff's cause of action was barred, and gave judgment accordingly. Plaintiff appealed.

When John Rice signified, in 1869, his election to accept the devise of land made to him by his father, by having the will probated and taking possession of the land thereunder, he became, by the terms of the will, personally liable to his brothers Robert and William each for one-third of \$1,300. Immediately upon his taking the land he became debtor to each of his brothers. Each one of them might then have maintained an action against him personally for the sum so due him. *Hines v. Hines*, 95 N. C. 482; *Aston v. Galloway*, 3 Ired. Eq. 126. Whether, by the terms of the will, this personal liability assumed by the devisee became a charge or lien on the land or not, is not important, in the view we take of the matter. The case last cited, *Aston v. Galloway*, seems an authority to sustain the contention that it did become so. There was a devise, in the will under consideration in that appeal, to John Aston, in fee, he paying to two nephews of the testator, as they arrived at the age of 21 years, the sum of £100 each, with the proviso that, if it should so happen that the nephews should be of age before the devisee should be in possession of the land, he should not be bound to make the payments to them until two years after his taking possession. The court said: "It seems to us that the hundred pounds was not intended by the testator to be a personal debt on the devisee only, but it was to arise out of the land after the devisee should get into the possession of the same, and he be able to make it out of the rents and profits. Therefore it was a charge on the land." In a former part of the opinion it was said: "We think it was an equitable charge; that is, that in this court the land is to be regarded as security for it." In our case there is nothing whatever to indicate that the money that the devisee, by accepting the devise, assumed to pay his brothers Robert and William, was "to arise out of the land," or that he was "to make it out of the rents and profits." Hence there is not here the premise from which, in *Aston v. Galloway*, the conclusion was drawn, "therefore

it was a charge on the land." But, however that may be, we have here a right of action against John Rice personally in favor of the plaintiff, accruing in 1869, and suit brought thereon in 1894. If we assume that a payment was made in 1876, and that time is to be reckoned from that date, the cause of action, considered as merely a personal debt of John Rice, is clearly barred, for his liability to pay grows out of a contract implied from his taking the land, and the limitation of the Code, § 155 (1) (three years), we think, applies to it. And if we consider the plaintiff's cause of action as not merely a personal claim against John Rice, but also a right to enforce a lien or charge on his land, the same conclusion must be arrived at, for more than ten years had elapsed between the date of the alleged payment and the bringing of this action, and that period is a bar to the enforcement of any charge on land, such as this is claimed to be. Code, § 158. We can see nothing in the relation of this debtor, John Rice, to this creditor, the plaintiff, to prevent the running of the statute. We assume the facts to be as insisted upon by the plaintiff, and upon those facts we adjudge, as his honor did, that his alleged cause of action is barred by the statute of limitations. Hence it is not necessary to consider the other exceptions taken on the trial. Affirmed.

(115 N. C. 71)

#### TUCKER v. MOYE et al.

(Supreme Court of North Carolina. Oct. 16, 1894.)

##### CONSTRUCTION OF WILL—ADVANCEMENTS.

Where a will directs that the estate be equally divided among four persons, deducting from the share of one certain money advancements, and the amount of the advancement exceeds the legacy, the legatee must account to the estate for the difference.

Appeal from superior court, Pitt county; Bynum, Judge.

Action by J. L. Tucker, executor, against Catharine Moye, S. S. Quinerly, and others, for the construction of a will. From the judgment rendered, defendant Quinerly appeals. Reversed.

James E. Moore, for appellant.

BURWELL, J. In *Lassiter v. Wood*, 63 N. C. 360, Mr. Justice Reade said of the will then being interpreted: "It is apparent that the leading purpose of the testator was to make all his children equal. The purpose of the testator as gathered from the will is always to be carried out by the court, and minor considerations, when they come in the way, must yield. Especially is this so when the purpose is in consonance with justice and natural affection." Of the will we have under consideration here it may be said, we think, that it is apparent that the leading purpose of the testatrix seems to have been to divide her estate equally between certain

persons named therein. She gave to the appellant one-fourth of her estate, and to the plaintiff one-fourth. Her estate consisted of three promissory notes, amounting to \$4,000 principal money, and "a small amount of personal property, which has since been sold for \$30." This general purpose of the testatrix, that her estate should be divided into four equal parts, of which the appellant should have one, must be carried out, and minor considerations must yield to it. The words used by the testatrix in the third item of her will must be so construed as to make them harmonize with this general purpose, if such a construction can be reasonably put upon them. It seems to us that this can be done, for we have only to declare that when the testatrix said that from the plaintiff's one-fourth of her estate he should deduct \$2,000, with interest, advanced to him, for which she held his note, she meant only that that note should be used as might be necessary in settlement of plaintiff's share of the estate. And if it is said that this construction does violence to the words used in said item, it may be replied that the construction contended for by the plaintiff and adopted by his honor seems to us to do violence to the whole will, and to thwart its apparent general purpose, which is in consonance with justice and natural affection. This is more reasonable, we think, than a construction that will bring us to the conclusion that the testatrix meant that one of her legatees, to whom she gave one-fourth of her estate, should get nothing, while another legatee, to whom she likewise gave one-fourth of her estate, should get what was worth more than \$2,000. The construction contended for by the plaintiff would bring about that result, it seems, if adopted, and that, too, while, so far as appears, the condition of her estate was not changed between the date of her will and her death. Our conclusion is that in a settlement with the appellant for his one-fourth part of the estate of the testatrix the plaintiff must account for the note mentioned in the third item of the will. Reversed.

(115 N. C. 587)

### HARRIS v. HARRIS.

(Supreme Court of North Carolina. Oct. 16, 1894.)

#### VALIDITY OF DIVORCE—PERSONAL SERVICE—CUSTODY OF CHILD—APPLICATION BY NONRESIDENT.

1. A divorce obtained by the wife without personal service on the husband, a resident of another state, has no extraterritorial validity.

2. The court will not deliver a child into the custody of a nonresident mother if it does not appear that the child desires to go to her, or that the husband is not a proper person to have it, or that the child will be benefited by the change.

Appeal from superior court, Buncombe county; Shuford, Judge.

Petition for habeas corpus by Florence R. Harris against C. J. Harris for the custody

of their minor son. Judgment for plaintiff, and defendant appeals. Reversed.

W. W. Jones and J. J. Hooker, for appellant. J. H. Merrimon, for appellee.

CLARK, J. The decree of divorce obtained by the wife, resident in Colorado, against the husband, domiciled in this state, without personal service upon him, is a nullity in this state. *Irby v. Wilson*, 21 N. C. 568. At the most, it could only be valid in the state where it was granted. It can have no extraterritorial validity. *Davidson v. Sharpe*, 28 N. C. 14; *Schonwald v. Schonwald*, 55 N. C. 367. *Arrington v. Arrington*, 102 N. C. 491, 9 S. E. 200, reaffirms *Irby v. Wilson*, supra, though the divorce in the *Arrington Case* was upheld, because of the appearance of the defendant to the action. *State v. Schlachter*, 61 N. C. 520, merely holds that, where a person divorced by a decree valid in the state where granted marries another by a marriage recognized as valid in such state, the validity of the latter marriage cannot be questioned by an indictment for fornication and adultery in this state on their removal here. The decree obtained in Colorado, upon constructive service by publication, and by sending summons through the mail to the defendant in this state, has no validity here (*Long v. Insurance Co.*, 114 N. C. 465, 19 S. E. 347; *Wilson v. Seligman*, 144 U. S. 41, 12 Sup. Ct. 541), either as to the relation of the parties or as to the custody of the child, which, at the time of the proceeding, was domiciled with its father, in North Carolina. This is therefore to be treated simply as a contest upon habeas corpus between husband and wife, living in separation, without being divorced, as to the custody of the child, under Code, § 1661. This rests in the sound discretion of the judge, subject, however, to review on appeal upon the facts found, as provided by Code, § 1662. According to the findings of fact, the father is a suitable person to have the custody of the boy, 9½ years old. It does not appear that the mother (who already has the only other child) is in any wise more suitable than the father. The father is domiciled in this state. The mother is a non-resident. Under these circumstances, unless more shall appear, the custody should remain with the father. The court certainly would not, upon these facts, award the custody to a person out of the state. To award the custody alternately to the father and the non-resident mother would be to place the child out of the jurisdiction of the court, so that it would be impossible to enforce so much of the decree as directs the return of the child to the father after the specified time. The bond might possibly secure the payment of damages, but not the return of the child. The court, under special circumstances, may allow an infant ward to go out of its jurisdiction, but it will not abdicate its functions, and, upon the state of facts here appearing,

take the child from a father of good character, who is taking every proper care of it, and place it out of the reach of its process, and beyond its control. *Dawson v. Jay*, 3 De Gex, M. & G. 764. Indeed, if both parties resided here, the law would not take the child by the process of the court from the custody of the father, and award it to the mother, unless it appeared that the interest of the child required it. *Symington v. Symington*, L. R. 2 H. L. Sc. 415; *People v. Humphreys*, 24 Barb. 526. What the preferences of the child were is not found as a fact, though this has weight always with a court in such cases, according to the age and intelligence of the child. It does not appear in this case that the child desired to go to the mother, nor that its welfare would be promoted by such change of custody. The prayer of the petitioner should have been denied. Error.

(115 N. C. 85)

**GASKINS v. DAVIS.**

(Supreme Court of North Carolina. Oct. 16, 1894.)

PLEADING—CONVERSION OF LOGS—INCREASE IN VALUE—TRANSPORTATION TO DISTANT POINT.

1. A counterclaim defectively stated is cured by a reply which contains the allegations omitted therefrom.

2. One who, believing he is on his own land, cuts logs from the land of another, cannot, when they are retaken by the lawful owner, set up a claim for their increase in value, caused by his having transported them to a place where there was a ready market, nor can he set up such claim in an action by the owner against him for damages for cutting other logs.

Appeal from superior court, Craven county; Bynum, Judge.

Action of trespass by Patsy Ann Gaskins against Henry C. Davis. Judgment was rendered for defendant, and plaintiff appeals. Reversed.

W. W. Clark, for appellant. F. M. Simmons and P. M. Pearsall, for appellee.

AVERY, J. The plaintiff's complaint is in the nature of a declaration for trespass in the entry by the defendant upon her land, after being forbidden, and cutting, carrying away, and converting to his own use valuable timber that was growing thereon, to her damage \$500. The logs, after being severed, were transported to Newbern in two lots, one of which lots was seized by plaintiff after reaching that city, where it was much more valuable than at the stump, and was sold by her for the sum of \$112. The other lot was converted into boards and sold by the defendant. The defendant, for a second defense, sets up by way of counterclaim the seizure of the logs by the plaintiff; and though the counterclaim may be a defective statement of the defendant's cause of action, in that it fails to aver an unlawful taking, the defect is cured, if the counterclaim can be maintained at all, by the reply, which,

by way of alder, raises the question of the rightfulness of the seizure. The well-established rule is that in such cases the injured party is entitled to recover of the trespasser the value of the timber where it was first severed from the land and became a chattel (*Bennett v. Thompson*, 13 Ired. 146), together with adequate damage for any injury done to the land in removing it therefrom. As long as the timber taken was not changed into a different species, as by sawing into boards, the owner of the land retained her right of property in the specific logs as fully as when by severance it became her chattel, instead of a part of the realty belonging to her. *Potter v. Mardre*, 74 N. C. 40. The value of the material taken indicates the extent of the loss, where there are no circumstances of aggravation or willfulness shown, and is the usual measure of damages. Where the trespasser has converted the property taken into a different species, under the rule of the civil law which we have adopted, the article, in its altered state, cannot be recovered, but only damages for the wrongful taking and conversion, when the change in its form is "made by one who is acting in good faith, and under an honest belief that the title was in him." In *Potter v. Mardre*, supra, Rodman, J., delivering the opinion of the court, says: "The principle of equity [applied in that case] is supported by the analogy of the rule established in this state by the decisions which hold that a vendee of land by a parol contract of sale, who takes possession and makes improvements, and is afterwards ejected by the vendor, may recover the value of his improvements. *Albea v. Griffin*, 2 Dev. & B. Eq. 9. So if one who has purchased land from another, not having title, enters and improves, believing his title good, and is ejected by the rightful owner, he is entitled to compensation. In both cases one who is morally innocent has confused his property with that of another, and he is held entitled to separate it in the only way it can be done, viz. by being allowed the value of his improvements in the raw material." The judge laid down correctly the rule as to the damage that the plaintiff was entitled to recover of the defendant for the original trespass,—the value of the logs when severed at the stump, and adequate damage for injury done to the land in removing them. *Potter v. Mardre*, supra; 5 Am. & Eng. Enc. Law, p. 36; *Ross v. Scott*, 15 Lea, 479. The character of the logs had not been changed by cutting and transporting to Newbern, but the value had probably been greatly enhanced. The approved rule, where the plaintiff is asking damage for the trespass, seems to be that the owner is entitled to recover the value of the logs when and where they were severed, and without abatement for the cost of severance. *Coal Co. v. McMillan*, 49 Md. 549. But, if he prefers to follow and claim the timber removed, he is entitled to do so, as long as the species remains unchanged. The



plaintiff was entitled to recover in a claim and delivery proceeding the logs that she seems to have acquired peaceful possession of without action. Was the defendant entitled, by way of recoupment, to the benefit of the enhanced value imparted to the property by transporting it to market? Had they been sawed up in planks, and used to construct a boat, the plaintiff would not have been entitled to recover the boat, or the material used in its construction. But if the plaintiff had then unlawfully seized and lost or destroyed the boat, and the defendant had been thereby driven to an action to recover compensation for his loss, he might have recovered the value of the boat, together with the damage, if any, done to his land in removing it therefrom; but the present plaintiff would have been entitled "to deduct or recoup, by way of counterclaim, the value of the timber which was manufactured into the canoe, just after it was felled and converted into a chattel." *Potter v. Mardre*, supra. It seems to have been conceded that the defendant cut and carried away the logs under the honest but mistaken belief that the land upon which they were growing was his own. Where a trespasser acts in good faith under a claim of right in removing timber, though he may not be allowed compensation for the cost of converting the tree into a chattel, may he not recoup, in analogy to the equitable doctrine of betterments, for additional value imparted to the property after its conversion into a chattel, and before it is changed into a different species? The judge below, in allowing the defendant, by way of recoupment, the benefit of the enhanced value imparted to the logs by removal from the stump to the Newbern market, seems to have acted upon the idea that the defendant, by reason of his good faith, was entitled to the benefit of the improvement in value imparted by his labor and expense. In *Ross v. Scott*, supra, where it appeared that the defendant had entered upon land to mine for coal, and, under the honest but erroneous belief that he was the owner, had built houses thereon, it was held that the plaintiff might recover the cost of the coal in situ, subject to reduction by an allowance for permanent improvements put upon the land. See, also, in re *United Merthyr Collieries Co.*, L. R. 15 Eq. 46; *Hilton v. Woods*, L. R. 4 Eq. 432; *Forsyth v. Wells*, 41 Pa. St. 291. The weight of authority, it must be conceded, sustains the rule that, where the action is brought for damages for logs cut and removed in the honest belief on the part of the trespasser that he had title to them, the measure of damages is the value in the woods from which they were taken, with the amount of injury incident to removal, not at the mill where they were carried to be sawed. *Tilden v. Johnson*, 52 Vt. 628, 36 Am. Rep. 769, and note, 770; *Herdie v. Young*, 55 Pa. St. 176; *Hill v. Canfield*, 56 Pa. St. 454; *Moody v. Whitney*, 38 Me. 174; *Cushing v. Longfellow*, 26 Me. 306; *Goller v.*

*Fett*, 30 Cal. 432; *Foot v. Merrill*, 54 N. H. 496; *Railway Co. v. Hutchins*, 32 Ohio St. 571. In the absence of any evidence that would justify the assessment of vindictive damages, there is only one exception to the rule, as we have stated it, and that is where the trees destroyed are not the ordinary timber of the forest, but are peculiarly valuable for ornament, or as shade trees.

It being settled in this state that the right to the specific chattel, which vests on severance from the land in the owner of the soil, remains in him till the species is changed, we are constrained to go further, though it may sometimes subject a mistaken trespasser to hardship, and hold that the true owner is entitled to regain possession of a log cut and removed from his land, either by recapture or by any other remedy provided by law, whatever additional value may have been imparted to it by transporting it to a better market, or by any improvements in its condition short of an actual alteration of species. In *Weymouth v. Railroad Co.*, 17 Wis. 550, the court say: "In determining the question of recaption the law must either allow the owner to retake the property, or it must hold that he has lost his right by the wrongful act of another. If retaken at all, it must be taken as it is found, though enhanced in value by the trespasser. It cannot be returned to its original condition. The law, therefore, being obliged to say either that the wrongdoer shall lose his labor, or the owner shall lose the right to take the property wherever he may find it, very properly decides in favor of the latter. But where the owner voluntarily waives the right to reclaim the property itself, and sues for damages, the difficulty of separating the enhanced value from the original value no longer exists. It is then entirely practicable to give the owner the entire value that was taken from him, which it seems that natural justice requires, without adding to it such value as the property may have afterwards acquired from the labor of the defendant. In the case of recaption the law does not allow it, because it is absolute justice that the original owner should have the additional value. But where the wrongdoer has by his own act created a state of facts, when either he or the owner must lose, then the law says the wrongdoer shall lose." *Id.*, 26 Am. Rep. 529, note. When, therefore, the plaintiff recaptured the one lot of logs that had been enhanced in value by transportation from the stump to the city market, she but exercised the right given her by law to peacefully regain possession of her own chattels wherever found. She was guilty of no infringement of the rights of the defendant, for which an action would lie. It is familiar learning that a defendant can only maintain successfully a counterclaim when it is of such a nature that he could recover upon it in a separate suit brought against the plaintiff. The defendant could not recover, there-

fore, either in a distinct action for the taking of the logs, or by way of counterclaim. When the plaintiff recaptured the logs she was guilty of no wrong, and the question of title to the property so rightfully taken was eliminated from all possible future controversy. Her remedy by act of the law remained as to so many of the logs as she had not regained possession of by her own act. After she had recaptured one lot the property in them in their altered state, and at the new situs, revested in her, with the absolute *jus disponendi*, as in the case of her other personal property. Nothing remained to be adjusted in the courts, except her claim for damages for the taking of the other lot and the injury to the land, if any, incident to the removal of both lots. It was error, therefore, to instruct the jury that the enhanced value imparted by removal to the one lot of logs might be allowed the defendant as a counterclaim, so as to set off the damages assessed for injury to the land and for the value at the stump of the other lot, and the plaintiff is entitled to a new trial.

(115 N. C. 624)

**MADDOX et al. v. ATLANTIC & N. C. R. CO. et al.**

(Supreme Court of North Carolina. Oct. 16, 1894.)

**DECLARATIONS—OF PLAINTIFF'S ASSIGNOR—ADMISSIBILITY AGAINST PLAINTIFF.**

Where the ownership of a draft and bill of lading are in issue, declarations made since the date of the alleged transfer of the instruments to plaintiff, by one under whom plaintiff claims, but whom he has not called as a witness, are inadmissible to disprove such transfer.

Appeal from superior court, Craven county; Bynum, Judge.

Action by Maddox, Rucker & Co. and the Maddox-Rucker Banking Company against the Atlantic & North Carolina Railroad Company and another to recover possession of a sawmill and fixtures, and for damages for their detention. Judgment for defendants, and plaintiffs appeal. Reversed.

"The plaintiffs claim title through a bill of lading issued to the De Loach Mill Manufacturing Company, which plaintiffs claim was transferred to plaintiff Maddox, Rucker & Co. by the De Loach Mill Manufacturing Co. The following issue was submitted to the jury: 'Was the same [the bill of lading] assigned for value to Maddox, Rucker & Co. on or before 7th of August?' to which the jury answer 'No.' The plaintiffs introduced upon this issue the deposition of W. L. Peele, and examined W. G. Bryan, who testified that he was the collecting clerk of the National Bank of Newbern, and, as such, received on August the 3d, 1891, the draft which is attached to the deposition of W. L. Peele, with a bill of lading attached thereto, which was indorsed by the De Loach Mill Manufacturing Co.; that the papers came in the usual course

of business, purporting to come from Maddox, Rucker & Co., for whose account he held the same; that he identified the draft by marks he put upon it, but cannot say whether the bill of lading be same or not; that the indorsement upon the bill of lading shown him, a copy of which is set out in the complaint, and the same which is attached to the deposition of W. L. Peele and A. A. De Loach, is in the same handwriting as the signature to the draft, having qualified himself as an expert upon handwriting; that he kept the said draft and bill of lading attached thereto until the 29th of August, 1891, when he returned it to Maddox, Rucker & Co. The plaintiffs had taken the deposition of one A. A. De Loach, a nonresident, and the defendants had cross-examined said witness upon said examination. The plaintiffs declined to introduce said deposition upon the trial. (A copy of the deposition is hereto annexed, marked 'A.') The defendants proposed to introduce the cross-examination of A. A. De Loach, as taken in deposition, and the exhibits therein referred to, for the purpose of showing that the bill of lading referred to had not been transferred bona fide and for value before the 7th day of August, 1891. Upon the opening of the deposition, the plaintiff excepted to this part of the deposition, and by consent the exception was left to be determined upon the trial. The plaintiffs objected to the admission of the testimony—First, because the defendant could not introduce the cross examination without the direct having first been introduced, and without the witness having been used upon the trial by the adverse party, which the plaintiff had not done; and, second, for that the exhibits proposed to be read were only the declaration of A. A. De Loach, under whom the plaintiffs claimed, but all made at time subsequent to the date of assignment alleged to have been made, and which was in issue, then being tried, the defendants then claiming under the same person."

W. D. McIver, for appellants. W. W. Clark, for appellees.

BURWELL, J. Upon the trial the plaintiffs submitted evidence which, if believed by the jury, made out for them a *prima facie* case, according to the principle established when this cause was before the court on a former appeal. 111 N. C. 122, 15 S. E. 936. That evidence tended to show that the plaintiffs were owners of the draft, and also of the attached bill of lading, by virtue of an indorsement of it to them by the consignor, the De Loach Mill Manufacturing Company, the shipment being to the order of the said consignor, and the indorsement being made by A. A. De Loach, the president of the company. If A. A. De Loach had testified on the plaintiffs' behalf that they were the owners of the bill of lading, and that he, as president of the company, had transferred it to them by indorsement at a certain time, then

it would have been, of course, entirely competent for the defendants to show, for the purpose of weakening the force of his testimony, that, since the date of the alleged transfer of the bill of lading, he had made statements, oral or written, contradictory of or inconsistent with his testimony. But the plaintiffs saw fit not to use him as a witness in their behalf, and thus rendered his declarations about the fact at issue entirely irrelevant; hence the telegram and letters written and sent by him after the alleged transfer of the bill of lading and the drawing of the accompanying draft to plaintiffs' order, and put in evidence by the defendants, and admitted over the plaintiffs' objection, should have been excluded. There was no evidence that in any way connected the plaintiffs with this telegram and these letters, and no statement therein contained should be allowed to affect their rights. It matters not in what manner the sending of the telegram and the writing of the letters by De Loach was proved,—whether by his testimony as a witness present at the trial, and put upon the witness stand by the defendants, or by his deposition, these declarations of his should have been excluded. It is not necessary, therefore, to decide whether a defendant, upon the trial of a cause, should be allowed to use for his own purposes a portion of the deposition of a witness which was taken at the instance of the plaintiffs,—whether he should be allowed to put in evidence what the witness said under his cross-examination, without also putting in evidence the whole deposition; for the facts testified to by this witness were irrelevant facts, and had no proper place in the trial, whether established by the introduction of an entire deposition or part of one, or by the oral testimony of a present witness. New trial.

(115 N. C. 631)

## WHITE v. NORFOLK &amp; S. R. CO.

(Supreme Court of North Carolina. Oct. 16, 1894.)

## CARRIERS—ASSAULT ON PASSENGER BY CREW—BOAT LET FOR EXCURSION.

1. A corporation chartered as a common carrier, with power to use steamboats as well as trains, is liable as a carrier to a passenger on one of its boats, though the boat is at the time let for an excursion, where it also lets the crew, which is still in its pay, and subject to be discharged or changed by it.

2. The liability of the carrier is not affected by the fact that the boat is let to run between points not on the carrier's regular lines.

3. A carrier is liable to a passenger where one of the crew goes outside of his line of duty to assault him.

Appeal from superior court, Chawan county; Armfield, Judge.

Action by Frank White against the Norfolk & Southern Railroad Company for assault on plaintiff, while a passenger on defendant's boat, by one of the crew. On the statement of the court that plaintiff could not recover, he took a nonsuit, and appeals. New trial.

It is alleged in the complaint, and admitted in the answer, that defendant was on the 15th of July, 1893, and now is, a corporation duly chartered under the laws of and doing business in North Carolina as a common carrier of passengers, and that it did on the date stated, and does now, employ and use, in prosecution of its business, besides its trains and engines, one or more steamboats.

W. M. Bond and J. H. Blount, for appellant. Pruden & Vann, for appellee.

MacRAE, J. The first contention of defendant is that it is in no event liable, because the boat had been chartered by Morris & Ferebee for the occasion, and the contract of carriage was between the last-named parties and plaintiff; and it is found in the case that "the defendant had no control or direction of said excursion, or of said boat, except that it employed the crew as aforesaid." But the defendant is a corporation duly chartered under the laws of North Carolina, and doing business as a common carrier of passengers, for the purpose of using not only its trains, but one or more steamboats. One of these steamboats was chartered to Morris & Ferebee. The word "chartered," as here used, means "hired." The defendant however, by virtue of its franchise, was the common carrier, and would have no power to relieve itself of liability to passengers simply by delegating its privilege to others. It is upon the same principle that it has been so often held that, unless there be express authority by statute to a railroad company to lease its line, the company is liable for the negligent acts of its lessee. See 2 Am. & Eng. Enc. Law, p. 756, where many authorities are cited. It will be seen, also, that this boat was hired fully manned by officers and crew in the pay of the defendant. It cannot differ materially from the hiring of a train for the carrying of an excursion, where the contract of carriage is made between the passengers and the hirers under whose direction the excursion is made. In the present case the boat was hired to run from Edenton to Nag's Head, and return, between certain hours. The defendant had no control or direction of the excursion or of the boat, except that it owned the boat and employed the crew. The crew, however, constituted the agency by which the boat was run. There might have been a distinction if the naked boat had been let to parties without further stipulation; but here the specific object of the excursion is stated in the contract, and the servants of defendant directed to carry it out. "Hiring a train for an excursion does not excuse the company from liability to the passengers for injury caused by their servants." 2 Redf. Ry. 212. The case of *Skinner v. Railway Co.*, 5 Exch. 786, is cited, where the declaration alleged that the plaintiff, at the request of the defendants, be-

came a passenger in one of their trains to be carried, etc., for reward to them, etc.; that, through the carelessness, negligence, and improper conduct of the defendants the train in which the plaintiff was such passenger struck against another train, whereby the plaintiff was injured. At the trial it appeared that the train in question had been hired of the company by a benefit society for an excursion, the tickets for which were sold and distributed by the treasurer of the society, from whom the plaintiff purchased one, and that the accident was occasioned by the train in which the plaintiff was running against a train standing at the station, it being then dark. One of the points made by defendants was that there was no evidence that plaintiff was a passenger to be carried by defendants for hire. Upon this point, Alderson, B., said: "The company, by giving their tickets to the treasurer of the society to distribute, constitute him their agent to contract with those who take the tickets; at all events, that was a question for the jury."

The test in such a case as the present is whether the defendant abandoned the entire control of its servants, the master and crew of the boat, to the hirers. "If the hirer is vested for the time with the exclusive right to discharge the servants and employ others, he alone is responsible for their default." *Shear. & R. Neg.* § 74, note 1. The defendants hired to H., for a day, a steamer and crew. The crew were hired and paid and entirely controlled by the defendant, who also had power to substitute others in their place. By the negligence of the crew, an injury was occasioned to the plaintiff. Held, that the defendant was liable, as the crew were its servants, and not those of H. *Dall-yell v. Tyrer*, El. Bl. & El. 899. In this instance, would the hirers have had the right to discharge the crew and employ others in their stead? Or did the defendant retain the authority to employ and discharge them? This contract of hiring is something like a charter party, in which the owner may either let the capacity or burden of the ship, continuing the master and crew in their employment, or he may surrender the entire ship to the charterer, who then assumes possession and control, and provides himself with master and crew. The first is a mere covenant for the performance of a stipulated service, and the owner is responsible under such circumstances for the conduct of the master and crew. 3 Am. & Eng. Enc. Law, p. 144, note 6.

It is contended that, as the boat was chartered to run to points not upon defendant's regular lines, the defendant would not be liable, under the facts of this case. We have held in *Washington v. Railroad Co.*, 101 N. C. 239, 7 S. E. 789, that a common carrier, who entered into a special contract to transport passengers or freight to a point beyond its own line which can only be reached by

another line, thereby constitutes the latter its agent in the performance of the contract, and will be held liable for any damage resulting from the negligence of the agent. So we conceive that the liability of the defendant would not be affected by the fact that the boat was chartered to run between points not upon defendant's regular lines.

It is contended, also, that there is a distinction between the liability of the master for negligence and that for a willful wrong committed by the servant. Upon this point we have held in *Hussey v. Railroad Co.*, 98 N. C. 34, 3 S. E. 923, that "the rights, the powers, and the duties of corporate bodies have been so enlarged in modern times, and these artificial persons have become so numerous and entered so largely into the everyday transactions of life, that it has become the policy of the law to subject them, as far as practicable, to the same civil liability for wrongful acts as attach to natural persons; and this liability is not restricted to acts committed within the scope of granted powers, but a corporation may be liable in an action for false imprisonment, malicious prosecution, and libel. *Pierce, R. R.* 273." We have endeavored to show, however, further on, that the liability of defendant arises here, not for the negligence or wrongful acts of its servants within the scope of their employment, but upon the distinct principle of its obligation to protect its passengers from insult or harm. This being the case, is defendant liable for the assault made by its engineer upon the plaintiff, a passenger? Whether this wrongful act was done by the engineer while acting within the scope of his employment is of no moment. The doctrine of respondeat superior is not involved. Its general principle is that a master is liable for the act of his servant done in the course of his employment about his master's business; but he is not liable for an act done outside of his employment, nor for the wanton violation of the law by him. *Wood, Mast. & S.* 552-559. The liability of defendant here rests upon the obligation on the carrier not only to carry his passengers safely, but to protect them from ill treatment from other passengers, intruders, or employés. "Kindness and decency of demeanor is a duty not limited to the officers, but extends to the crew." Judge Story, in *Chamberlain v. Chandler*, 3 Mason, 242, Fed. Cas. No. 2575. "Passengers do not contract merely for ship room and transportation from one place to another; they also contract for good treatment and against personal rudeness and every wanton interference with their persons, either by the carrier or his agents employed in the management of the ship or other conveyance. In respect to such treatment of passengers, not merely officers, but the crew, are agents of the carriers." See, also, 2 Wood, Ry. Law, § 315. "It is among the implied provisions of the contract between a passenger and a railway company

that the latter has employed suitable servants to run its trains, and that passengers will receive proper treatment from them; and a violation of this implied duty or contract is actionable in favor of the passenger injured by its breach, although the act of the servant was willful and malicious, as for a malicious assault upon a passenger committed by any of the train hands, whether within the line of his employment or not. The duty of the carrier towards a passenger is contractual, and among other implied obligations is that of protecting a passenger from insults or assaults by other passengers, or by their own servants." Many authorities are cited to sustain this doctrine. A very apt illustration of the distinction between the consequence to the master of the wrongful act of the servant done to one not a passenger, and to whom the master owed no duty, and an injury of a passenger by a servant, whether done within the scope of his employment or not, may be found in *Williams v. Car Co. (La.)* 3 South. 631.

We think there was error in the intimation of his honor, and that the case should have gone to the jury. New trial.

(42 S. C. 392)

**STEWART v. GREGG et al.**

(Supreme Court of South Carolina. Oct. 16, 1894.)

**DISTRESS FOR RENT—UNCERTAINTY OF LEASE.**

1. One who purchases land in the possession of a tenant under a lease from the former owner cannot issue a distress warrant for rent accruing after he acquires title.

2. Where a lease of land provides that the lessor will rent the lessee two mules, and the rent reserved is a gross sum for both the land and mules, and no separate rental is fixed for each, there is such an uncertainty as to the amount reserved for the rent of the land that payment thereof cannot be enforced by distress.

Appeal from common pleas circuit court of Florence county; J. H. Hudson, Judge.

Action of replevin by A. S. Stewart against A. M. Gregg and another. Judgment was rendered for defendants, and plaintiff appeals. Reversed.

The following are the requests, the charge of the court, and plaintiffs' exceptions thereto:

"(1) That in order for the jury to find for the defendant, they must be satisfied by the preponderance of the evidence that a tenancy existed between defendant and plaintiff, and that in the alleged lease a sum certain was reserved for rent. (2) That if the jury believe that the relation of landlord and tenant existed between the plaintiff and M. A. Bowen, and that the plaintiff took possession of the premises under her lease, and that the lease had not expired when defendant purchased the lands, then the tenancy was a continuing one, and a payment of the rent to his landlord under the existing lease was proper. (3) That a distress for rent of plain-

tiff's property by a claimant out of possession, during and before the expiration of the lease under which he entered, was improper procedure as against him, and that the jury should find for the plaintiff. (4) That when there are other remedies provided by statute for the enforcement of agricultural liens, a distress was an improper procedure, unless the defendant proves by preponderance of evidence that there was a lease written, or by parol, in which a certain sum was reserved for rent; and, in order for a lease to exist, there must be a mutuality of agreement between the parties thereto."

"Gentlemen of the jury: I will not have a great deal to say to you in expounding the law of the case, and what little I have to say to you I will not be able to instruct you according to the request of the counsel for the plaintiff in entirety, in so far as his request is in accordance with what I have to say to you. I will charge you, in so far as his request is not in accordance with what I have to say to you, I refuse the request. I think, gentlemen, that the law bearing upon this case is simple, and in the present case, when you get to the facts, you will not find them complicated. Law is said, gentlemen, to be based upon common reason and common sense. It is certainly intended to be. Now, it is an undisputed fact in the present case that in the fall of 1889 Mr. Stewart rented from Mrs. Bowen a certain plantation in your county called the 'Crowfoot Place,' which Mrs. Bowen had at that time in her possession, and claimed to be the owner of it. That the written lease was for three years, 1890, 1891, and 1892, and so long as the relation of landlord and tenant existed between Mr. Stewart and Mrs. Bowen he was bound to pay the rent to Mrs. Bowen. The contract which he had with her was of such a character that if he failed in any one year to pay the rent, Mrs. Bowen could have distrained for rent. The contract is sufficient warrant for distress. Now, it is also undisputed that on the 6th day of January, 1892, Mrs. Bowen's right, title, and interest to that land was sold by a decree of the court in the proceeding to marshal assets. At that sale Mr. Graham, the present defendant, became the purchaser. He bought all the rights, title, and interest of Mrs. Bowen, and became the landlord. He who was the tenant of Mrs. Bowen became by operation of law the tenant of the new landlord, and was bound to attorn to the new landlord in such regard. If, after that, he recognized Mrs. Bowen as landlord, and paid Mrs. Bowen the rent, knowing the sale had taken place, the title had changed hands, why, he paid at his peril. That is common sense. If, when you buy a tract of land on which there lived a tenant, just as soon as you get the title you have the right to demand of the tenant rent, and he is bound to pay you, and should you notify him that you are the landlord, and he goes and pays the rent to the

original landlord, he incurs the risk of paying the rent again. It is necessary that he should know the change had taken place. Did Mr. Stewart know this? He says himself that he attended the sale, heard the sale, and that he knew Mr. Graham purchased the land. Subsequent to that time, in the month of February, the agent of Mr. Graham went to talk about the matter, and informed him that the title had changed, and that the new landlord would expect the rent paid the new landlord, whereupon Mr. Stewart, who is presumed to know the law, to know what his duty was, what his legal obligation was, and was bound by it whether he knew what it was or not,—he is presumed to know what it is, and bound by it whether he knew it or not,—Mr. Stewart, of his own free will and a correct knowledge of these facts, paid eight bales of cotton to Mrs. Bowen, and in doing so he gave it away. He had no right to do it, and he did it at his peril. The new landlord was not getting any return for rent due that year the landlord, Graham, by Mr. White, makes the distress,—the paper in controversy,—that is, has the landlord the right to distress or seize under distress for rent? The landlord has the right to distrain for rent. Therefore the tenant can't maintain his action to recover it back. The landlord has a right to seize upon the proceeds in payment of his rent. In this case Mr. Stewart got the property back into his possession, and gave bond to pay the rent if the suit goes against him. I am obliged to instruct you, gentlemen, under the undisputed testimony, uncontested, that in this case Mr. Stewart owed the rent to Graham, although he paid it to Mrs. Bowen. He can't excuse himself that way at all. He had fair warning, fair warning. Therefore the purchaser, Mr. Graham, had the right to distrain for his rent due.

"Now, gentlemen, if these undisputed facts are not undisputed facts, under the law as I have explained to you, your verdict will have to be for the plaintiff, and your verdict will have to be in this form: 'We find for the plaintiff the property in dispute, and, in case the same cannot be delivered, we find such amount of money to be the value thereof.' If you find for the defendant, your verdict will be: 'We find for the defendant, Graham, the property in dispute. In case the same cannot be delivered, we find \$345 to be the value thereof,' or whatever amount you find to be the value. Witnesses have said, in valuing the property taken, that it was valued at \$600, but the debt claimed is only \$345. You must not misunderstand me. If you take the undisputed facts in the case, and apply them to the law as I have given it to you, that you are obliged to find for the defendant to the amount of the rent due, your verdict will be: 'We find for the defendant, Benj. Graham, the property in dispute. If the same cannot be delivered, we find \$345,' or whatever amount you find to be the

value thereof. If there is any mistake in the instruction, you are not responsible for it. That falls on me. Write your verdict on the back here. Retire to your room."

The jury being out in the room for some time, the court ordered them brought back into court for additional instructions.

Additional charge to jury: "Mr. Foreman and Gentlemen: I did not wish my instructions in this case to be misunderstood, and your delay caused me to apprehend that you might have misunderstood my instructions. I wish to say that the responsibility of your verdict rests with me almost entirely, and I have left very little for you to consider, and you are to accept the law as submitted to you by the court. You are not responsible for the instruction. I say to you that under the circumstances and the testimony the defendant is entitled to a verdict, because the plaintiff says he was at that sale, and that the land was sold, and bought by Mr. Graham; and subsequently, in February, Mr. White went down and spoke to him about the rent. Under the circumstances in the testimony, the defendant, Graham, is entitled to recover. You can't find a verdict for the plaintiff under the facts. Your verdict must be for the defendant. The only question you have to consider is the value of the property. The defendant, Graham, does not want the property back, he just only wants the value of his rent, \$345. The plaintiff, Stewart, says the value of the property is somewhere about five or six hundred dollars. Your verdict will be: 'We find for the defendant the property in dispute, and, in case the same cannot be delivered, we find so many (—) dollars the value thereof,' whether it is \$345 or \$600 as the value; just whatever you find is the value."

The plaintiff (appellant) thereupon submitted the following exceptions and grounds of appeal: "(1) Because his honor erred in refusing to charge the jury that, in order for them to find for the defendant, they must be satisfied by the preponderance of evidence that a tenancy existed between the plaintiff and the defendant, and that a sum certain was agreed upon and reserved for such rent. (2) Because his honor erred in holding that there was a new contract between plaintiff and defendant for rent of the premises in 1892, when the lease between plaintiff and M. A. Bowen for same would not expire before 1893. (3) Because his honor, in holding that such new contract existed, erred in holding that a definite rental or sum certain was not necessary to authorize the new landlord to distrain for rent. (4) Because his honor erred in refusing to charge the jury that, where there are other remedies provided by statute for the enforcement of agricultural liens, a distress was an improper procedure, unless the defendant prove by preponderance of evidence that there was a lease, written or by parol, in which a sum certain was reserved for such rent. (5) Be-

cause his honor erred in charging the jury: 'You can't find a verdict for the plaintiff under the facts. Your verdict must be for the defendant,'—as it is respectfully submitted that the sufficiency of the evidence based upon the testimony or 'facts' is entirely a question for the jury. (6) Because his honor erred in charging the jury that under the facts and circumstances of this case they must find a verdict for the defendant, when it is respectfully submitted that the warrant upon which the distress was made was illegal, null, and void. (7) Because his honor erred in charging the jury that there were no disputed facts, and that they must find for the defendant, when it is respectfully submitted that it was a question for the jury to determine as to whether or not there was a contract of lease, the rent paid or rent due, and whether or not there was a rent certain reserved between the parties."

McNeill & Hursey, for appellant. John T. Sloan, Jr., and Allen J. Green, for respondents.

McIVER, C. J. This was an action to recover possession of sundry articles of personal property alleged to have been unlawfully taken from the possession of the plaintiff by the defendants. The defendants justified the taking under a distress warrant for rent. The following facts seem to be undisputed: On the 12th day of November, 1889, the plaintiff leased from one M. A. Bowen a certain tract of land, the latter agreeing in the lease to furnish two mules for cultivating said place, for the term of three years, commencing on the 1st day of January, 1890, the lessee agreeing to pay to the lessor, "as rent for the same," 5,400 pounds of lint cotton annually, to be delivered on or before the 15th day of October in each year during the currency of the lease. There is no copy of this lease incorporated in the "case," but, as the same was offered in evidence, the court, at the hearing, under the rule, called for a copy of the lease, which was furnished, and is herewith filed. On the 4th day of January, 1892, the premises leased, along with other property, was sold by the order of the court of equity under proceedings for that purpose, to which the said M. A. Bowen was a party, and the premises leased were bought by the defendant Graham, of which sale and purchase the plaintiff had notice at the time, he having been present at the sale. Soon after this sale the plaintiff was called on by the agent of Graham, doubtless for the purpose of advising him of the said purchase, and notifying him that Graham would claim the rent for the year 1892. On the 14th of October, 1892, the plaintiff delivered to the said M. A. Bowen eight bales of cotton on account of the rent for that year. Learning of this, the defendant Graham, through his agent, issued his distress warrant, addressed

to his codefendant, Gregg, authorizing and requiring him "to make distress of all goods and chattels of the said A. S. Stewart, so that you may collect forty-seven hundred and ten pounds of lint cotton, in merchantable condition, of the value of the sum of three hundred and forty-five 50/100 dollars, for rent in arrears and due me on the 15th day of October, 1892." Under this warrant the said Gregg seized the property sued for in this action, and the same was afterwards replevied by the plaintiff. There is some conflict in the testimony as to what passed between the plaintiff and the agent of the defendant Graham when the latter called upon the former in February, 1892, soon after the sale, as well as in a subsequent interview between those parties in June, 1892, which, under the view we take of the case, need not be stated. It appears from the testimony that before the distress warrant was issued some calculation was made by the attorney of Graham with a view to ascertain the amount due Graham for rent of the land, in which, after deducting so much cotton as would pay for the rent of the mules, estimated at \$50, the balance of the 5,400 pounds of cotton, to wit, 4,710 pounds, valued at something less than 8 cents per pound,—the amount cotton was understood to be worth on the 15th of October, 1892,—would produce the amount stated in the distress warrant, viz. \$345.50. After the testimony was closed, the plaintiff submitted certain requests to charge, and the circuit judge, without passing upon these requests specifically, proceeded to charge the jury as set out in the "case," and these requests, with the charge, should be set out in the report of the case. Under this charge the jury found a verdict in favor of the defendants that they were entitled to the property in dispute, and, in case the same cannot be delivered, then they found for the defendants the sum of \$345.50, the value thereof. Judgment having been entered upon this verdict, the plaintiff appeals upon the several grounds set out in the record, which should likewise be embraced in the report of the case.

Without undertaking to examine these grounds seriatim, we propose to point out what we consider to be errors in the charge. When premises held by a tenant under a lease are sold during the currency of the lease, either by the landlord himself or by process or order of the court, there can be no doubt that the purchaser becomes entitled to the rent from the time of his purchase, and may recover the same, under an action for use and occupation, from the tenant, provided he has notice of such sale before he pays the rent to his landlord. *Moore v. Turpin*, 1 Speer, 32; *Snyder v. Riley*, Id. 272. But whether such purchaser can distrain for the rent due him, without any evidence that the tenant has attorned to him, is a very different question. The

remedy by distress, like an attachment, is a very stringent proceeding, and the courts will always require a strict compliance with the requirements of the law. Indeed, there is more reason for this in a case of distress than in an attachment, for in the former the proceeding is by the act of the party interested, while in the latter the interposition of an officer of the court is required. In *Jacks v. Smith*, 1 Bay, 315, it was held that to justify a distress there must be some lease, either written or parol, by which a sum certain is reserved for rent. In that case the facts were that the plaintiff had rented the premises from one Bourke, and the same were afterwards sold for the debts of Bourke, and purchased by the defendant Smith, who attempted to justify the taking of the goods in question under a distress warrant, resting his claim solely on his deed, but offered no evidence of any written or parol lease to the plaintiff. The court held as above stated, but added that an action for use and occupation would lie against the tenant for the time he held the house after it was sold. It seems that the case just cited is so nearly identical with the case now under consideration as to be decisive of it. The same doctrine was held in the subsequent case of *Smith v. Sheriff of Charleston Dist.*, 1 Bay, 443, and the case of *Jacks v. Smith*, supra, was expressly affirmed. Neither of those cases has ever, so far as we are informed, been overruled, or even questioned, by any subsequent decision. The cases of *Moore v. Turpin*, and *Snyder v. Riley*, supra, cited and relied upon by respondents' counsel, were both actions for use and occupation, and there is nothing in either of them which warrants the idea that a purchaser of leased premises can distrain for rent accruing after his purchase, though he may maintain an action for use and occupation. Counsel for respondent also relies upon certain language found in the opinion of the court in *Reid v. Stoney*, 1 Strob., at page 188. But the point we are considering was not made and did not arise in that case, and therefore the remark relied upon cannot be regarded as anything more than obiter dictum, if, indeed, it is even that. In that case the premises had been leased to one Thompson by Samuel Reid in his lifetime, who, by his will, directed that his estate be kept together during his wife's lifetime, and after her death to be divided between his children, one of whom was the plaintiff, and the other the wife of defendant Stoney. The parties undertook, by agreement, to make an informal partition, which, however, the court of equity refused to confirm, whereby the estate was to be divided into three parts, one to the widow for life, and one to each of the children; the storehouse being on the portion assigned to Mrs. Stoney. Thompson, the lessee of the storehouse from the testator, sold the stock of goods therein to the plaintiff, who took

possession, and the same were soon after seized by Stoney, who undertook to justify his seizure of the goods under his distress warrant. The court held that the husband of a minor, daughter of the testator, has no right, under a title derived from an informal partition of the estate, unconfirmed by the court of equity, to distrain for rent due the estate; and that the executor alone has the right to distrain for rent due the estate during the lifetime of the wife. It is very manifest that no such question as we are considering arose in that case. In delivering the opinion of the court, his honor, Judge Evans, uses the language quoted by respondents' counsel, as follows: "Without the legal estate, he could not distrain for rent due by one who did not enter under him, and who was in no way liable to him, *unless the estate of the original landlord had been assigned to him.*" Now, whether the learned judge intended the words which counsel has italicized as above to convey the idea that the defendant could not distrain unless the legal estate had been assigned to him, or only meant to say that the tenant would be in no way liable to him unless the legal estate had been assigned to him, is at least questionable; and, judging from the well-known fact that Judge Evans was noted for his familiarity with the decisions of our court, we think there is more reason to say that he only meant the latter, and not the former, for the presumption is that he was familiar with the decisions of *Jacks v. Smith*, and *Smith v. Sheriff of Charleston Dist.*, cited above, which showed the law to be that a purchaser from a landlord could not distrain for rent, although the tenant would be liable in an action for use and occupation to such purchaser. But whether he meant the one thing or the other is immaterial, for certainly a mere passing remark of this kind cannot be regarded as sufficient to overturn two solemn decisions of the court of last resort. We think that the circuit judge erred in refusing plaintiff's first request to charge, and in charging that Graham had the right to distrain for rent.

But, again, there can be no doubt that, in order to justify a distress for rent, there must be a lease, either written or parol, by which a sum certain is reserved for rent. *Jacks v. Smith*, supra; *Smith v. Sheriff of Charleston Dist.*, supra; *Marshall v. Giles*, 2 Tread. Const. 637. Though it need not be reserved as rent eo nomine. *Price v. Limehouse*, 4 McCord, 544. Now, as the testimony as to what passed between the plaintiff and the agent of defendant Graham after the sale was conflicting, if it should be sought to draw therefrom the conclusion that there was a parol lease, then that question should have been left to the jury, which was not done, and therefore we must look alone to the terms of the written lease, of which the defendant Graham claims to be the assignee. By reference to that instru-



ment we find that Mrs. Bowen, the lessor, agreed to lease to Stewart, the lessee, the tract of land known as the "Crowfoot Place," and also "to furnish two mules for cultivating said place; and the lessee agrees to pay to the lessor, as rent for the same, fifty-four hundred pounds of white lint cotton annually," etc. Now, what was the plaintiff to pay the 5,400 pounds of cotton for? The language is explicit, "for the same;" that is, for the mules as well as for the land. This is manifestly the construction placed upon the lease by the attorney for the defendant Graham, for in making his calculation as to the amount of rent due, preparatory to issuing the distress warrant, he expressly recognizes that a part of the 5,400 pounds of cotton was to be paid for the use of the mules, and the balance only for the rent of the land. Here, clearly, was an element of uncertainty as to the amount of the rent of land, for which alone could the defendant distrain, even under his own view of the law. Who was to determine what portion of the 5,400 pounds of cotton was due for the rent of the land and what portion for the mules? Surely the defendant had no right to determine this question, as he assumed to do. The defendant does not pretend to claim anything for the rent of the mules, and could not do so, for he never bought the mules. All that he does claim, and all that he can, by any possibility, claim, is so much of the 5,400 pounds of cotton as was due for the rent of the land; and what that amount is remains absolutely uncertain. So that, to say nothing of what may be due for the use of the molasses mill, which the plaintiff was allowed, without objection, to testify constituted a part of the consideration for the lease, although it is not mentioned in that instrument, and resting our conclusion solely upon the terms contained in the written lease, it is clear that there was such an uncertainty as to the amount reserved for the rent of the land as would forbid the defendant from enforcing the payment of the same by distress. While, therefore, the defendant Graham, as the assignee, practically, of so much of the lease as secures the rent of land, might, in an action for use and occupation, recover so much of the rent reserved as is due for the land by introducing evidence to show how much that is, he certainly cannot, by distress, enforce the payment of an uncertain and unascertained amount due for the rent of the land. So that, as it seems to us, in either view of the case the seizure of the plaintiff's property was not justified by the distress warrant. The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial.

POPE, J., concurs.

(42 S. C. 383)

# DUNHAM v. CARSON.

(Supreme Court of South Carolina. Oct. 15, 1894.)

## DEATH OF PARTY IN FORECLOSURE—SUBSTITUTION OF DEVISEES.

1. Where, on the death of a defendant in an action to foreclose a mortgage on land, her devisees are, by order, made parties defendant, it is error to provide in the order that they may answer the complaint generally, as the only question they can raise by answer is whether they are the heirs or devisees of the deceased.

2. On the death of a party to an action which survives, a party wishing to continue the same against the representatives of deceased should, on a proper showing, apply *ex parte* for a rule against the parties sought to be brought in, requiring them to show cause why the action should not be continued against them in the character ascribed to them; and, on default in showing cause, the action will be so continued.

Appeal from common pleas circuit court of Charleston county; James F. Izlar, Judge.

Action by C. T. Dunham against Caroline Carson to foreclose a mortgage on land. From an order making the devisees of defendant parties, plaintiff appeals. Reversed.

The order and exceptions referred to in the opinion are as follows:

"It is therefore ordered that William Carson and James Petigru Carson, sole heirs and devisees of Caroline Carson, above named, appear and answer the complaint herein within twenty days from the service of this order upon them, or that, in default thereof, the plaintiff may apply to the court for an order entering their appearance, and directing the action to stand revived and continued against them, as heirs at law and devisees of Caroline Carson, and that the answer of Caroline Carson be then deemed the answer of said William Carson and James Petigru Carson, as heirs at law and devisees of Caroline Carson. It is further ordered that copies of this order be served upon said William Carson and James Petigru Carson, by publishing the same once a week for six successive weeks in the daily News and Courier, a newspaper published in the city of Charleston, in said state, and by depositing a copy, postage prepaid, in the post office, directed to each, the said William Carson and James Petigru Carson, at No. 16 Exchange place, in the city and state of New York; provided that if personal service can be made upon said William Carson and James Petigru Carson out of the state, as provided in the case of a summons, in section 156 of the Code of Procedure, the same shall be equivalent to and in lieu of the publication and deposit in the post office hereby ordered."

Exceptions: "Take notice that the undersigned appeal, on behalf of the plaintiff, C. T. Dunham, from the order of his honor, Judge Izlar, filed the 30th of August, 1893, upon the following grounds: (1) That his honor erred in not granting the order asked for by the plaintiff, and in the form asked for by him.

(2) That his honor erred in granting leave to the heirs of Mrs. Carson to answer the complaint generally, whereas his honor, if he allowed them to answer at all, should have restricted the answer to matters showing a lack of right on the part of the plaintiff to continue the cause as against the heirs of Mrs. Carson. (3) That his honor should have ruled that, under a motion to continue a cause as provided in section 142 of the Code of Procedure, parties against whom the same is continued are bound by all prior proceedings in the cause against the party in privity with and as representing whom the cause is to be continued against them, and that they have no fresh or additional right to answer, but the right to continue as against them is absolute. (4) That his honor should have ruled that the motion under the said section of the Code of Procedure to continue is *ex parte*, like the issuing of process to bring in an original party to a suit; and that it is competent for the parties against whom the cause is sought to be continued, if they can show that the cause should not be properly continued as against them, on motion, to dismiss the complaint, or to rescind the order as against them. (5) That his honor should have held that, under the said section of the Code of Procedure, the utmost that he could do was to make a rule nisi against the parties against whom the case was sought to be continued, to show cause, if any they could, why such cause should not be continued as against them; and, upon failure to show such cause, that the order continuing the same against them should be made absolute."

Mitchell & Smith, for appellant. H. E. Young, for respondent.

McIVER, C. J. The plaintiff brought this action for the foreclosure of a mortgage of real estate, and, after the case had proceeded to a stage in which it was ready for a hearing on the merits, the defendant departed this life, leaving, as alleged, her last will and testament, whereby, among other things, she devised to her two sons, William Carson and James Petigru Carson, who are her sole heirs, the premises covered by the mortgage which the plaintiff is seeking to foreclose. Upon these facts, stated more in detail in an affidavit submitted, the plaintiff applied to his honor, Judge Izlar, for an order (1) that the action be continued against the said William Carson and James Petigru Carson, the sole heirs and devisees of the said Caroline Carson; (2) that a copy of the order be served by publication on the said William Carson and James Petigru Carson, who are absent from and reside beyond the limits of this state, to wit, in the city and state of New York; (3) "that said William Carson and James Petigru Carson shall have until twenty days after the last publication herein ordered, or twenty days after personal service on them in lieu of

said publication, to appear and continue to defend this action, and, in default of any such appearance within the time aforesaid, the plaintiff may proceed with the cause against them in like manner, force, and effect as if the said Caroline Carson had survived, and for such time forth made default herein." Judge Izlar, before hearing the motion, stated that he had been requested by Mr. H. E. Young, counsel on record for Caroline Carson, deceased, defendant, to give him notice before granting any order in the case. Thereupon Mr. Young was sent for, came into court, and argued against the motion, stating that he did not appear for the devisees of Mrs. Carson, but as *amicus curiae*. In the course of the argument, counsel for plaintiff asked the court, if it declined to grant the order in the form asked for, then to modify it only to the extent of issuing a rule nisi against the heirs of Mrs. Carson to show cause why the action should not be continued against them, and, in default of good cause shown, that the same be so continued. After hearing argument, the court refused to grant the order as asked for by plaintiff, and on the 30th of August, 1893, granted an order, a copy of which is set out in the case, and which should be incorporated in the report of the case. This order contains the following paragraph: "It is therefore ordered that William Carson and James Petigru Carson, sole heirs and devisees of Caroline Carson, above named, appear and answer the complaint herein within twenty days from the service of this order upon them, or that, in default thereof, the plaintiff may apply to the court for an order entering their appearance, and directing the action to stand revived and continued against them, as heirs at law and devisees of Caroline Carson, and that the answer of Caroline Carson be then deemed the answer of said William Carson and James Petigru Carson, as heirs at law and devisees of Caroline Carson." From this order plaintiff appeals, upon the several grounds set out in the record, which need not be repeated here, but should be set out in the report of the case. These grounds practically impute the following errors to the circuit judge: (1) In not granting the order as asked for; (2) in allowing the parties sought to be brought in to answer the complaint generally; (3) in not holding that under a motion to continue a cause, under section 142 of the Code, the parties proper to be brought in are bound by all former proceedings in the cause, and have no right to answer generally; (4) in not holding that such a motion is *ex parte*, and the remedy of a party claiming to have been improperly brought in is by a motion to dismiss the complaint, or rescind the order as to him; (5) that the circuit judge should, at least, have granted a rule nisi against those proposed to be brought in, to show cause why the action should not be continued against them, and,

upon default in showing such cause, the order continuing the action against them be made absolute.

We do not propose to take up these several assignments of error in detail, but rather to consider the general question as to what is the proper practice in a case like this. It seems to us that the manifest object of the Code of Procedure was to carry out the mandate of the constitution, as contained in section 3, art. 5, to "simplify and abridge the rules, practice, pleadings and forms of the courts now in use in this state;" and therefore, when, by section 142 of the Code, it was provided that "no action shall abate by the death \* \* \* of a party \* \* \* if the cause of action survive or continue. In case of death \* \* \* of a party, the court, on motion, at any time within one year thereafter, \* \* \* may allow the action to be continued by or against his representative or successor in interest,"—the manifest purpose was to dispense with the necessity for the cumbrous proceeding by bill and its accompaniments, and to substitute in lieu thereof a simple motion; and such seems to have been the view taken by this court in *Best v. Sanders*, 22 S. C. 589. It is but natural and proper, therefore, that we should look into the former practice, in a case like the present, where it became necessary to revive an action, because of the death of the defendant, by means of a bill of revivor, in order to ascertain the rights of the parties under such a proceeding. By reference to *Story, Eq. Pl. §§ 370, 377*, it will be seen that in such cases the general rule was that no answer to a bill of revivor was either necessary or proper, except simply to put in issue the fact as to whether the party sought to be brought in bears such a relation to the deceased as makes him a proper party; as, for example, whether he is the heir at law or administrator of such deceased party. If the defendant, in his answer to such a bill, should undertake to state other matters or set up defenses to the original bill, the answer would have been treated as impertinent. In *Fretz v. Stoner*, 22 Wall. 198, after answer filed and testimony taken, the defendant, Stoner, died, and a bill of revivor was filed to make his brother, who was his sole devisee and legatee, and also the executor of his will, a party defendant. The brother appeared and answered, admitting the character imputed to him by the bill, and setting up new defenses. The court held such new defenses impertinent, saying: "Nothing could be brought into the litigation by the bill of revivor besides the mere question whether the brother brought in on the bill of revivor was the executor of the will of Stoner and his legatee and devisee." The same doctrine was held in *Gunnell v. Bird*, 10 Wall. 304. See, also, to the same effect, 3 *Daniell, Ch. Pl. & Pr. (Perkins' Ed.)* 1711.

It is contended, however, that where the parties sought to be brought in were devisees, and not heirs at law,—that is, where the re-

lationship of the new parties to the deceased arises from the act of the parties, and not by operation of law,—the action could not be revived by an ordinary bill of revivor, but that it was necessary to file an original bill in the nature of a bill of revivor. In 3 *Daniell, Ch. Pl. & Pr.* 1718, the author, after stating that, where the transmission of interest was by operation of law, "there is no other fact to be ascertained than whether the new party brought before the court has the character imputed to him," goes on to say that there are cases in which other facts may be brought into litigation. "Thus, if the death of a party whose interest is not determined by his death is attended with such a transmission of his interest that the title to it, as well as the person entitled, may be litigated in the court of chancery, as in the case of a devise of real estate, the suit cannot be continued by a mere bill of revivor. An original bill, upon which the title may be litigated, must be filed; and this bill will have so far the effect of a bill of revivor that, if the title of the representative substituted by the act of the deceased party is established, the same benefit may be had of the proceedings upon the former bill as if the suit had been continued by a bill of revivor." The reason for this distinction, as stated in note 2 to section 379 of *Story, Eq. Pl.*, is that in the case of a devise, if an ordinary bill of revivor were resorted to, the heir would be pretermitted, who might have a right to contest the devise; and hence there must be an original bill, in the nature of a bill of revivor, to which the heir or executor should be made a party, as well as the devisee or legatee. But, as is said in section 378 of *Story, Eq. Pl.*, such a bill "will have so far the effect of a bill of revivor that, if the title of the representative substituted by the act of the deceased party is established, the same benefit may be had of the proceedings upon the former bill as if the suit had been continued by a bill of revivor." Now, as *William Carson* and *James Petigru Carson* are designated as sole heirs at law as well as devisees of *Caroline Carson*, it is very obvious that the reason for the distinction above adverted to does not apply in this case; and therefore, even under the former practice, they might have been brought in by an ordinary bill of revivor, and, when so brought in, could only contest the fact that they stood in such a relation to *Caroline Carson* as entitled them to represent the interest transmitted to them by her either as heirs or devisees. Indeed, so far as appears in this case, the parties sought to be brought in must be regarded as taking as heirs at law and not as devisees; for the doctrine is well settled that, where a testator devises and bequeaths his property to his "heirs," in the sense which that word conveys under our law, this does not amount to a testamentary disposition. *Seabrook v. Seabrook*, *McMul. Eq.* 201; same case, as reported in 10 *Rich.*

**Eq. 495.** As it is well expressed by Dargan, Ch., in his circuit decree in the case last cited, affirmed by the court of appeals: "It is undoubted law that, where a testator gives by his will the same estate to the same persons who would be entitled to take that estate by operation of law in case of an intestacy, the devise or legacy will be void, and the right of the party or parties entitled will be referred to the law of distributions and descents. If there be any variation between the dispositions which the will and which the law make in such a case, either in regard to the persons who are to take or the quantity of the estate, the title will be referred to the will." In this case, so far as appears, there is no such variation, and, on the contrary, the undisputed statement is that Mrs. Carson devised her entire real estate to her two sons, who were her sole heirs at law. It must therefore be regarded, in the light of the facts before us, that William Carson and James Petigru Carson take as heirs, and not as devisees. But whether they take in the one capacity or the other makes no difference in this case; for, when brought in, they are not entitled to answer the complaint generally, but are only entitled to contest the fact that they are heirs or that they are devisees of Mrs. Caroline Carson, and will be bound by all the former proceedings in the cause. We are of opinion, therefore, that the circuit judge erred in so much of the order appealed from as permits William Carson and James Petigru Carson to "answer the complaint herein," and their answer should be restricted to the points above indicated. As this is said to be a new question in this state, and as one of the grounds of appeal opens the way for the purpose, we may add that the proper practice in a case of this kind is for the party who desires to continue an action against the representatives of a deceased party to make an *ex parte* application, based upon a proper showing by affidavit, for a rule against the persons sought to be brought in, requiring them to show cause why the action should not be continued against them in the character ascribed to them; and, upon default in showing good cause, the action will be so continued. The judgment of this court is that the order appealed from be reversed in so far as it conflicts with the views herein announced, and that the case be remanded to the circuit court for such further proceedings as may be necessary.

POPE, J., concurs.

(42 S. C. 389)

MOORE v. PERRY et al.

(Supreme Court of South Carolina. Oct. 10, 1894.)

RECORD ON APPEAL—AGREED CASE—CONSTRUCTION OF WILL—CONDITIONAL DEVISE.

1. Under Code, § 345, subd. 5, which provides that on appeal, if the attorneys agree on

a statement of the case, no other paper shall be required, papers not in the agreed case cannot be considered, though the case refers to them as filed with the clerk "for reference by either party."

2. In the absence of a statement of the evidence in the agreed case, findings of the trial court based thereon cannot be reviewed.

3. Testator gave to his three children, O., H., and S., lot 29, "which shall vest immediately after my death," and lot 31, "the latter being mortgaged." \* \* \* As soon as the mortgage on the above-named property is satisfied, I direct that it shall be owned by my three children, provided that O. and H. pay to S. what he has paid out in satisfying the mortgage;" and, "if O. and H. shall fail to pay \* \* \* S. as above, then the property shall belong to S. free from every claim." *Held*, that payment by O. and H. of the sum paid out by S. on the mortgage was a condition precedent to the vesting in them of any interest in lot 31.

4. As O. and H. were entitled only to a reasonable time in which to pay S., a failure by them to do so for four years barred them from any interest in the land.

Appeal from common pleas circuit court of Charleston county; James Aldrich, Judge.

Action by Zacharia Moore against Henry S. Perry and others. From a judgment in favor of defendant H. S. Perry, plaintiff and the other defendants appeal. Affirmed.

The following is the master's report mentioned in the opinion:

"This case was referred to me by an order of the court, filed 6th December, 1892, to take testimony, and report upon all issues of law and fact arising herein, with leave to report any special matter. I have held references, have been attended by the solicitors of the parties, have taken testimony, and have heard argument upon the issues involved, and I respectfully report: That the plaintiff, Zacharia Moore, brings this action against Henry S. Perry, Amarintha Perry, Geneva A. Perry, Henry S. Perry, Jr., Christopher W. Perry, Hermann H. Perry, and Oliver S. Perry (the last five named being minors), defendants, alleging that parties own and possess, as tenants in common, the premises No. 31 Cooper street, in this city, described in the complaint. That the parties own no other real estate in common. That Henry S. Perry, one of the defendants, has had charge and control of said premises as agent and representative of the owners, and has rented the premises out, and has made no account of the rents; wherefore plaintiff prays that Henry S. Perry may be ordered and required to account for said rents, and that partition may be made of the premises, according to the rights of the parties, or, if an actual partition cannot be made, then for a sale of the premises and a division of the proceeds of sale. Subsequently to the filing of the complaint, on motion, plaintiff was allowed to amend paragraph 2 thereof by setting forth that plaintiff's interest in said property is of one undivided third part, instead of one undivided sixth part, as originally stated, and also by adding as paragraph 5 the following: "That, since the commencement of this action, Henry S. Perry, Jr., has departed this life in

testate, and that his share vests in his mother, Amarintha Perry, and the other minor defendants, Geneva A., Christopher W., Hermann H., and Oliver S. Perry, all parties to this action.' It was further ordered that the answers heretofore filed to the original complaint be taken as filed to the amended complaint. All parties consented to this order. The defendant Amarintha Perry answered, alleging that her husband, Oliver Perry, the younger, died 10th October, 1891, intestate, and that his interest in the property sought to be partitioned vested in his wife and children; that under the will of Oliver Perry, the elder, admitted to probate 27th April, 1887, said premises were devised to testator's three children, Oliver, Henry S., and Hannah D. Perry; that Hannah D. Perry subsequently intermarried with the plaintiff, and died, intestate, May, 1890. And this defendant joins in the prayer of the complaint. The answer of the defendant Henry S. Perry raises the main issue of the case. He denies that plaintiff and his codefendants have any interest or estate in the premises sought to be partitioned. He denies that he owns any lands in common with the other parties to the suit. He denies that he has had charge of the premises as agent for plaintiff or his codefendants. For a further defense, defendant alleges that he is the owner in fee simple of said premises, said Zacharia Moore, the plaintiff, having sold to defendant his entire interest in said premises, by deed dated 10th of March, 1891; and this defendant, Henry S. Perry, 'respectfully submits to this honorable court his desire to prove full and complete ownership in fee of said premises, and prays that he be dismissed, with costs.' The issues were tried before me by consent, upon the testimony taken and filed by me herewith. The will of Oliver Perry, Sr., was put in evidence by plaintiff, and it was agreed that the typewritten copy thereof attached to this report shall be accepted as a correct copy. By this will, testator devises to his three children, Oliver Perry, Jr., Henry Stover Perry, and Hannah D. Perry, 'to be owned by them, share and share alike, all my real property, consisting of the following: House and lot No. 29 Cooper street, which shall vest immediately after my death, and the house and lot No. 31 Cooper street [the subject of this suit], next to the above-named property, the latter being mortgaged to the loan and trust company. As soon as the mortgage on the above property is satisfied, I direct that it shall be owned by my three children above named, share and share alike; provided the said Oliver Perry, Jr., and the said Hannah D. Perry shall pay, or cause to be paid, to the said Henry Stover Perry, whatever amounts the said Henry Stover Perry has paid out on his own personal account, or may hereafter pay out on his own personal account, in satisfying the mortgage on the property. Henry Stover Perry must produce receipts or other proper proof of whatever money he claims to

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expend; and Oliver Perry, Jr., and Hannah D. Perry must each pay one-half of whatever amounts are paid out by Henry Stover Perry in clearing the property of the mortgage. If the said Oliver Perry and the said Hannah D. Perry shall fail to pay any and every just debt due the said Henry S. Perry as above, then the property shall belong to the said Henry Stover Perry, free from every claim and incumbrance.' It is admitted that Hannah D. Perry married the plaintiff, and died in May, 1890, intestate, leaving, surviving her, an infant child and her husband, the plaintiff; that the child died shortly after its mother, and thereupon whatever interest or estate Hannah D. Perry was entitled to in this property passed to and became vested in the plaintiff. It is also admitted that Oliver Perry, the younger, died October 10, 1891, intestate, and that his interest or estate thereupon became vested in his widow and children, as above set forth.

"Without regard to the order in which the evidence was taken, I proceed to state the main issues as developed between the parties. The defendant Henry S. Perry claims that the mortgage of the Prudential Building & Loan Association upon the premises 31 Cooper street was paid off by him after his father's death, and he produces the said bond and mortgage fully discharged and satisfied, the satisfaction bearing date the 9th of February, 1891. He also produces in evidence a sworn statement of the rents collected by him, and applied towards this payment, together with a statement, also sworn to, of the amounts added by him to the rents out of his personal funds to make up the monthly amounts due to the association. By this statement it appears that the amount due on the mortgage debt, to wit, the sum of \$1,609.60, was paid as follows:

|  |                  |
|--|------------------|
| By Oliver Perry, before his death....\$        | 50 00            |
| By rents, collected and paid by H. Perry ..... | 900 50           |
| By Henry S. Perry, personally.....             | 648 60           |
| Penalties .....                                | 9 60             |
|  | <hr/> \$1,608 70 |

—The two accounts thus nearly balancing each other.

"But it is further claimed on behalf of Amarintha Perry, the widow, that, as she did not renounce her dower upon the deed, her right of dower still exists, and is a charge upon the property. I hold that, as matter of law, Oliver Perry never had such a legal estate in this property, 31 Cooper street, as would subject the same to his wife's right of dower. To entitle a widow to dower, a husband must have been seised, either in fact or in law, of an estate of inheritance in the land at some time during coverture. This rule is inflexible. When, therefore, the husband had, previous to his death, simply a reversion in fee, or a vested remainder, expectant upon an estate for life, his widow cannot be endowed. As in such case the husband has never had possession, or any present

right of possession, he cannot be said to have had a seisin of any sort, either actual or legal. *Durando v. Durando*, 23 N. Y. 332, decided by the New York court of appeals, June, 1861, and followed and confirmed by the same court in *House v. Jackson*, 50 N. Y. 161. In *Shiell v. Sloan*, 22 S. C. 151, our supreme court held that a widow is dowerable of her deceased husband's interest in lands held by him in joint tenancy during coverture, but that, where such right attached at the marriage upon land then subject to a charge, a subsequent sale in satisfaction of such charge defeated the right of dower; and various cases from our own reports are cited by the court in support of this view. Now, under the will of Oliver Perry, the property, 29 Cooper street, was to vest immediately in his heirs. But this property, 31 Cooper street, was not to vest in them until the mortgage to the building and loan company should have been paid, and until Oliver and Hannah should have repaid to Henry the amount which he should have personally paid in liquidation of the mortgage; and, in default of such repayment by them, 'the property shall belong to the said Henry Stover Perry, free from every claim and incumbrance.' However we construe this devise, whether as giving to Oliver and Hannah a future right of possession or estate upon their complying with the condition precedent of repaying Henry the said amounts, whether we regard it as a conditional devise, or as an estate subject to a charge, in either view the right of dower, under the authorities cited, cannot attach. If it was an estate upon a condition, then the condition must have been fulfilled before the estate could vest. See 2 Redf. Wills, 283. If it was an estate subject to a charge, then, when Oliver Perry released to Henry Perry, it was virtually a sale in satisfaction of the charge, and the grantee took the property clear of the right of dower. I cannot doubt from the evidence that, even in the view most unfavorable to Henry Perry, some portion of the mortgage was paid from his own funds, and that Oliver Perry made the conveyance to him upon that basis. He settled with Henry then and there, and no reason adequate to my mind has been shown why this court should disturb or reopen that settlement. I hold, as matter of law, that Amarintha Perry, the widow of Oliver Perry, has no claim of dower in this property, and that the heirs of Oliver Perry are barred by this deed."

The following is the decree mentioned in the opinion:

"This case came before the court upon exceptions to the report of G. H. Sass, master, to whom it was referred to hear and report upon all issues of law and fact arising in the action, with leave to report any special matter. The master's report is, in my opinion, able, lucid, and convincing; and I might with perfect propriety, in a short order, confirm it and adopt it as the judgment of the

court. I will, in deference to the learned counsel for defendants, take up his exceptions, and consider them severally. I shall not attempt to state the case, except incidentally, as the master's statement is clear and satisfactory.

"The plaintiff and all the defendants, except Henry S. Perry, appeal to this court, and ask that the master's report and decision be reversed and set aside, because the master erred in finding: (1) That the amount due on the mortgage debt, to wit, the sum of \$1,609.60, was paid as follows:

|  |            |
|--|------------|
| By Oliver Perry, before his death. . . . \$        | 50 00      |
| By rents, collected and paid by H. Perry . . . . . | 900 50     |
| By Henry S. Perry, personally. . . . .             | 646 60     |
| Penalties . . . . .                                | 9 60       |
|  | <hr/>      |
|  | \$1,606 70 |

"There is an error in this exception. The debt is stated to be \$1,609.60, and the items included in the statement of payments amount to only \$1,606.70. The master, in his report, after making the statement as it appears in this exception, says: 'The two accounts thus nearly balance each other.' He does not find that this statement is absolutely correct; for, in the course of his report, he says: 'I cannot doubt, from the evidence, that, even in the view most unfavorable to Henry S. Perry, some portion of the mortgage was paid from his own funds, and that Oliver Perry made the conveyance to him upon that basis.' But had he received the statement of Henry S. Perry as correct and true, and so held, the evidence would, in my opinion, sustain that conclusion. I overrule this exception.

"Next turn to that exception wherein it is alleged that said master erred in failing to find '(5) that there should be an accounting by the defendant Henry S. Perry of his rents and profits accruing from the property in dispute, and also of a vouching of the amounts which he claims to have paid to the building and loan association.' This exception seems to be based upon the idea that Henry S. Perry must produce a voucher, receipt, or some written instrument to prove his personal payments. The will says: 'Henry Stover Perry must produce receipts or other proper proof of whatever money he claims to expend.' The receipt of the building and loan association is a 'voucher' in the sense in which that word is used in this exception, and the sworn statement of Henry S. Perry, on which he was examined, is 'proper proof' of his expenditures. His admission of money received from rent of the house is sufficient to charge him; and, if he has received further sums from that source than he has admitted, appellants should have proven such receipts. If Henry S. Perry only received a certain amount from the rent, and his father (the testator) only paid \$50 on the mortgage, then it follows, in the absence of other evidence, that he must have paid the balance necessary

to satisfy the mortgage debt. This exception is overruled.

"Second exception: '(2) That Oliver Perry never had such a legal estate in this property, 31 Cooper street, as would subject the same to his wife's right of dower.' I will not copy the will. It is attached to the master's report, and, so far as the question is concerned, it is recited in the body of the report. 'A will is the formal declaration in writing by which the maker provides for the distribution of his property after his death. This being the case, it necessarily follows that in its construction the first and great object should be to inquire what was the intention of the testator. That intention must be gathered from the paper itself,—the whole paper taken together,—and read in the light of the circumstances surrounding the testator at the time he executed it.' *Lott v. Thompson*, 36 S. C. 43, 15 S. E. 278; *Bannister v. Bull*, 16 S. C. 227; *Durant v. Nash*, 30 S. C. 184, 9 S. E. 19. Testator executed his will on January 12, 1887. At that time he owned two parcels of real estate, lots Nos. 29 and 31, on Cooper street. Lot No. 31 was incumbered with a considerable mortgage to the building and loan association, conditioned to be paid in monthly installments of \$16. This mortgage is dated February 9, 1883, and, according to the plan of payments, would not be paid in full until about 1891. Testator was an elderly man, and his cash seems to have been insufficient to meet his obligations. In some way, not fully explained, testator's son, Henry S. Perry, came to his assistance, paid installments due to the building and loan association, and, it seems, agreed with testator to protect the property so far as said mortgage was concerned. There is no direct proof of this, but it is evident that such was the belief and expectation of testator, and that these ideas inspired the terms used in his will. Testator, in his will, clearly expresses this idea when he says: 'Whatever amount or amounts the said Henry Stover Perry has paid out of his own personal account, or may hereafter pay out of his own personal account, in satisfying the mortgage on the property.' The next idea we gather from the will is that testator intended that this son, Henry S. Perry, who had come to his aid in his financial distress, should be repaid whatever amounts he had paid or might have to pay in satisfying the mortgage. This was the first duty of the testator, and the entire scheme of the will shows that such was his intention. Henry S. Perry was to be paid in one of two ways: (1) By his brother and sister, the other devisees under the will; they were to repay him the money advanced; or (2) by the testator himself. He (testator) provided for his payment by giving to Henry S. Perry, 'free from every claim and incumbrance,' said lot No. 31. Testator's payment was to be made 'if the said Oliver Perry and the said Hannah D. Perry shall fail to pay every and any just debt due to the said Henry S. Perry.' The

will does not contemplate any accounting for rents by Henry S. Perry, or that the lot No. 31 shall stand as security for payments made by him on the mortgage, because testator says, if Oliver and Hannah 'fail to pay any and every just debt due to the said Henry S. Perry, then the property shall belong to the said Henry Stover Perry, free from every claim and incumbrance.' Testator, by his will, states that Henry has paid money of his own upon the mortgage debt. That was certainly a 'just debt;' and, Oliver and Hannah having failed to pay the same (not to mention or consider the amounts paid by Henry after the death of testator, or even the execution of the will), lot No. 31 must 'belong' to Henry, and, if the will is to be given full force and effect, 'free from every claim and incumbrance.' If this is correct, then, under the will, Henry owns lot No. 31, 'free from every claim of accounting,' rents, or anything else; and 'free from every incumbrance,' dower, conditional estate in Oliver and Hannah, condition precedent, etc. The master has found that Oliver and Hannah and plaintiff have failed to comply with the terms of the will, and that neither of them has refunded to Henry the money paid on the mortgage from his 'personal account.' I concur with him. The will was probated on April 27, 1887, and on the same day Oliver Perry and Henry Stover Perry qualified as executors. The law allows one year in which to collect in the assets of an estate, and, in contemplation of law, a year is a reasonable time in which to settle an estate. The building and loan association was satisfied on February 9, 1891. Oliver and Hannah were not given an indefinite time in which to comply with the terms of the will. They were given, by implication, a reasonable time. Surely, a 'reasonable time' ended in a year after the grant of letters; and certainly when the mortgage debt was paid in full by Henry (a period nearly four years after the probate of the will), and Henry called upon Oliver and Hannah and plaintiff to repay to him the money he had advanced in satisfying the mortgage, and they 'failed' to comply, and thereupon lot No. 31 became the individual and absolute property of Henry, 'free from every claim and incumbrance.' I am satisfied with the construction placed by the master upon the conveyances of Oliver and plaintiff to Henry, executed, respectively, on June 22, 1891, and March 18, 1891.

"Now, in regard to the claim of dower set up by the defendant Amarantha Perry, as the widow of Oliver Perry, Jr. Her claim to dower depends upon her husband's interests in the lot. If it exists, it had its origin in his estate, and she takes it subject to every burden, condition, or liability which testator placed upon her husband. Her dower right is dependent upon the estate of Oliver. It is true that the fee to land must vest in some one; it cannot be hung up in air. But the fee to land will pass from one person to

another if a will so directs, and, if necessary to carry out the intention and provisions of a will, the fee will be considered as vested in the person to whom the property is adjudged to belong. I concur with the master in his finding that Amarintha Perry is not entitled to any dower in this lot No. 81.

"The exceptions that the master 'failed to find' as stated in exceptions 1, 2, 3, and 4 are overruled. Under the testimony, I do not see how he could have reached any such conclusions.

"Exceptions 6 and 7 are overruled. Incidentally, they have already been considered.

"Wherefore, it is ordered, adjudged, and decreed that the report and conclusions of the master be, and hereby are, confirmed, and made the judgment of this court; and, further, that the demands set up in the answer of all the defendants, except the answer of the defendant Henry S. Perry, be, and hereby are, refused and dismissed; that the complaint herein be, and hereby is, dismissed; and judgment is hereby given to Henry S. Perry in his favor, and against the plaintiff and the defendants above, and for his costs and disbursements, to be taxed by the clerk of this court."

The following are the grounds of appeal:

"(1) Because his honor erred in holding that the amount due on the mortgage debt, to wit, the sum of \$1,609.60, was paid as follows:

|   |            |
|---|------------|
| By Oliver Perry before his death.....             | \$ 50 00   |
| By rents, collected and paid by H. S. Perry ..... | 900 50     |
| By Henry S. Perry, personally.....                | 646 60     |
| Penalties .....                                   | 9 60       |
|   | <hr/>      |
|   | \$1,606 70 |

—There being no evidence to that effect before the court.

"(2) Because his honor erred in holding, with the master, that Oliver Perry, the younger, never had such a legal estate in the property, 81 Cooper street, as would subject the same to his wife's right of dower.

"(3) Because his honor erred in failing to find that the consideration expressed in a deed may always be inquired into by parol, for the purpose of showing the real consideration, and whether there was any consideration.

"(4) Because his honor erred in failing to find that, it appearing that the consideration expressed in the deeds did not in fact exist, the deeds should be set aside.

"(5) Because his honor erred in failing to find that the deeds, having been made under a mistake of fact, should be set aside.

"(6) Because his honor erred in failing to find that, the grantors having been induced to execute and deliver the said deeds by a misstatement of their rights, under the facts of the case, the said deeds should be set aside.

"(7) Because his honor erred in failing to find that there should be an accounting by the defendant Henry S. Perry, of his rents

and profits accruing from the property in dispute, and also a vouching of the amounts which he claims to have paid the building and loan association.

"(8) Because his honor erred in failing to find that should, in said accounting, it appear that the said Henry S. Perry has paid to the said building and loan association sums in excess of the rents and profits aforesaid, the plaintiff and defendants, representing the interests of Oliver Perry, Jr., be allowed to refund to him such excess, and thereupon be permitted to take their respective equal shares in the property.

"(9) Because his honor erred in failing to find that, upon such accounting, the said property should be sold, and out of the proceeds any inequality of interests be first settled, and the partition be then granted as prayed in the complaint."

Charles E. Prioleau, for plaintiff. W. St. Julien Jervey, for defendants.

McIVER, C. J. The plaintiff brings this action for the purpose of obtaining partition of a certain lot of land in the city of Charleston among himself and the defendants, and also for an account by the defendant Henry S. Perry of the rents and profits of said lot. The case, as prepared for argument here, contains nothing but copies of the pleadings, the master's report, the decree of the circuit judge, and the exceptions thereto, without any evidence, or even any general statement thereof, although some of the questions made by the appeal turn entirely upon the evidence. It is true that it is stated that a copy of the testimony and the master's report is filed with the clerk of the supreme court "for reference by either party." This mode of preparing a case for argument in this court has been condemned by this court in a recent decision in the case of *In re Perry's Estate*, 20 S. E. 84, and parties must take the risk of such incomplete preparation. It is true that this is an "agreed case," and, under the provisions of subdivision 5 of section 345 of the Code of Civil Procedure, this court would not be at liberty to dismiss the appeal, or to decline to hear the case, or to require anything else incorporated in the case, but is bound to hear the case upon what appears in the agreed case, but it is not bound to search elsewhere for materials upon which to base its decision. If the court should be required to explore the vast mass of records in the clerk's office to obtain the facts upon which to base its decision, and which should appear in the case, it is very manifest, under the pressure of business on this court, it would work great delay and injustice to other suitors. We adhere, therefore, to what has been well said in the case above cited. We must, therefore, in considering this appeal, confine ourselves to what appears in the case, as prepared for argument here, just as we do in all other appeals. We must assume that the facts of the case are



fully and fairly stated in the master's report, which is incorporated in the case, and which should be incorporated in the report of the case. From this we learn that the main question in the case turns upon the proper construction of the will of Oliver Perry, Sr., under which all parties claim. As we understand it, the master held that Oliver Perry, Jr., and Hannah D. Perry, under whom the plaintiff and the defendants other than Henry S. Perry claim, never had any estate in the premises sought to be partitioned, and could not have until they had paid certain amounts due to Henry S. Perry, which he found, as matter of fact, they had never done. We infer that he also found that the plaintiff and the said Oliver Perry, Jr., had released, by deed, to the said Henry S. Perry, whatever interest they might have had in said premises. It seems, also, that the defendant Amarintha Perry, who is the widow of Oliver Perry, Jr., at some stage of the case, set up a claim of dower in the interest of her deceased husband in the premises, though no such claim is set up in her answer, and, on the contrary, she there claims her interest as heir at law of her husband, which is inconsistent with the claim of dower. Upon this report and the exceptions thereto the case came before his honor, Judge Aldrich, who rendered a decree overruling all the exceptions, and confirming the report of the master, and rendered judgment in favor of the defendant Henry S. Perry. From this judgment the plaintiff, together with the defendants Amarintha Perry and her children, appeal, upon the several grounds set out in the record, which, together with the decree of the circuit judge, should be incorporated in the report of this case.

The first ground of appeal presents a pure question of fact; and, under the well-settled rule, the finding of the master, concurred in by the circuit judge, will not be disturbed by this court, unless it is without any testimony to sustain it, or is against the manifest weight of the evidence, which we certainly cannot say is the case here, as there is no testimony set out in the case, and nothing, therefore, to warrant such a conclusion.

The second ground of appeal imputes error to the circuit judge in holding that Oliver Perry, Jr., never had such a legal estate in the lot in question as would subject the same to his widow's right of dower. To determine the question raised by this ground of appeal, it will be necessary to consider the terms of the will of Oliver Perry, Sr., disposing of the lot here in question. Those terms are thus stated in the master's report, which affords the only information which we properly have upon the subject: "By this will, testator devises to his three children, Oliver Perry, Jr., Henry Stover Perry, and Hannah D. Perry, 'to be owned by them, share and share alike, all my real property, consisting of the following: House and lot No. 29 Cooper street, which shall vest imme-

diately after my death, and the house and lot No. 81 Cooper street [the latter lot being the one in contention here], next to the above-named property, the latter being mortgaged to the loan and trust company. As soon as the mortgage on the above property is satisfied, I direct that it shall be owned by my three children above named, share and share alike; provided the said Oliver Perry, Jr., and the said Hannah D. Perry shall pay, or cause to be paid, to the said Henry Stover Perry, whatever amounts the said Henry Stover Perry has paid out on his own personal account, or may hereafter pay out on his own personal account, in satisfying the mortgage on the property. Henry Stover Perry must produce receipts or other proper proof of whatever money he claims to expend; and Oliver Perry, Jr., and Hannah D. Perry must each pay one-half of whatever amounts are paid out by Henry Stover Perry in clearing the property of the mortgage. If the said Oliver Perry and the said Hannah D. Perry shall fail to pay any and every just debt due the said Henry S. Perry as above, then the property shall belong to the said Henry Stover Perry, free from every claim and incumbrance.'" We do not think there can be a doubt that the intention of the testator, which must govern, was that, while the title to lot 29 should vest in the three children immediately upon the death of the testator, no interest or estate in lot No. 31 should vest in either Oliver Perry, Jr., or Hannah D. Perry, until they had refunded to Henry S. Perry the amounts which he had already paid, as well as what he might thereafter pay towards relieving the last-mentioned lot from the lien of the mortgage referred to. Now, as the master has found as a matter of fact (which finding we must, under the rule, accept) that these amounts never were refunded to Henry S. Perry either by Oliver or Hannah, it would seem to be clear that no estate in said lot ever vested in either of them, but the entire estate remained in Henry S. Perry. We agree with the master and the circuit judge in rejecting the claim of dower.

As to the third, fourth, fifth, and sixth grounds of appeal, they all, except the third, which raises an abstract question of law, which, so far as appears, was not pertinent to any point decided in the case, turn upon questions of fact, which the case affords us no means of investigating, and need not therefore be considered.

The seventh ground imputes error to the circuit judge in failing to require an accounting from Henry S. Perry for the rents and profits of the lot, and also a vouching of the amounts claimed to have been paid by him towards the satisfaction of the mortgage. It appears from the master's report that Henry S. Perry did show, to the satisfaction of the master, that he had made payments on the mortgage debt, which had never been refunded to him by either Oliver or

Hannah D. Perry; and therefore, as we have seen, Henry S. Perry could not be called to account for the rents and profits of the lot.

What we have already said is sufficient to dispose of the eighth ground, for certainly, as the circuit judge held, the appellants could not, in any view of the case, be allowed anything more than a reasonable time to refund the amounts advanced by Henry S. Perry towards the satisfaction of the mortgage debt; and clearly a period of nearly four years was amply sufficient.

The ninth ground is also disposed of by what has been said. If no title to the lot vested in Oliver and Hannah D. Perry until Henry S. Perry was reimbursed, surely neither they nor their heirs at law could have any claim to have the lot sold; especially after whatever interests they may have had in the lot had been released to Henry S. Perry.

The judgment of this court is that the judgment of the circuit court be affirmed.

POPE, J., concurs.

(115 N. C. 158)

JONES v. EMORY et al.

(Supreme Court of North Carolina. Oct. 24, 1894.)

COMPETENCY OF WITNESS—TRANSACTIONS WITH DECEASED.

In an action for land, a person living as a member of plaintiff's household on the land, and aiding in her support, is not a party "interested in the action" (Code, § 590), so as to be incompetent to testify in regard to a transaction with the deceased father of defendants.

Appeal from superior court, Wake county; Hoke, Judge.

Action by Rowan Jones against Elizabeth Emory and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

T. R. Purnell, for appellants. Armistead Jones, for appellee.

AVERY, J. The general rule (Code, § 589) is that no person offered as a witness shall be excluded on account of his interest in the event of the action. The exception (Code, § 590) is that neither a party interested in the event of the action, nor any one from, through, or under whom such interested person derives his interest or title by assignment or otherwise, shall be examined as a witness, etc., concerning a personal transaction or communication between the witness and the deceased person. The witness Ephriam Emory lived with the plaintiff on the land in controversy, and helped to support her. If she should lose the suit, he would seek a home elsewhere with her, but he had no legal or pecuniary interest in the lot in controversy. The statute does not disqualify every witness who, in the broadest sense of

the term, is interested in the event of the action, but only such as have a direct and substantial or (to apply the principle more exactly to the case before us) a direct legal or pecuniary interest in the result. Unless the witness bear such a relation to the controversy that the verdict and judgment in the case may be used against him as a party in another action, he is not disqualified to testify. The fact that the witness, as a member of the family, must move out along with the servants of the plaintiff if the defendant should prevail in this suit, would not, he being neither privy nor party, estop him from setting up a claim to the land in a future action as against the present defendants. Were this record offered in such a suit, it would be res inter alios acta. *Mull v. Martin*, 85 N. C. 406; *Williams v. Johnson*, 82 N. C. 288; *White v. Beaman*, 96 N. C. 122, 1 S. E. 789. When we ignore this test, and give to the word "interest," as used in statutes, a meaning so broad as to include every person who stands in such a relation to the controversy as would naturally be calculated to enlist his prejudices for or excite favorable emotions in his breast towards the party on whose behalf he is introduced as a witness, we embark on a sea of uncertainty, without chart or compass. This same principle was evidently applied in *Lawrence v. Hyman*, 79 N. C. 209, where the testimony of one of the trustees of a church, who was a party, was excluded as to such a transaction, while that of members who worshiped in the congregation was admitted. To show how unsatisfactory it would prove to dispense with this test, one need but recall the fact that every citizen is interested in having good roads constructed in the county in which he resides, but it does not follow that every such citizen is a proper or necessary party to a proceeding to lay off a public road, because the statute requires that every person interested must be notified, and allowed the opportunity to resist the order asked for. It has been held that in such cases a reasonable construction, and one that can be applied as a test, must be adopted. 11 Am. & Eng. Enc. Law, 422; *Taylor v. Town of Normal*, 88 Ill. 527. So, too, we would say in common parlance that every citizen of a county or of a state is interested in collecting tax claimed as due to the county or state when he has no such direct legal or pecuniary interest as would make him a proper party to a proceeding against a delinquent tax collector. We think that there was no error in admitting the testimony of Ephriam Emory.

After the trial the defendants moved for a new trial on the ground that there was not sufficient evidence to establish a parol trust. We think the testimony that the plaintiff had entered upon the land more than 20 years before the trial, under a bargain with one Saintsing, who was a son-in-law of Wilks Emory, and had built a house upon it,

and had paid taxes and lived thereon undisputed, claiming the property as her own, with her father, Willis Emory, until his death; that the proceeds of a sale of a horse, a gun, and other personal property had been applied in payment of the purchase money by her or for her; and that exchanges of portions of the two lots had been from time to time made; together with the reasons given according to the witnesses for agreeing to have title to both lots made to W. C. Emory, the father of the defendants,—was sufficient to go to the jury as tending to establish the parol trust. *Shields v. Whitaker*, 82 N. C. 519; *Wood v. Cherry*, 73 N. C. 110; *Turner v. Eford*, 5 Jones, Eq. 106. The recognition of her right by W. E. Emory during his life by exchanging parts of two lots so as to throw both into better shape grows in importance when considered with the fact that the controversy did not arise till after the death of both Willis Emory and W. C. Emory. If the testimony for the plaintiff is to be believed, in these exchanges the father of the defendants repeatedly recognized the rights and dominion of the occupant of the lot in controversy. This was a direct recognition of an adverse interest in her or her father. The other evidence tends to explain who was the claimant, and the jury have found that the consideration proceeded from, and the recognition of right was intended for, the plaintiff. It is not material whether there was or was not conflicting evidence, if that offered by the plaintiff was sufficient to go to the jury. *Smiley v. Pearce* (N. C.) 3 S. E. 631. There was no error in submitting the issues to the jury. Affirmed.

(115 N. C. 563)

**CONLY v. COFFIN.**

(Supreme Court of North Carolina. Oct. 24, 1894.)

**RESCISSION OF CONTRACT — MISREPRESENTATIONS.**

Misrepresentations as to the value of land, when it is not peculiarly within the knowledge of the vendor alone, will afford no grounds for relief to the vendee through rescission of the contract.

Appeal from superior court, Swain county; Armfield, Judge.

Action by J. B. Conly against E. G. Coffin for the rescission and cancellation of an executed contract on the ground of misrepresentation. Judgment for defendant, and plaintiff appeals. Affirmed.

W. W. Jones, for appellant. Fry & Newby, for appellee.

**BURWELL, J.** It is alleged in the complaint that J. B. Conly was induced by the false and fraudulent representations of the defendant to execute to him a deed for certain valuable property in this state, and to accept in exchange therefor from the defendant certain real estate in the state of Kansas. He brought this action to have the whole

contract rescinded, and, he having died, his heirs and personal representative prosecute this suit. Since his honor held that in no aspect of the case could the plaintiff recover, we must consider the evidence in the light most favorable to them. The false representations consisted in the allegation that the Kansas property was worth "not less than twelve thousand dollars." The evidence tended to show that this statement was false,—grossly so,—and that the defendant made it to cheat and defraud the said Conly, who says in his complaint that he "relied entirely upon the representations of the defendant."

Let us assume first that he entered into this contract solely because of this alleged false and fraudulent representation of the defendant. "A mere false assertion of value, when no warranty is intended, is no ground of relief to a purchaser, because the assertion is a matter of opinion, which does not imply knowledge, and in which men may differ." 2 Kent, Comm. p. 486. "The vendor of property may indeed know that the property is not worth what he says it is worth, but the very fact that the representation is made by the owner is enough to put any person of average intelligence on his guard." 1 Story, Eq. Jur. p. 207, note. "Simplex commendatio non obligatio" is a maxim of sales, not only in the Roman but in the common law.

\* \* \* The reason why the law treats such statements as idle, so far as it does so treat them, is that they are only 'trade talk,' and ought not to be accepted as trustworthy. As owner, he will naturally set a high value upon his own; and, if he is about to sell it, everybody knows that the temptation to make the most out of it is characteristic of human nature. The law will not help the purchaser who accepts the exaggerated or false statements of value made by the vendor or his agent." Bigelow, *Frauds*, 491. In *Saunders v. Hatterman*, 2 Ired. 32, it was decided that where at the time of the sale of land a false and fraudulent affirmation of its value was made, yet an action on the case for deceit will not lie, as the vendee might by reasonable diligence have informed himself of its true value. And in *Setzar v. Wilson*, 4 Ired. 501, *Ruffin, C. J.*, says: "The law does not give an action against the vendor for his false affirmation as to the value of the thing sold." "A misrepresentation, to be material, should be in respect of an ascertainable fact, as distinguished from a mere matter of opinion. A representation which merely amounts to a statement of opinion \* \* \* goes for nothing, though it may not be true, for a man is not justified in placing reliance on it." Kerr, *Fraud & M.* p. 83. This author says that "a man who relies on such affirmation, made by a person whose interest might so readily prompt him to invest the property with exaggerated value, does so at his peril, and must take the consequences of his own imprudence." There was no evidence tending to show that the value of this property

was a matter peculiarly within the knowledge of the defendant; that it was not known to other persons, to whom the purchaser might have applied for information; that the defendant did anything to prevent investigation on his part; or that there was any relation of trust and confidence between them that might have that effect. Hence, the principles announced by the learned authors quoted above, and established by the former decisions of this court, have application here; and the vendee, having seen fit to purchase the property at the price set upon it by the vendor, and in entire reliance upon his statements as to its value, cannot get relief by the rescission of the bad bargain he so negligently made.

It appears from the evidence that J. B. Conly, of his own accord, or at the suggestion of the defendant, before the consummation of the trade, inquired by telegraph of the mayor of the town in Kansas where the property was situated, concerning its value, and this inquiry (the mayor being absent) came into the hands of one Baker, who was the resident agent of the defendant, and had charge of the property for him, and was answered by said agent in the name of the mayor. There was no evidence, as it seems to us, that this representation of the value of the property was within the scope of Baker's agency, or that it was made at the suggestion of the defendant, or with his knowledge or consent. There was no evidence that he knew of the existence of the telegram until informed of it by Conly after the whole trade was consummated. It seems to us, moreover, that this telegram purporting to come from the mayor was of such a nature as should have put him on his guard. The defendant, he says, had represented to him that the Kansas property which he offered to exchange for his North Carolina property was worth twelve thousand dollars. He made inquiry of a disinterested person, as he supposed, and was told in effect that the defendant had misrepresented the value of his property,—that it was not worth twelve thousand dollars, in the opinion of the sender of the telegram, but only eight or ten thousand dollars. If, after he received this information, he still chose to rely on what the defendant had told him, he ought not now to ask that a contract so negligently entered into by him should be rescinded, for it appears that he consummated the contract after he was informed that the defendant's statement as to the value of his property was false. His honor therefore did not err when he refused to submit the issues tendered by the plaintiff, and when he intimated that there was no evidence to support the affirmative of the issues that were submitted. We think there was error in the exclusion of the evidence offered by the plaintiff to show that the defendant had told Conly that the property was worth \$12,000, and that the statement, when made, was known to be false, for those facts might have been material upon the issues submitted. But the error

became harmless when, as appears here, the excluded evidence could not, if it had been admitted, have changed the result. There would still have been no sufficient evidence to go to the jury to establish the affirmative of the issues, the burden of which was upon the plaintiff. Affirmed.

(115 N. C. 64)

**McCADDEN et al. v. PENDER et al.**  
(Supreme Court of North Carolina. Oct. 23, 1894.)

Appeal from superior court, Edgecombe county; Graves, Judge.

Action by McCadden & McElwee and others against D. Pender and others to restrain payment of certain notes, and for a receiver. From a judgment overruling a demurrer to the complaint defendants appeal. Affirmed.

John L. Bridgers, for appellants. Don Gilliam, for appellees.

**PER CURIAM.** We are of the opinion that there is no misjoinder, and that a cause of action is stated in the complaint. We think it best to defer the discussion of the questions argued by counsel until the case shall be tried, and the facts more fully developed. Affirmed.

(115 N. C. 120)

**PETIT v. WOODLIEF.**  
(Supreme Court of North Carolina. Oct. 24, 1894.)

**RELEASE AND DISCHARGE—ACCEPTANCE OF DRAFT.**

Where a draft for part of an indebtedness was sent by letter, both draft and letter stating that it was to be in full payment of the debt, the creditor, by converting the draft into money, elects to accept the compromise, and the debt is thereby discharged in full.

Appeal from superior court, Wake county; Hoke, Judge.

Action by Charles W. Petit against L. Woodlief on a contract for repairing a boiler. Judgment for plaintiff, and defendant appeals. Reversed.

T. R. Purnell, for appellant. Strong & Strong, for appellee.

**AVERY, J.** The defendant inclosed in a letter a draft to the plaintiff for \$300, setting forth upon its face that it was to operate as a payment in full of a claim for repairing an engine. The defendant contended that only \$250 was in fact due, but stated in his letter that he had concluded to send \$300. The letter and draft, construed together, constituted a proposal of compromise; and even though in reality a larger sum was due, as the jury found, if the offer was accepted, either expressly or by implication arising from the defendant's conduct, there was not simply a valid executory agreement, but an executed contract, as in that event the payment operated to discharge the whole claim.

The defendant, Woodlief, not only stated in his letter that the draft for \$300 was inclosed "to settle with you [plaintiff] in full to date," but according to the undisputed testimony the same words, or the equivalent expression, "settlement in full to date," were incorporated in the draft itself, which was drawn on Strudwick & Royster, and was afterwards destroyed by fire. When the plaintiff indorsed this draft and collected the money, with the proposal staring him in the face that it should, if received, operate to discharge the whole debt, instead of returning it to the drawer and declining the offer, we think that his conduct amounted to an acceptance of it, and the debt was therefore discharged in full. Our statute (Code, § 575) having been declared constitutional, the offer of a part in satisfaction of the whole, if accepted, discharges a debt as fully and effectually as if the entire sum originally due is paid in full. When the amount due is uncertain or unliquidated, if an offer in satisfaction of the claim is accompanied with such acts and declarations as amount to a condition that the money shall be accepted only as a payment in full of the claim, and the party to whom the offer is made must of necessity understand from its very terms that if he takes the money he takes it subject to such condition, then in law the payment operates to discharge the whole claim. *Preston v. Grant*, 34 Vt. 201; *Townslée v. Healey*, 30 Vt. 522; *Boston Rubber Co. v. Peerless Wringer Co.*, 58 Vt. 553, 5 Atl. 407. Under the construction placed upon our statute, the offer of a less sum than is due, when the amount of the debt is certain, is in effect the same as an offer of a given sum in satisfaction of a contingent or unliquidated claim. We cannot rely as authority, therefore, upon the earlier cases decided by the court, or upon the authorities in other states, where the principle still prevails that an agreement to accept a payment of a part of an unconditional claim for a sum certain in satisfaction of the whole is, unless there is an actual release, but a *nudum pactum*. We must therefore be governed by the rule adopted in reference to offers to settle contingent claims, because they are analogous to proposals of compromise of indebtedness under our statute. The plaintiff knew from the face of the draft that the defendant intended it to be accepted upon condition that it should discharge the debt, and that the draft itself should be in the nature of a receipt or voucher for the full payment. With that knowledge he chose to use the draft, and take his chances to collect more. We think the question of intent was no more an open one, for the jury to determine upon the testimony, than would be the question of acceptance, where the drawee writes the word "Accepted" on the back of a bill of exchange, and signs his name under it. There is no difference in principle between the case at bar and that of *Boykin v. Bule*,

109 N. C. 501, 13 S. E. 879. There the creditor agreed by letter to accept an offer from the debtor of a part in discharge of his whole debt, but when the latter forwarded a check in compliance with the agreement the creditor entered the amount paid as a credit. In our case the defendant sent a draft and a letter, both expressing the condition upon which the draft was to be accepted; the terms of the proposition being unmistakably, we think, that the acceptance of the money was an implied assent to the proposal, the legal effect of which was to discharge the whole debt. We are of opinion, therefore, that in the refusal to give the instruction that the claim was satisfied there was error, for which we must grant a new trial.

(115 N. C. 68)

## ROLLINS v. KEEL et ux.

(Supreme Court of North Carolina. Oct. 24, 1894.)

## CONSTRUCTION OF WILL—"HEIR" USED IN SENSE OF "ISSUE."

Testator devised lands to his only son, and provided that, in case of the death of such son "without any lawful heir," the lands should go to testator's brother on the expiration of the widowhood of testator's wife. *Held*, that the phrase "without any lawful heir" should be construed to mean "without issue."

Appeal from superior court, Pitt county; Bynum, Judge.

Action by Verdie E. Rollins against William Keel and wife to recover possession of land. Judgment for defendants, and plaintiff appeals. Reversed.

Larry I. Moore and Latham & Skinner, for plaintiff.

SHEPHERD, C. J. "In interpreting wills, it is the duty of the court to ascertain and give effect to the intention of the testator. Technical rules of construction and decided cases serve only as aids, rather than as binding rules, in the discharge of such duties. The meaning of every will and its several parts depends largely upon the circumstances of the testator, as these appear from the will itself. The meaning attributed by him to words and phrases, when it appears, must prevail, however different this may be from that ordinarily implied by such words and phrases in other wills or other written instruments. The sole and controlling purpose is to ascertain what the testator, whose will may be under consideration, intended." Applying these principles of interpretation to the will of Rufus Rollins, we experience no difficulty in reaching the conclusion that the words "any lawful heir" should be construed to mean "issue." In other words, the limitation should be read "that if the said Joseph shall die without issue, then the same [the lands devised], after the expiration of the widowhood of my wife, shall inure to my brother, Reuben A. Rollins, his heirs and

assigns, forever." It is plain that the devisor intended that his widow should have the land until Joseph attained the age of 18 years, and that if he should die without issue she should have it only during her widowhood. If the words "lawful heir" are to be taken in their technical sense, the widow would, in the event of Joseph's dying without issue, or brother or sister, or the issue of such (and this was the case), take the fee as heir of her son. This would defeat the intention of the devisor, as it is clear that he did not intend that she should have any interest in the land in the event of her marrying again. This view is well sustained by the reasoning of the court in *Patrick v. Morehead*, 85 N. C. 62. Joseph having died without issue, and the widow having married, the limitation over to Reuben must take effect; and his heir, the plaintiff, is entitled to recover. Reversed.

(115 N. C. 556)

**PENNIMAN et al. v. ALEXANDER.**

(Supreme Court of North Carolina. Oct. 24, 1894.)

**INSTRUCTIONS—HARMLESS ERROR.**

The giving of instructions, in the absence of evidence to which they are pertinent and which warrants them, is not ground for reversal, unless they were prejudicial.

On petition by B. J. Alexander for a rehearing. Denied.

For former opinion, see 17 S. E. 530.

The errors set out in the defendant's petition for a rehearing are as follows: "(1) It was erroneous to construe the instrument sued on solely by what appeared upon its face, and to exclude from consideration the surrounding circumstances. (2) It was error for the court, in putting its construction, to stop where it did, without advising the jury when, upon the face of the instrument, or when, upon the face of the instrument, interpreted in the light of the surrounding circumstances, the money sued for would become due from the defendant to the plaintiff. (3) It was erroneous for the court to tell the jury that the defendant substantially admitted that its construction of the instrument was correct."

James H. Merrimon and Chas. A. Webb, for appellant. Chas. A. Moore and J. B. Batchelor, for appellees.

**BURWELL, J.** Concerning the first three assignments of error, we deem it sufficient to say that the matters involved in them have all been heretofore considered by us, and the argument of counsel upon the hearing of this petition has failed to show us that we omitted to give attention to the exceptions to his honor's charge here again pointed out and insisted on.

The fourth assignment is as follows: "(4) It was error to leave it to the jury to pass upon material facts, without evidence upon

which the jury could find the existence of such facts." This refers to the following portion of the charge: "If the jury find that there was at the time of the writing this agreement, outside of the writing, and that Mooney quit the building before he did the work which was to have been done before the second payment was to be paid, then the plaintiff cannot recover of the defendant in this action. Of course, if there was any fraud or collusion between Mooney and Alexander to defraud the plaintiff, Alexander could not by fraud avoid his liability. Or, if Alexander prevented Mooney from going on to complete the work, he could not be allowed by his own wrongdoing, by his unlawful interference to prevent Mooney from doing the work, relieve himself from liability to pay. But the plaintiff must show you that there was such fraud and collusion, or that Alexander did prevent Mooney from going on with the work on his contract with Alexander." It is to be noted in this connection that upon the trial, as the case shows, neither of the parties requested his honor to give any special instructions, or excepted then to the instructions which he gave the jury. It is evident from the record that the issue of fact between the parties was well understood. His honor had heard the examination of witnesses and their cross-examinations, and the argument of counsel to the jury. No doubt it had been urged in the argument there, as it was here, that there were circumstances brought out in the evidence from which the jury might infer that the contractor's abandoning the work so soon after the defendant's acceptance of the order sued on was to enable the latter to escape liability for the payment of that order. It is often difficult to distinguish between that "very slight evidence," "a scintilla" (*State v. White*, 89 N. C. 462), which a jury should not be allowed to consider, and those facts and circumstances which rise to the dignity of substantial evidence of the thing intended to be established. His honor had not only heard the words of the witnesses, but had had opportunity to observe their conduct. There was no request from the defendant's counsel to take away from the jury the consideration of this matter. Arguments had been made to them, and no doubt, as we have said, the plaintiffs' counsel, without objection on the part of defendant, had urged that there was some foundation for his allegation that the contractor quit the work after the acceptance of the order and the delivery of plaintiffs' brick, because of a collusive arrangement between the defendant and himself. Under these circumstances, his honor seems to have felt it his duty to caution the jury in the defendant's behalf, and he said to them the words quoted above. In *Leach v. Linde*, 108 N. C. 547, 13 S. E. 212, it is said: "The court should not give instructions, special or otherwise, in the absence of evidence to which they are perti-

ment, and that warrant them. It would be error to do so if they prejudiced the adverse party." The rule thus stated is well established. It seems to us that under the circumstances the instructions thus given by his honor could not have prejudiced the defendant's cause. We do not say that there are not to be found in the testimony of the witnesses, as set out in the case, statements from which the jury might have been left to infer that there was collusion between the defendant and his contractor. We do not think it necessary now to review and analyze the evidence to determine that matter. The counsel of the plaintiffs called our attention to many facts there set out, which, as they insisted, supported their theory in this particular; and their argument upon this part of the cause confirmed us in the opinion that his honor said nothing to the jury of which, under all the circumstances, the defendant can justly complain. Petition dismissed.

(95 Ga. 567)

**WILLIAMS v. STATE.**

(Supreme Court of Georgia. Oct. 8, 1894.)

**MOTION FOR NEW TRIAL—DISMISSAL—FILING BRIEF OF EVIDENCE.**

The motion for a new trial having, by an order passed at the term when the case was tried, been set for a hearing on a day named in vacation, the order providing that the movant should have until that day to make out and file a brief of the evidence, and the hearing having then been continued until the next term of the superior court by an order which preserved until the hearing at that term the movant's right to file and have approved a brief of the evidence, and the brief having been filed before that term, it was error to then refuse to approve it and to dismiss the motion on the ground that no brief of evidence had been filed within 30 days from the adjournment of the court at which the verdict was found. *Water Co. v. Gale*, 91 Ga. 813, 819, 18 S. E. 11; *Adamson v. Melson* (decided Aug. 31, 1894) 20 S. E. 253.

(Syllabus by the Court.)

Error from superior court, Douglas county; C. G. Janes, Judge.

James F. Williams was convicted of a crime. A motion for a new trial was dismissed, and defendant brings error. Reversed.

W. A. James, for plaintiff in error. A. Richardson, Sol. Gen., for the State.

**PER CURIAM.** Judgment reversed.

(95 Ga. 474)

**BROCK v. STATE.**

(Supreme Court of Georgia. Oct. 8, 1894.)

**SEDUCTION—EVIDENCE.**

According to the evidence in behalf of the state, interpreted, not by its mere letter, but by its substantial import, in the light of actual facts and of physical laws and the ordinary principles of human nature, the intercourse in December, 1891, was neither rape nor seduc-

tion, but fornication only. This being so, it was legally impossible that the offense of seduction could have been committed by the same man on the same woman in February thereafter. Applying the law correctly to the evidence, the verdict was unwarranted, and the court erred in not granting a new trial.

(Syllabus by the Court.)

Error from superior court, Dude county; T. W. Milner, Judge.

Dude Brock was convicted of seduction, and brings error. Reversed.

T. J. Lumpkin, J. G. Hall, B. T. Brock, and J. W. Harris, Jr., for plaintiff in error. A. W. Fite, Sol. Gen., for the State.

**PER CURIAM.** Judgment reversed.

(95 Ga. 496)

**BRISCOE et al. v. STATE.**

(Supreme Court of Georgia. Oct. 8, 1894.)

**NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—INCOMPETENCY.**

1. Newly-discovered evidence that another person has admitted that he and certain others committed the offense is no cause for a new trial, inasmuch as the admissions would not be competent evidence in behalf of the accused were a new trial ordered. *Kelly v. State*, 82 Ga. 441, 9 S. E. 171, and cases cited.

2. The evidence warranted the verdict, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Henry Briscoe and Colonel Mathis were convicted of a crime. A motion for a new trial, on the ground of newly-discovered evidence, was denied, and defendants bring error. Affirmed.

G. A. H. Harris and J. B. F. Lumpkin, for plaintiffs in error. W. J. Nunnally, Sol. Gen., for the State.

**PER CURIAM.** Judgment affirmed.

(95 Ga. 497)

**JONES v. STATE.**

(Supreme Court of Georgia. Oct. 8, 1894.)

**OBJECTIONS TO JUROR—WAIVER.**

1. The exercise of due diligence by the accused and his counsel would have enabled them to discover before accepting a juror put upon them under the name of "T. G. Howell" that he was the same person whose name appeared in the bill of indictment as "Thomas G. Howell," and that he was a member of the grand jury which found the bill.

2. The evidence fully warranted the verdict. The newly-discovered evidence is not such as to authorize the granting of a new trial, and no error was committed which would justify this court in setting aside the verdict after its approval by the trial judge.

(Syllabus by the Court.)

Error from superior court, Chattooga county; W. M. Henry, Judge.

John Jones was convicted of a crime, and brings error. Affirmed.

Wesley Shropshire and Copeland & Jackson, for plaintiff in error. W. J. Nunnally, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

(95 Ga. 459)

**BEARDEN v. STATE.**

(Supreme Court of Georgia. Oct. 8, 1894.)

BURGLARY—WHEAT CONSTITUTES.

Where the house broken and entered was not a dwelling, nor within the curtilage, and was neither alleged nor proved to be a place of business, but was in fact a corncrib or barn in which corn was stored, there was no burglary. The offense proved was larceny from the house only.

(Syllabus by the Court.)

Error from superior court, Richmond county; H. C. Roney, Judge.

John Bearden was convicted of burglary, and brings error. Reversed.

Dwight L. Pendleton and J. H. Foster, for plaintiff in error. W. H. Davis, Sol. Gen., for the State.

PER CURIAM. Judgment reversed.

(95 Ga. 465)

**CORLEY v. STATE.**

(Supreme Court of Georgia. Oct. 8, 1894.)

ASSAULT WITH INTENT TO MURDER — CONVICTION OF LESSER OFFENSE — EVIDENCE — ARREST OF JUDGMENT—TIME FOR EXCEPTIONS.

1. The motion in arrest of judgment is controlled by *Moody v. State*, 54 Ga. 660, in connection with *Arnold v. State*, 51 Ga. 144; *Isom v. State*, 9 S. E. 1051, 83 Ga. 378; and *Jenkins v. State*, 17 S. E. 693, 92 Ga. 470.

2. The indictment being for an assault with intent to murder, and alleging that with a pistol, a rock, and a large stick the accused did assault, beat, and shoot a named person, a conviction thereon could be had for shooting at that person; and, there being evidence that the accused shot a pistol, making thereby a wound upon the person named in the indictment, although there was conflicting evidence both as to the shooting and the cause of the wound, there was enough on which to base a charge to the jury authorizing them, if they thought the evidence warranted it, to find the defendant guilty of the minor offense of shooting at another.

3. The sentence having been pronounced in October, it was too late to except thereto in the following June. There was no error in denying a new trial or in refusing to arrest the judgment.

(Syllabus by the Court.)

Error from superior court, Dekalb county; R. H. Clark, Judge.

Chaney M. Corley was convicted of a crime, and brings error. Affirmed.

A. C. McCalla, J. R. Irwin, and J. N. Glenn, for plaintiff in error. John S. Coudler, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(93 Ga. 719)

**BURCH v. HARRELL et al.**

(Supreme Court of Georgia. April 23, 1894.)

ACTION FOR RENT—SUFFICIENCY OF EVIDENCE—FAILURE TO PRODUCE LEASE.

In an action upon an account for rent, or for use and occupation, the plaintiff can recover upon undisputed and uncontradicted evidence that the defendant has admitted that the account was correct, due, and unpaid, notwithstanding it appears that the defendant, at the time the tenancy was created, took a written lease of the premises from the plaintiff, and this lease is neither produced nor accounted for.

(Syllabus by the Court.)

Error from superior court, Dodge county; C. C. Smith, Judge.

Action by John H. Burch against Harrell, Caldwell & Co. and others to recover rent. Judgment was rendered for defendants, and plaintiff brings error. Reversed.

Roberts & Smith, for plaintiff in error. De Lacy & Bishop, for defendants in error.

LUMPKIN, J. This was an action brought by Burch against Harrell, Caldwell & Co. upon an open account for the "lease of lots of land Nos. 124 & 117, in the 14th Dist. of Dodge county, for turpentine purposes, 12,077 boxes, for the years 1883, 1884, 1885, @ \$20 per thousand." By an amendment it was alleged that the account sued on was for the use or rent of timber for turpentine purposes, of which the defendants had enjoyed the benefits during the years mentioned. It appeared from the testimony of one Woodard, who was introduced by the plaintiff, that the lease from the plaintiff to the defendants was in writing, signed by the plaintiff, and had been delivered by him to the defendants, who, however, had not themselves signed the lease, or given to the plaintiff any written evidence of their obligations to him in respect to the timber leased. After Woodard had testified to these facts, the court, on the ground that the lease was the best evidence of the matter sought to be proved, refused to allow the witness to state how many boxes had been cut in the timber by the defendants, and also ruled out all the testimony previously given by this witness as to the boxing of the timber by the defendants. For the same reason the court also refused to allow the plaintiff to prove by another witness that all of the defendants had admitted to him that the account sued on was correct, due, and unpaid. The plaintiff, as a result of these rulings, having no evidence upon which to go before the jury, was nonsuited, and brings the case to this court for review. Nothing more than has already been stated appears as to what were the contents of the written lease in question.

In *Tumlin v. Furnace Co.* (recently decided) 20 S. E. 44, and which was a very carefully considered case, we again stated and reaffirmed the doctrine, supported by previous adjudications of this court and by other recognized authorities, that, although there



may have been a special contract in writing between the parties as to the subject-matter in controversy, an action upon an open account might be brought and sustained where it appeared that the plaintiff had fully performed his part of the contract, and nothing remained to be done, except for the other party to make payment. If this be sound law, it would seem logically to follow that the plaintiff in such a case would be entitled to prove his action as laid, and consequently that evidence showing a quantum meruit or quantum valebit would be admissible without reference to the written instrument, though, of course, as stated in the case just cited, the writing itself would be admissible in evidence, whether mentioned in the pleadings or not. Of what avail would be the right to bring an action upon an implied assumpsit, the action not being based on any writing, were the plaintiff then denied the right to prove the justice and correctness of his account in any of the methods usually recognized as appropriate for this purpose?

In the case now before us, it does not appear that the writing stated the price per box which the defendants were to pay; but, granting that it did, it was in the possession of the defendants, and could very easily have been produced by them in reply to any evidence which might be introduced by the plaintiff tending to show the actual value per box, and in case of a conflict in this respect the writing would, of course, prevail. It was manifest error to reject the evidence that the defendants took possession of the lands covered by the lease, as well as that showing the number of boxes they had actually cut. It was necessary for the plaintiff to show these facts, and this could not have been done by producing the writing. We suppose, however, the case really turned upon the idea that presumably the written lease stated the price to be paid per box, and that the plaintiff should not be allowed to prove the correctness of the amount charged in the account in any other way than by the writing itself. We think that under the particular facts of the present case this was applying to the plaintiff a rule somewhat too stringent. Suppose the proposed evidence as to the admission made by the defendants had been received, and no evidence in reply had been offered. As the case would then have stood, the plaintiff would have had undisputed and uncontradicted evidence of admissions by the defendants that the account sued upon was correct, due, and unpaid, or, in other words, that they honestly owed the money, and ought to pay it. Justice and common sense unite in upholding the proposition that under such circumstances there ought to be a recovery for the plaintiff, notwithstanding the existence of some sort of a written agreement between the parties as to the matter involved. We do not, of course, know how the defendants would have met the evidence as to their alleged admissions, nor of what

value to them the written contract would have been had it been produced; but we are satisfied that, taking the case as the plaintiff proposed to make it out, he should not have been cut off by a nonsuit. If, in the trial of a case like the present, the written instrument at any time becomes important to the rights of either party, it can be produced; and, should there be a conflict between it and the parol evidence offered by either side, its terms will, of course, be conclusive.

The cases of *Johnson v. Quin*, 52 Ga. 485; *Hill v. Sibley*, 56 Ga. 531; and *Schmidt v. Wambacker*, 62 Ga. 321,—have some bearing upon the question under consideration, and are cited for whatever light they may shed upon it. In the case of *Dobbins v. Manganeese Co.*, 75 Ga. 450, the facts of which were much like those in the case at bar, a similar question as to the nonproduction of the writing was perhaps involved, but the issue was not made nor passed upon. The admissions of one Woodward, the president of the defendant company, as to the correctness of the account sued upon, were objected to, not on the ground that the contract was evidenced by a writing, but because, as insisted by the defendant, Woodward was not authorized to make admissions binding upon the company he represented.

On the whole, we think the case should be tried again. If, upon the next trial, the plaintiff goes as far as he offered to do on the last, he will have established a prima facie right to recover; but the record suggests nothing which will prevent the defendants from establishing the contrary, if the truth and justice of the case so demand. Judgment reversed.

(33 Ga. 723)

#### CONEY v. HORNE.

(Supreme Court of Georgia. April 30, 1894.)

LIMITATIONS—SUIT AGAINST ADMINISTRATRIX—ACCOUNTING—EVIDENCE—SUFFICIENCY OF DECLARATION—RESIDENCE OF DEFENDANT.

1. A declaration against the administratrix of a decedent for the recovery of money alleged to have been received by the defendant's intestate, as trustee for the plaintiff's intestate, alleging that the former intestate was trustee for the latter, and as such managed her business and collected rents due to her, etc., specifying amounts, sets forth a cause of action, and is not barred by the statute of limitations if filed within ten years from the time the plaintiff's intestate had the right to sue, with the addition of one year for the time during which the defendant's intestate was by statute exempt from suit. It not appearing upon the face of the declaration that the plaintiff's intestate became of age, or that the alleged trust ceased to be active more than eleven years before the suit was brought, the declaration was not demurrable on the ground that the action was commenced too late.

2. The suit was not founded on the memoranda or writings set forth in the declaration, but upon a claim for accounting touching an alleged trust, and these papers were alleged as matter of evidence or inducement. Consequently it was immaterial whether or not they constituted a cause of action in and of themselves.

3. The demurrer on the ground that the declaration failed to allege that the defendant was of the county was sustainable, as the omitted allegation was necessary to show jurisdiction over the person. For this defect the judgment dismissing the action is affirmed, but with leave to reinstate if the plaintiff below will amend by supplying this allegation before the remittitur from this court is entered on the minutes in the court below.

(Syllabus by the Court.)

Error from superior court, Pulaski county; C. C. Smith, Judge.

Action by Mrs. Low Coney, administratrix, against Mrs. E. Horne, administratrix. Judgment was rendered for defendant, and plaintiff brings error. Affirmed.

L. C. Ryan, for plaintiff in error. W. L. Grice, for defendant in error.

LUMPKIN, J. The plaintiff, Mrs. Coney, as administratrix of Miss Roberta N. Taylor, deceased, brought an action against Mrs. Elmira Taylor (who, during the pendency of the action, married O. A. Horne), as administratrix of Dr. A. R. Taylor, deceased. The declaration alleges that the defendant's intestate was the trustee of the plaintiff's intestate while they were in life, and that, as such trustee, he managed her business, and collected rents due to her. It sets out two writings, of which the following are copies:

"August 8th, 1878. I this day become responsible to Roberta N. Taylor, or her heirs, for the sum of \$595.00, execution against T. L. Taylor. [Signed] A. R. Taylor. Witness: C. R. Coney."

"Nov. 20, 1878. Due Roberta from me, \$675.00, for rents collected from H. H. Whitfield. [Signed] A. R. Taylor, Trustee R. N. Taylor."

The declaration further alleges, in substance, that Dr. Taylor received the specific amounts mentioned in these papers as trustee for the plaintiff's intestate, and prays a recovery of the same. It appears that at the date of the first of these instruments Miss Taylor was of age, but it does not appear how long before that time she had reached her majority, or when the alleged trust ceased to be active. The defendant demurred to the declaration on various grounds, only two of which require notice. One of these was that the declaration on its face did not show any liability on the part of the defendant to the plaintiff, and the other was that the declaration did not allege that the defendant resided in the county of Pulaski, where the action was brought.

1. The defendant contended that the general ground of the demurrer was good for two reasons: (1) That the declaration failed to set forth and describe the nature and character of the alleged trust, and (2) that the plaintiff's right of action was barred by the statute of limitations. As to the objection indicated by the first of these two reasons, we do not think the declaration was fatally defective. While it would have been better

to set forth how the trust was created, and to state in more specific terms what the duties and obligations of the trustee were, enough is alleged to show liability on the part of defendant's intestate as a trustee of some kind. As to the claim that the plaintiff's cause of action was barred by the statute of limitations, we think it would be better practice for the demurrer itself to set forth in terms this special objection; but, giving the general demurrer the full scope contended for, it was not maintainable in this respect. Section 2922 of the Code provides that all actions against executors, administrators, guardians, or trustees, except on their bonds, must be brought within 10 years after the right of action accrues. It is well settled law that under this section legatees or distributees are allowed 10 years from the time their respective legacies or shares in an estate become due within which to bring suit against an executor or administrator, and the statute of limitations does not begin to run against any person until after such person has arrived at majority. This section is expressly applicable to suits against trustees as such. As the statute allowed Dr. Taylor's administrator exemption from suit for 1 year, at least 11 years must have elapsed from the time the plaintiff's intestate, or her representative, had the right to sue, in order to bar the right of action. It not appearing when Miss Taylor became of age, or that immediately upon her reaching her majority the alleged trust vested, we are unable to determine the exact time from which the 11 years should be computed; and consequently the declaration does not affirmatively show upon its face that the cause of action is barred. This being so, the defense of the statute of limitations, if good at all, should have been made by plea, and not by general demurrer. *Stringer v. Stringer* 20 S. E. 242.

2. As already stated, the 10-years limitation is applicable in the present case. The action was not based on the writings set forth in the declaration, and consequently does not fall within the 6-years limitation, as in the case of promissory notes. These writings were, indeed, hardly more than mere memoranda, and the real gist of the action was for an accounting touching the alleged trust. This being so, it is of no consequence whether these papers, in and of themselves, do or do not constitute a cause of action.

3. The ground of the demurrer that the declaration failed to allege that the defendant resided in the county of Pulaski was well taken, the omitted allegation being essential to show jurisdiction over the person of the defendant. Because of this defect in the declaration we have felt constrained to affirm the judgment, but, as this defect is easily curable by amendment if the defendant does in fact reside in the county, we have given direction that if the plaintiff below will, before the remittitur from this court is entered

on the minutes of the court below, supply the needed allegation by a proper amendment, the case may be reinstated. Judgment affirmed, with direction.

(93 Ga. 715)

**McARTHUR v. PEACOCK.**

(Supreme Court of Georgia. April 23, 1894.)

**TAX SALE—ATTACK BY STRANGER TO TITLE.**

One who was not in possession of land when the same was sold for state and county taxes by the sheriff, and who has no interest in the land as owner, or as being in privity with or a creditor of the owner, but who is a mere stranger to the title, has no right to attack the sale because of excessiveness in the levy, or failure to advertise legally, or for other irregularities; and the burden of proving ownership, or the necessary privity with the owner, is upon the person making the attack.

(Syllabus by the Court.)

Error from superior court, Dodge county; C. C. Smith, Judge.

Action by W. T. McArthur against L. M. Peacock to recover possession of land. Judgment was rendered for defendant, and plaintiff brings error. Reversed.

J. A. Wooten, for plaintiff in error. E. A. Smith, for defendant in error.

LUMPKIN, J. McArthur brought an action of ejectment against Peacock for the recovery of two lots of land in Dodge county. At the trial he abandoned his claim of title to one of them. He supported his claim of title to the other by showing that in 1884 a tax *fi. fa.* was duly issued by the tax collector of that county, commanding that of the lot in question the sum of \$1.63 be made, the same being the amount of its state and county taxes for the year 1883, and that in pursuance of this *fi. fa.* the lot was levied on, sold, and duly conveyed by the sheriff to the plaintiff. The defendant introduced a deed made in 1890, conveying to himself the lot in controversy, executed by one Sapp, who, so far as the record discloses, was a stranger to the title. It appears that the defendant was in possession at the time of the trial, but it does not appear that either he or Sapp, under whom he claims, was in possession at the time of the sheriff's sale, or that either had ever previously been in possession of the lot. According to the evidence, the value of the lot ranged from \$200 to \$500. After the evidence on both sides had been closed, the court, being of the opinion that the sheriff's deed to McArthur was void because of excessiveness in the levy, and probably because of other irregularities in the sale, directed a verdict for the defendant, and the plaintiff excepted. We think the court erred. The attack upon the tax sale was made by one who, at the time it took place, was neither in possession of the land, nor had title to it, nor any interest in it whatever, either as creditor of the true owner or otherwise. Neither does it appear that he

was in any way in privity with the owner, or was anything more than a complete stranger to the title. Under these circumstances, we are satisfied he had no right at all to call in question the legality of the levy, or of any of the proceedings resulting in the tax sale. The right to complain of the levy of a tax *fi. fa.* because of excessiveness, or for any irregularity, is closely akin to the right of redeeming land which has been sold for taxes, and the two rights depend upon similar principles. It is well settled by respectable authorities that the right to redeem does not belong to one not in possession, but who is a mere stranger to the title, and in no way interested in or connected with it. Cooley, *Tax'n* (2d Ed.) 538-540, pars. 6, 7; Blackw. *Tax Titles* (2d Ed.) §§ 369, 430. We are unable to perceive how the right to attack a tax sale can rest on any better foundation than the right of redemption.

In each of the cases decided by this court which are relied on by counsel for the defendant in error, wherein attacks upon tax titles were sustained, it appeared that the objections to the same were made by one either owning or directly interested in the property; and this, we apprehend, will be found true of all other Georgia cases bearing upon this question. Judgment reversed.

(93 Ga. 731)

**CHURCHMAN et al. v. ROBINSON et al.**

(Supreme Court of Georgia. April 30, 1894.)

**EVIDENCE—ADMISSIONS BY STRANGERS TO SUIT—SUIT ON ACCOUNT—DEFENSE—ASSERTION OF RIGHTS OF THIRD PERSON.**

1. The plaintiff's contention being that the account sued upon was hers, and the defendants contending that it was contracted with and belonged to others who were not parties to the suit, and there being no assignment of it in writing, it was not competent for the plaintiff to prove oral admissions, made by these strangers to the suit, that the account belonged to her, and that they had no interest in it.

2. On the trial of an action upon an open account, all of which arose in consequence of a written order given by the defendants to a certain partnership, it was competent for the defendants, after proving they had applied the money due upon the account to a debt of that partnership, to show that, before this was done, the plaintiff admitted that she had assumed a portion of the indebtedness of the partnership, and that in conversation with the counsel of the creditor of the partnership, to which creditor the defendants afterwards paid the money, she had expressed a willingness for the amount due on the account now in suit to be so paid. This evidence was admissible, as tending to show that the defendants properly treated the debt in controversy as owing by them to the partnership, its weight and effect on this question being for determination by the jury.

(Syllabus by the Court.)

Error from superior court, Dodge county; C. C. Smith, Judge.

Action by A. L. Robinson and others against Churchman, Williams & Co. on an open account. Judgment was rendered for plaintiffs, and defendants bring error. Reversed.

De Lacy & Bishop, for plaintiffs in error.  
Roberts & Smith, for defendants in error.

**LUMPKIN, J.** The facts of this case are somewhat confused, but we gather from the record that the firm of Balcom, Vinson & Lucky, who were engaged in the lumber business, were succeeded by the Hawkeye Mill Company, which, in turn, was succeeded by Mrs. A. L. Robinson, the plaintiff below. She brought two actions against Churchman, Williams & Co. upon open accounts for lumber furnished, one of these actions being in her own name, and the other in the name of the Hawkeye Mill Company, for her use. The two cases, by consent, were consolidated. Separate verdicts were rendered in favor of the plaintiff, and, the defendants' motion for a new trial being overruled, they excepted. It appears that the defendants below had given an order to Balcom, Vinson & Lucky for certain bridge timbers, a part of which were furnished by that firm, and the balance of the order was filled by Mrs. Robinson after she became the owner of the business. The defendants insisted, however, that they had made no contract with Mrs. Robinson, had never recognized her as their creditor, and were really indebted to the original firm for all the timber delivered to them under the order above mentioned. There was no written assignment to Mrs. Robinson of the account which had accrued at the time she took possession of the business. Before her actions were brought, one Curry, a creditor of Balcom, Vinson & Lucky, had brought suit against that firm, and caused garnishments to be served upon Churchman, Williams & Co., upon which he obtained judgment, and collected the money from the latter firm.

1. Mrs. Robinson contended that the accounts sued upon, representing the indebtedness of Churchman, Williams & Co. for lumber they had received, belonged to her. The defendants contended that their indebtedness—all of it—had been contracted with and belonged to Balcom, Vinson & Lucky. The issue thus made was seriously contested at the trial. The court, over defendants' objection, allowed the plaintiff to prove by her attorney, E. A. Smith, admissions or statements made by the members of the firm of Balcom, Vinson & Lucky, both before and after the commencement of the present suit, to the effect that they had no interest in the accounts sued on, but that the same belonged to Mrs. Robinson. It appears from a correction made by the court to the ground of the motion for a new trial relating to this question that defendants' counsel did not object to the answer of the witness after it was made, but did object to the question by which the answer was elicited, on the ground that any conversation between the witness and Balcom, Vinson & Lucky in reference to the claim sued on was hearsay, illegal, and inadmissible. Taking the original ground of

the motion and the correction together, it fairly appears that the evidence itself was objected to on the ground stated, and it was error to admit it. Balcom, Vinson & Lucky were not parties, but mere strangers to the suit. They were competent to be called and sworn as witnesses, and their statements to Mr. Smith were hearsay, pure and simple. These statements were probably admitted under section 3786 of the Code, which provides for receiving in evidence "admissions made by a third person against his interest as to a fact collateral to the main issue between the litigants, but essential to the adjudication of the case." Whatever the language quoted may mean, it is certainly not applicable to the present case, because the statements of Balcom, Vinson & Lucky were not collateral to the main issue involved, but bore directly upon it.

2. The indebtedness of Churchman, Williams & Co. arose in the manner already stated. After proving they had paid to Curry upon the garnishment judgment the money which they contended they owed to Balcom, Vinson & Lucky, and not to Mrs. Robinson, they offered to prove by one of their counsel, J. Bishop, Jr., an admission by Mrs. Robinson that she had assumed, and on certain conditions agreed to pay, \$379 of the amount due to Curry by Balcom, Vinson & Lucky; and also that, in conversation with this witness, she had expressed a willingness for the amount due on the accounts now in suit to be so paid. This evidence the court improperly rejected. It was certainly admissible, as tending to show that Churchman, Williams & Co. were justified in treating the debt in controversy as owing by them to Balcom, Vinson & Lucky. The weight and effect to be given to this evidence, and the value to be attached to it, were questions for determination by the jury. When the case is tried again, with the illegal evidence excluded and the legal evidence admitted, and in the light of such additional facts as may be then brought out, exact justice, whatever it may be, will doubtless be done. Judgment reversed.

(95 Ga. 469)

#### HUFFMAN v. STATE.

(Supreme Court of Georgia. Oct. 4, 1894.)

CRIMINAL PROSECUTION — DISTURBING SCHOOL — GRANT OF CONTINUANCE—ABSENT WITNESS—INSTRUCTIONS—VERBAL INACCURACY.

1. An indictment under Code, § 4577a, for interrupting or disturbing a school, describes sufficiently the mode of interruption or disturbance which charges that the offense was committed "by cursing and quarreling and fighting and discharging a loaded pistol, and by bolsterous conduct, and by otherwise indecently acting;" and under such indictment evidence is admissible which tends to establish the charge.

2. It is not cause for reversing the denial of a continuance that the movant made a legal showing as to the absence of one witness, it appearing by the same showing, on cross-examination, that another witness was present by whom he could prove the facts to which the absent

witness was expected to testify, and it not appearing that the discretion of the court was abused.

3. Although putting one out of a house in which the exercises of a school are being conducted, for misbehavior, is not an arrest, yet, where the misbehavior amounted to a penal offense, it was a verbal inaccuracy, rather than a substantial error, for the court to denominate the expulsion as an "arrest," and instruct the jury that a private person is legally empowered to arrest any one committing an offense in his presence.

(Syllabus by the Court.)

Error from city court of Carroll; W. F. Brown, Judge.

Shug Huffman was convicted of interrupting and disturbing a school, and brings error. Affirmed.

Adamson & Jackson, for plaintiff in error. T. A. Atkinson, Sol. Gen., W. D. Hamrick, and H. M. Reid, for the State.

PER CURIAM. Judgment affirmed.

(95 Ga. 458)

#### HAWKINS v. STATE.

(Supreme Court of Georgia. Oct. 8, 1894.)

##### LARCENY—EVIDENCE.

A conviction for the offense of larceny from the house cannot be sustained without proof of the ownership of the property alleged to have been stolen, and that the same was of some value. In the present case there was no legal proof of ownership, the only evidence on this point being hearsay, which was illegally admitted, and there was no proof at all as to value.

(Syllabus by the Court.)

Error from superior court, Fulton county; R. H. Clark, Judge.

Robert Hawkins was convicted of larceny from a house, and brings error. Reversed.

The following is the official report:

Hawkins was indicted for the offense of burglary in breaking and entering the Houston street schoolhouse, and stealing therefrom a clock, the property of the city of Atlanta. He was found guilty of larceny from the house of goods of the value of less than \$50, according to the bill of exceptions and motion for new trial. The verdict in the record is, "Guilty of larceny less value of \$50.00," and, his motion for a new trial being overruled, he excepted.

The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also because the court erred in overruling defendant's objection to the evidence of one Matthews, as follows: On direct examination the witness testified that the clock was the property of the city of Atlanta. On cross-examination, being asked how he knew this, he replied that he knew it because Maj. Slaton told him it was; that he had been working there for four years and the clock had been there ever since he had been there. (It appeared that witness was principal of the Houston street school.)

Defendant's counsel then moved to rule out the testimony of the witness as to the clock being the property of the city of Atlanta. The court asked the witness to whom did the Houston street school belong, and he replied that it belonged to the city of Atlanta, and that he knew this because Maj. Slaton told him so; and that the other property in there belonged to the city of Atlanta, and he knew that because Maj. Slaton told him so; and that Maj. Slaton was superintendent of the school. (It did not otherwise appear that any of the property belonged to the city, nor what was the official position of Maj. Slaton or the witness.) Defendant's counsel again insisted upon his objection to the testimony, because there was better evidence of the ownership of the property than that of the principal of the school, his being merely hearsay evidence. The court remarked that the ownership of the property was immaterial, and overruled the objection. Error in charging: "If you believe the clock was stolen, do you believe it was the property of the city of Atlanta? You have heard the evidence on that point, and hence, if you believe that the house was the property of the city of Atlanta, and that the furniture in the house was likewise the property of the city, and that a part of that furniture was a clock, the same clock would be proven before you as the property of the city of Atlanta."

J. E. Robinson, for plaintiff in error. O. D. Hill, Sol. Gen., for the State.

PER CURIAM. Judgment reversed.

(95 Ga. 457)

#### TARPE v. STATE.

(Supreme Court of Georgia. Oct. 8, 1894.)

##### BURGLARY—EVIDENCE.

The evidence to connect the accused with the burglary as a principal being wholly circumstantial, and, while sufficient to raise a presumption against him, yet, as it did not exclude every other reasonable hypothesis, but, on the contrary, the hypothesis that the burglary was committed by the woman with whom he lived being sustained, not only by her positive testimony, but by physical facts established by other witnesses, the verdict for burglary was unwarranted by the evidence, and the court erred in not granting a new trial. The evidence was sufficient to convict the accused as accessory after the fact, but this grade of offense was not charged in the indictment.

(Syllabus by the Court.)

Error from superior court, Fulton county; R. H. Clark, Judge.

Tom Tarpe was convicted of burglary, and brings error. Reversed.

F. R. Walker, for plaintiff in error. O. D. Hill, Sol. Gen., for the State.

PER CURIAM. Judgment reversed.

(95 Ga. 501)

**FORD v. STATE.**

(Supreme Court of Georgia. Oct. 8, 1894.)

CRIMINAL APPEAL—REVIEW.

As the whole case turned upon the credibility of the witnesses, there was no error in denying a new trial.

(Syllabus by the Court.)

Error from criminal court, Atlanta; T. P. Westmoreland, Judge.

Charles Ford was convicted of gaming, and brings error. Affirmed.

The following is the official report:

Ford was convicted of gaming. His motion for new trial was overruled, and he excepted. The motion was on the grounds that the verdict was contrary to law, to the weight of the evidence, without sufficient evidence to support it, and strongly and decidedly against the weight of the evidence and the principles of justice. There was only one witness for the state,—Jim Hill. He testified: About three weeks before the trial he was sent by Lizzie Mosley to the club room of the \* \* \*, after defendant. He went to the club room, which is in Atlanta, Fulton county, opened the door, and told defendant Lizzie wished to see him, and defendant said he would see her after a while. When he put his head in the door he saw defendant, with other negroes, sitting around the table, playing poker, and saw defendant buy of Osborne Pope 5 or 6 cardboard chips for 10 cents, and pay 10 cents for the same, and go ahead playing poker with the other negroes, using and betting said chips in the game. The way witness got to the club room was by going up stairs, on the steps of which was a closed door, with a bell attached to the same, which bell, on opening the door, would ring in the room at the head of the stairs. There was another closed door which witness had to open to see defendant and the others gaming. Witness works for Russell, who swore out this accusation, and was in his employment at the time of this offense. Witness is out of jail on bond. Was in jail on the charge of forgery. On the trial of defendant at the commitment court witness was subpoenaed by Russell to testify that witness had let defendant have two dollars of Russell's money, to go into Russell's restaurant business, which business was then conducted by defendant, and that the money never went into the business. This charge against defendant was dismissed by the committing court, and defendant was bound over on the gaming charge. Witness did not conspire with Russell to make up and help him out in this gaming charge after the other warrant was dismissed. He was only subpoenaed by Russell, and testified the truth. He did not go into the club room at all, but only put his head into the door after opening it a little, and was only there about two minutes. None of the other parties who were gaming with defendant were prosecuted by Russell or by witness, and there are no warrants

against any of them. Osborne Pope testified for the defense: He remembers the time when Jim Hill came to the club room and called for defendant. He (witness) did not at that or any other time sell defendant any poker chips, nor did he play poker with him on that day, nor was there any one else in the club room playing poker with defendant that day, nor has defendant or any one else at any time within the past six months played poker or any other game of cards for money or other things of value. Witness has been in charge of this club room for the past six or eight months, and is there all the time when the rooms are open. There are cards and dice there, and members frequently play the different games of cards there for amusement, but never for money, and never play even for drinks, though whisky and beer are kept in the room for the use of members. Defendant made a statement to the effect that the prosecution was because of bad feelings on the part of Russell towards him, and that he, defendant, has never gambled.

F. R. Walker, for plaintiff in error. L. W. Thomas, for the State.

**PER CURIAM.** Judgment affirmed.

(95 Ga. 500)

**CANTRELL v. STATE.**

(Supreme Court of Georgia. Oct. 8, 1894.)

CRIMINAL PROSECUTION—ALIBI—REASONABLE DOUBT.

Reading the whole charge of the court together, it conforms substantially to the rule touching the establishment of an alibi and the doctrine of reasonable doubt set forth in *Harrison v. State*, 9 S. E. 542, 83 Ga. 129, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Fulton county; B. H. Clark, Judge.

Will Cantrell was convicted of a crime, and brings error. Affirmed.

F. R. Walker, for plaintiff in error. C. D. Hill, Sol. Gen., for the State.

**PER CURIAM.** Judgment affirmed.

(95 Ga. 467)

**IRBY v. STATE.**

(Supreme Court of Georgia. Oct. 8, 1894.)

PROSECUTION FOR MURDER—CONTINUANCE FOR ABSENT WITNESS—ADMISSIBILITY FOR CONFESSIONS—DECISION OF JUDGE—INSTRUCTIONS.

1. The showing for a continuance not stating that the witness who was confined in the county jail was too unwell to appear and testify, there was no error in denying the continuance; the court, at the conclusion of the state's evidence, offering to have the witness brought from the jail, for the purpose of testifying in behalf of the accused, and the offer being declined.

2. Before admitting a confession in evidence, the presiding judge should see to it that the confession was made freely and voluntarily—but where it affirmatively appears by the wit-

ness who heard the confession that he held out no inducement, and did nothing to excite either hope or fear, and knew of nothing done by others to induce the confession, it is prima facie admissible, and the court, before admitting it, is not bound to hear evidence offered by the accused which might show coercion or the excitement of fear or hope as inducement to confess. Such evidence, however, may afterwards be adduced to the jury; and it will be for them to determine, under all the evidence submitted, whether or not the confession was free and voluntary. *Dawson v. State*, 59 Ga. 333.

3. There being nothing in the evidence or in the prisoner's statement tending to show that the confession admitted in evidence was influenced by reward or the hope thereof, a request to charge the jury that the confession should not be considered if the jury believed from the evidence and the statement of the defendant, taken together, that it was influenced by fear of injury, or by reward or hope thereof, and that whether it was so induced was a fact for the jury to find, was properly denied. The language of the request was more comprehensive than the statement, whether taken with the evidence or without it, rendered pertinent or appropriate.

4. There being nothing in the evidence touching the element of self-defense, or any grade of homicide except murder, and no request having been made to charge the jury on self-defense, failure to charge on it was not error, although the prisoner's statement may have presented the question, the court having charged on the statement in terms of the statute. *Darby v. State*, 3 S. E. 663, 79 Ga. 63; *Underwood v. State*, 13 S. E. 856, 88 Ga. 47.

(Syllabus by the Court.)

Error from superior court, Bartow county; T. W. Milner, Judge.

Jeff Irby was convicted of murder, and brings error. Affirmed.

The following is the official report:

Jeff, Watt, and Gus Irby were indicted for the murder of Simon Foster. The indictment also charged Gus Irby with being an accessory after the fact and before the fact. Jeff Irby, being put upon trial, was found guilty, and, his motion for new trial being overruled, excepted. The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also, because the court erred in refusing to continue the case upon defendant's motion, defendant making affidavit that Watt Irby was providentially hindered from attending court; that he was a witness subpoenaed by defendant in the case; that he was not absent by defendant's consent or procurement, and defendant did not make this application for delay, but in good faith, in order to get said witness' evidence; and that defendant expected to prove by him that deceased threatened to take the life of defendant at the first good chance; and that such threats were communicated to defendant prior to the encounter in which deceased was killed. In a note to this ground it is stated that, at the conclusion of the state's evidence, the court announced to defendant's counsel, in open court, that he would have the sick witness brought from jail to testify for defendant if defendant desired to use him. Because the court failed and refused to give in his charge to the jury the law on self-defense,

which defendant alleges was demanded under the law and evidence, especially the defendant's statement. In a note the court states that the entire charge is made a part of this motion. Error in refusing to give the following request of defendant in charge: "If they believe from the evidence and statement of the defendant, together, that there was any confession made by this defendant, and if they further believe that that confession was induced by fear of injury, or by reward or hope thereof, it ought not to be considered against him by you. Whether or not it was so induced is a fact for you to find." Because the court erred in admitting to the jury, as evidence, testimony of a confession made by defendant, when the defendant's counsel offered to prove to the court by witnesses that threats were made and inducements held out to the defendant to make the confession, the language of the counsel being: "I expect to prove by other witnesses, and among them Mr. Ben Posey, that the confession sought to be introduced by the witness Jule Hawks was directly induced by fears of punishment and hopes of reward held out to defendant immediately before he made the alleged confession." The court declined to hear the evidence, but submitted the whole question to the jury, with the right of the defendant to offer to the jury evidence on the subject. All this transpired while the jury was absent from the court. Because the court, in his charge to the jury, intimated to them his opinion of the evidence in said case, by confining the jury to the consideration of but two grounds of homicide, murder and manslaughter,—in this case, that of murder and voluntary manslaughter,—and excluding from their consideration the subject of self-defense.

J. B. Conyers, T. C. Milner, and J. W. Harris, Jr., for plaintiff in error. A. W. Fite, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

(28 Ga. 803)

SAVANNAH, F. & W. RY. CO. v. SLOAT  
et al.

(Supreme Court of Georgia. April 23, 1894.)

CARRIER—WRONGFUL DELIVERY OF GOODS—LIABILITY AS FOR CONVERSION.

Loss of goods by a wrong delivery, made negligently by the carrier, is a conversion for which the carrier is liable to account at the full value of the goods, this mode of loss not being within the terms of the special contract fixing a conventional value upon the goods at the time of shipment in consideration of the rate of freight being reduced. Even granting that it was competent for the parties to make a contract which would have covered wrong delivery by negligence, they did not do so.

(Syllabus by the Court.)

Error from superior court, Lowndes county; A. H. Hansell, Judge.

Action by Sloat Bros. against the Savan-

nah, Florida & Western Railway Company for nondelivery of goods shipped. Judgment was rendered for plaintiffs, and defendant brings error. Affirmed.

The following is the official report:

An action was brought by the consignees of a barrel of whisky which had been shipped from Baltimore, Md., to Valdosta, Ga., against the terminal carrier. The facts were agreed on, and the case submitted to the judge without a jury; the issue being whether the defendant could be held liable to the plaintiffs for more than \$20 and the freight charges on the whisky, it having made a continuing tender of those two amounts. Judgment was rendered in favor of the plaintiffs for \$100, which was the value of the whisky, and defendant excepted. The shipper was a liquor house doing business in Baltimore, to whom, among others, the various transportation lines leading out of that city delivered blank bills of lading, which were filled in by the shippers in that city, according as they might desire to ship, under information furnished them by said transportation lines in book form, entitled "How to Ship." In this book of instructions is a classification of all articles usually transported by the lines leading out of Baltimore, and the rate, in dollars and cents, to all principal points south, including Valdosta. In this book, whisky in wood was put, at the date of the shipment, in second class, when it was to be shipped without any limitation of the liability of the carrier, in third class when it was to be shipped "released," and in class H when it was to be shipped under the following terms printed in the book: "Liquors \* \* \* in wood, \* \* \* value limited to 75c. per gallon, and so indorsed on bill of lading. In all cases where limitation of value is expressed in the classification, it must be written out or stamped in full upon the bills of lading, and shippers must be required to accept in writing the limitations expressed. Agents must respect this, and require acceptance by the shipper." The rate per 100 pounds was given at \$1.19 on second class, \$1.02 on third class, and 67½ cents on class H. According to his custom, and from information derived from said book, the shipper filled in all the written part of the original bill of lading, except the signature of the agent of the initial carrier, and the figures "67&1-2," which were written by said agent. The shipper also stamped on the bill of lading, "\$20 per bbl. valuation, released," which words entered into and became a part of the contract of affreightment between the shipper and the carrier, and were mutually understood by them to mean that in case of the total loss of the barrel of whisky the carrier should be liable only for \$20. Upon shipping, the shipper drew on the consignees for the price of the whisky, and attached the draft to the bill of lading for collection. The draft was paid on presentation, and they then presented the bill of lading to the defendant, paid the freight, and demanded

the whisky. It was not delivered to the consignees. It was received by defendant from its connection at Savannah, was started to Valdosta on one of its trains, and, by mistake of the conductor in charge of the train, was delivered at a flag station to a person from whom defendant has never been able to recover it; this wrong delivery not being chargeable to the consignees, but owing entirely to the negligence of the conductor. The shipper's name was indorsed on the bill of lading, which acknowledged receipt of the whisky to be transported by steamship to the wharf of the initial carrier at Portsmouth, Va., and there to be delivered to connecting railroad or water line, and so on by one connecting line to another until it reached the station nearest to ultimate destination: "Each carrier, subject to the limitations and exceptions contained in this contract, shall be bound to deliver said goods in the same order and condition as that in which it received them, and the ultimate carrier to deliver them at its station or wharf to the consignee or his assigns, if called for by them or him, as in this contract provided, he or they paying freight and charges thereon. \* \* \* It is mutually agreed that the liability of each carrier as to goods destined beyond its own route shall be terminated by proper delivery of them to the next succeeding carrier. \* \* \* In case of loss, detriment, or damage to the goods, or delay in the transportation thereof, imposing any liability thereunder, the transportation company or carrier in whose actual custody they were at the time of such loss, damage, detriment, or delay shall alone be responsible therefor. \* \* \* The acceptance of this bill of lading is an agreement on the part of the shipper, owner, and consignee of the goods to abide by all its stipulations, exceptions, and conditions as fully as if they were all signed by the shipper, owner, and consignee. This bill of lading is signed for the different carriers who may engage in the transportation, severally but not jointly, and each of them is to be bound by, and have the benefit of, all the provisions thereof as if signed by it, the shipper, owner, and consignee. This bill of lading shall have the effect of a special contract, not liable to be modified by any receipt from or act of an intermediate carrier."

Wilkinson & Cranford and S. T. Kingberry, for plaintiff in error. H. H. Griffin, for defendants in error.

LUMPKIN, J. This was an action against the railway company for the recovery of the full value of a barrel of whisky it had failed to deliver to the consignees. The material portions of the contract under which the whisky was shipped appear in the reporter's statement, which also sets forth the facts necessary to an understanding of this case. The delivery of the whisky by the defendant company at a flag station, and to a person to whom it was not consigned, was



grossly negligent, and this was fully conceded by counsel for the company. Indeed, this wrong delivery, which occasioned to the plaintiffs a total loss of their goods, was neither more nor less than a conversion by the carrier, and makes it liable for the full value of the goods. We have very carefully examined the special contract under which the whisky was shipped. Although it fixes upon the goods a valuation less than their real market value, which stipulation the shipper agreed to in consideration of the rate of freight being reduced, there is nothing in its terms which would relieve the carrier from damages occasioned by its own negligence in making a wrong delivery. Granting that it was competent for this to be done, it is enough to say that in the present case it was not even attempted. Among the numerous stipulations in the contract of shipment special attention is called to the following: "Negligence shall not be presumed as against any carrier under this bill of lading, and no liability shall exist therefor, without actual and affirmative proof thereof." It will thus be seen that the contracting carrier, which issued the bill of lading in behalf of itself and all other carriers which might be concerned in the transportation, contemplated liability from the carriers' negligence, and only provided that negligence should not be presumed, but should be positively proved. As will appear from what has been said above, the question as to whether a carrier may lawfully contract against liability for injuries or damages caused by its own negligence is not presented by the facts of the present case. We have accordingly refrained from entering unnecessarily upon a discussion of this question. It may be incidentally remarked, however, that in the case of *Railroad Co. v. Reid*, 91 Ga. 377, 17 S. E. 934, cited and relied on by counsel for the plaintiff in error, no such issue was either raised or passed upon, nor was there any negligence on the part of the carrier affirmatively shown. Neither do we now recall any decision by this court, rendered in a case where the contract was signed by the shipper, in which the question has been directly made and passed upon. In the cases of *Berry v. Cooper*, 28 Ga. 543, *Purcell v. Express Co.*, 34 Ga. 815, and *Railroad Co. v. Gann*, 68 Ga. 350, it does not appear that any one of the contracts under which the shipments were made was signed by the shipper. In *Railroad Co. v. Pickett*, 87 Ga. 734, 13 S. E. 750, the writer, on page 737 of 87 Ga., and on page 750 of 13 S. E., remarked, offhand, that "no railroad company can lawfully contract against liability for injuries caused by its own negligence," and added, "and defendant did not attempt to do so in this case." So the question was not really involved in that case. Should it hereafter arise this court will, after full investigation and careful consideration, undertake its definite and authoritative solution. Judgment affirmed.

(42 S. C. 222)

STATE ex rel. GEORGE et al. v. CITY COUNCIL OF AIKEN.

(Supreme Court of South Carolina. Oct. 8, 1894.)

INTOXICATING LIQUORS—"DISPENSARY ACT"—CONSTITUTIONALITY—LEGISLATIVE POWERS.

1. The supreme court, in determining the constitutionality of the dispensary act, regulating the sale of spirituous liquors, should not follow a prior decision if erroneous. *McIver, C. J.*, dissenting.

2. The "Dispensary Act" of 1803, forbidding the sale of liquors by private individuals, and providing for its sale by the state, is a valid police regulation. *McIver, C. J.*, dissenting. *McCullough v. Brown* (S. C.) 19 S. E. 458, overruled.

3. The dispensary act does not violate Const. art. 1, § 14, which provides that no person shall be despoiled of his property or privileges but by judgment of his peers and laws of the land. *McIver, C. J.*, dissenting. *McCullough v. Brown* (S. C.) 19 S. E. 458, overruled.

4. Nor does the act violate Const. art. 1, § 1, which provides that all persons are endowed with the inalienable rights of "acquiring, possessing and protecting property and of protecting their safety and happiness." *McIver, C. J.*, dissenting. *McCullough v. Brown* (S. C.) 19 S. E. 458, overruled.

5. Nor is the act in violation of Const. U. S. Amend. 14, forbidding the state to pass any law abrogating the privileges of citizens of the United States, or to deprive any person of life, liberty, or property without due process of law.

6. Const. art. 1, § 41, which provides that "the enumeration of rights in this constitution shall not be construed to impair or deny others retained by the people and all powers not herein granted remain in the people," does not deprive the legislature of power to pass an act depriving individuals of the right to engage in liquor traffic, though such right is not expressly granted by the constitution.

7. Nor is the act unconstitutional because it empowers the state to engage in traffic in liquors, as such traffic by the state is a mere incident of the regulation of the sale, and not the object of it. *McIver, C. J.*, dissenting. *McCullough v. Brown* (S. C.) 19 S. E. 458, overruled.

8. The fact that the sale of liquors could be as readily regulated by allowing individuals to engage in its traffic under proper regulations is immaterial.

9. 26 Stat. 313, which provides that all intoxicating liquors imported into any state for use, sale, consumption, or storage therein shall be subject to the operation of the laws of such state, renders such liquors, though imported for a citizen's "own use," subject to the laws of the state.

10. There is no inherent right in the people to engage in the traffic of intoxicating liquors.

Appeal from common pleas circuit court of Aiken county; James Aldrich, Judge.

Petition by the state on the relation of J. V. George and another against the city council of the city of Aiken for a writ of prohibition. From the judgment both relators and respondent appeal. Affirmed.

O. W. Buchanan, Atty. Gen., for plaintiffs. G. W. Croff and M. B. Woodward, for defendant.

GARY, J. The issues involved in this case are far-reaching in their consequences, and of gravest moment. An act of the legislature which has for its object the solution of the vexed question of the liquor traffic is

before this court for review, and its constitutionality is contested. The scheme of the act is novel in its features, and the court is not able to get much light from adjudications bearing directly thereon. We are therefore compelled from necessity to reach our conclusions upon a consideration of the general principles of law on which it is founded. We trust that we enter upon the consideration of the principles involved in this case with a proper sense of the responsibility which rests upon us. The conclusions at which we have arrived were reached after mature deliberation, and careful consideration.

The issues involved herein will be seen more clearly by a short statement of facts out of which the case arose. The relators, who were operating a dispensary by state appointment and authority, under the act of the general assembly approved December 23, 1893, and known as the "Dispensary Act," having been summoned to answer before the town council of Aiken for violation of an ordinance prohibiting the sale of vinous or malt liquors without a license, applied before his honor, Judge Aldrich, for a writ of prohibition restraining the town council from interfering with them upon said charge, on the ground that the ordinance was a nullity, and the council, in seeking to enforce it, was attempting to exercise a power with which it was not vested. The town council, in answer to a rule to show cause, justified its proposed action by an assertion of the validity of the ordinance in question, and by the claim that the dispensary act of 1893 was null and void, as violative of sections 1, 2, and 41 of article 1 of the constitution of the state, of section 8, art. 1, of the constitution of the United States, of amendments 4, 5, and 14 to that constitution, and of the national laws regulating interstate commerce. It is also urged that the relators had ample remedy at law for the correction of their alleged grievance, and that the writ, on that ground, should not issue. Judge Aldrich held, under the authority of *McCullough v. Brown* (S. C.) 19 S. E. 458, that the act of 1893 was violative of the state constitution, null and void; that the act is not in violation of the constitution of the United States, the amendments thereto, or of the interstate commerce laws of the United States; but that the charter of the city of Aiken does not sustain the ordinance, and that the same was illegal and void. He further overruled the objection that the relators had ample remedy at law, and ordered the writ of prohibition to issue. Both relators and respondents appealed,—the first on the ground that the judge erred in holding the act of 1893 null and void, as violative of the state constitution, and in permitting respondents to question the constitutionality of the act; and the respondents on the grounds that the judge erred in not holding the dispensary act null and void as violative of the consti-

tution of the United States and of the national interstate commerce laws, in not holding the relators had ample remedy at law, and so are not entitled to the writ, and in holding the ordinance in question to be without support of law, null and void.

We are met at the threshold with the objection that the principles involved in this case have been adjudicated by this court in the case of *McCullough v. Brown*, 19 S. E. 458, followed by the cases of *Barringer v. City Council*, and *Ex parte Brunson*, Id. 745, and *State v. O'Donnell*, Id. 748, and that the doctrine of *stare decisis* should prevail. The act of 1892, known as the "Dispensary Act," had been construed by the court before the case of *McCullough v. Brown* was decided. It received its first judicial construction by his honor, Judge Simonton, in the case of *Cantini v. Tillman*, in the circuit court of the United States for the district of South Carolina. 54 Fed. 969. In an able and clear-cut opinion his honor, Judge Simonton, sustained the constitutionality of the act generally, but reserved his opinion as to other provisions of the act in these words: "There are other and much more grave questions in this case, affecting the jurisdiction of this court. The conclusions reached render the discussion of them at this time unnecessary." In that case his honor, Judge Simonton, says: "This is a proceeding to test the constitutionality of an act of the general assembly of South Carolina, commonly known as the 'Dispensary Act.' The purpose of the act, as expressed in its title, is to prohibit the manufacture and sale of intoxicating liquors as a beverage within this state, except as herein provided. \* \* \* We have seen that the right to sell intoxicating liquors is not a right inherent in the citizen, and is not one of the privileges of citizenship; that it is not within the protection of the fourteenth amendment; that it is within the police power. The police power is a right reserved by the states, and has not been delegated to the general government." The act of 1892 was next brought in review before the supreme court of this state in the case of *State ex rel. Hoover v. Town Council of Chester*, and *State ex rel. Groeschel v. Same*, 39 S. C. 307, 17 S. E. 752. In these cases (which were heard together) Mr. Justice Pope, in delivering the unanimous opinion of the court, says: "As to these several points embodied in these four objections wherein it is claimed that the act we are now considering is in violation of certain provisions of our constitution as well as that of the United States, we do not see how such questions can arise in this case. The only question involved here is whether said act violates the constitution in forbidding the granting of licenses to retail spirituous liquors beyond the 30th day of June, 1893, and to that question we have confined our attention, and, having reached the conclusion that the said act being in effect an act to regulate the sale

of spirituous liquors, the power to do which is universally recognized, it is quite clear that there is nothing unconstitutional in forbidding the granting of licenses to sell liquors except in the manner prescribed by the act. But whether the act contains other features not affecting the right of relators to the licenses claimed by them, is a question that cannot properly arise in these cases, and cannot, therefore, be considered, for, as we have said above, it would be extrajudicial to do so." It will be observed that in those cases Mr. Justice Pope spoke for the court, when he said: "Having reached the conclusion that the said act being in effect an act to regulate the sale of spirituous liquors, the power to do which is universally recognized, it is quite clear that there is nothing unconstitutional in forbidding the granting of licenses to sell liquors, except in the manner prescribed by the act." It will also be seen by an examination of those cases that the doctrine of stare decisis did not prevail when the cases of *State v. Platt*, 2 S. C. 150, and *State v. Hagood*, 13 S. C. 46, were brought in review before the court. Mr. Justice Pope, speaking for the court, says: "There have been two decisions by this court, and both most unsatisfactory, there having been a strong dissenting opinion in each,—Chief Justice Moses in the case of *State v. Platt*, 2 S. C. 150, and the present chief justice in the case of *State v. Hagood*, 13 S. C. 46." After citing authorities to show that the principles announced in them were erroneous, he thus proceeds: "Therefore, however unpleasant it may be to reverse previous decisions of this court, still, after full and mature consideration, we feel it to be a duty we owe the state that the case of *State v. Platt*, supra, should be, and is hereby, overruled; and as the case of *State v. Hagood*, supra, was really decided upon the authority of *Platt's Case*, it follows necessarily that the case of *Hagood* must fall when the foundation upon which it rests is taken away." Chief Justice Simpson, delivering the opinion of the court in *Suber v. Chandler*, 18 S. C. 526, overruling *McGowan v. Hitt*, 16 S. C. 602, uses this language: "The judgment which we propose to announce is directly in conflict with *McGowan v. Hitt*, 16 S. C. 602. That case was decided by a divided court, Mr. Justice McIver having dissented. It is a very recent decision. Judge Pressley, delivering the opinion of the majority, stated that in several of the state cases were found holding that the statute was suspended in cases like that. \* \* \* Under these circumstances, and upon examination finding that it has no sufficient support, either in principle or authority, in our opinion it should be overruled, and it is so ordered." In *Piester v. Piester*, 22 S. C. 145, Mr. Justice McGowan, in overruling *Edwards v. Sanders*, 6 Rich. (N. S.) 316, said: "This is the case upon which the circuit judge rested his decree; but with all due respect, and an

anxious desire to maintain consistency in the adjudications of this court, we are constrained to say that in our judgment the case of *Edwards v. Sanders* is not only unsustained by proper rules of construction, but is in direct opposition to the decided cases, and what was at that time considered the settled law of the state." In *Willis v. Owen*, 43 Tex. 41, the court said: "The questions to be considered in these cases have no application whatever to the title or transfer of property, or to the matters of contract. They involve the construction and interpretation of the organic law, and present for consideration the structure of the government, the limitations upon legislative and executive power as safeguards against tyranny and oppression. Certainly it cannot be seriously insisted that questions of this character can be disposed of by the doctrine of stare decisis." Chief Justice Bleckley in *Ellison v. Railroad Co. (Ga.)* 13 S. E. 809, very forcibly says: "Minor errors, even if quite obvious, or important errors, if their existence be fairly doubtful, may be adhered to, and repeated indefinitely, but the only treatment for a great and glaring error affecting the correct administration of justice in all courts of original jurisdiction is to correct it. When an error of this magnitude, and which moves in so wide an orbit, competes with truth in the struggle for existence, the maxim for a supreme court—supreme in the majesty of duty as well as in the majesty of power—is not 'stare decisis,' but 'flat justitia ruat caelum.'" In the case of *Crowther v. Sawyer*, 2 Speer, 578, overruling *Dinkins v. Vaughan*, 1 McCord, 554, Judge O'Neill, in delivering the opinion of the court, said: "That case, as a precedent, until reviewed and reversed, of course prevented any other decision than that given on the circuit. Here, however, if we think that the case was decided wrong, it presents no such obstacle; for although the wisdom of the maxim stare decisis is acknowledged, and we rarely think it prudent to overrule a former decision, yet when it conflicts with other decisions, or has proceeded upon a plain mistake of the law, it is our duty to put it out of the way." In *Kottman v. Ayer*, 1 Strob. 577, Evans, J., said: "The effect of this is a reversal of the case of *Hillegas v. Hartley* [1 Hill, 106]. I feel the full force of all that has been said on the rule of stare decisis, but the case of *Hillegas v. Hartley* has not settled any great principle of property under which rights have been acquired which the reversal would defeat." In *Fulmer v. Harmon*, 3 Strob. 580, Richardson, J., said: "I here take the occasion to remark that I was myself the presiding judge in the case of *Slider v. Myers*, and it so happens that I am now to review my decision in that case; and I propose to show that it was erroneous, and ought to have been overruled, as we now overrule the present circuit decision, for the following reasons." In *Ex parte White*, 83

S. C. 450, 12 S. E. 5, Chief Justice Melver, in overruling *Twitty v. Houser*, 7 S. C. 153, says: "While, therefore, Judge Wallace, not having the power to overrule that case, may have been justified in following it, yet when the question reaches a tribunal which is invested with such power it seems to us that such power should be exercised, when the former decision is not only clearly erroneous, but likely to lead to evil results; especially where such decision establishes no rule of property, and is not otherwise entitled to be adhered to under the wholesome doctrine of stare decisis." There are some reasons, it might be contended, why the doctrine of stare decisis does not apply to this case. For instance, the dispensary act of 1892 did not, in its title, expressly purport to be a police measure, while such is the title of the act of 1893. Again, in the act of 1893 the revenue feature is dependent upon rules to be adopted by the state board of control, while in the act of 1892 express provision was made in the act itself as to the revenue. We, however, are of the opinion that the principles upon which the act of 1892 was declared to be unconstitutional will make the act of 1893 unconstitutional if followed in this case. In the light of the foregoing cases, the doctrine of stare decisis cannot be applied in this case.

The principles upon which the former decision was rendered will now be reviewed by this court, and, if found to be sound, will be followed, while, on the other hand, if found to be erroneous, will be overruled. The circumstances under which a legislative enactment should be declared unconstitutional are well expressed by Chancellor Waties, who, in delivering the opinion of the court in the case of *Byrne's Adm'rs v. Stewart's Adm'rs*, 3 Desaus. Eq. 476, says: "If legislative authority is supreme in all cases in which it is not restrained by the constitution, and as it is the duty of the legislators as well as of the judges to consult this, and conform their acts to it, so it ought to be presumed that all their acts are conformably to it, unless the contrary is manifest. This confidence in the wisdom and integrity of the legislature is necessary to insure a due obedience to its authority; for, if this is frequently questioned, it must tend to diminish that reverence for the laws which is essential to the public safety and happiness. I am not, therefore, disposed to examine with scrupulous exactness the validity of a law. It would be unwise to do so on another account. The interference of the judicial power with legislative acts, if frequent, or on dubious grounds, might occasion so great a jealousy of this power, and so general a prejudice against it, as to lead to measures which might end in the total overthrow of the independence of the judiciary, and with it this best preservative of the constitution. The validity of a law ought not, then, to be questioned unless it is so obviously repug-

nant to the constitution that when pointed out by the judges all men of sense and reflection in the community may perceive the repugnancy. By such a cautious exercise of this judicial check no jealousy of it will be excited, the public confidence in it may be promoted, and its just and salutary effects be justly and fully appreciated." Mr. Justice McGowan, in *Ex parte Lynch*, 16 S. C. 34, says: "It is a delicate thing to declare an act of the legislature unconstitutional. This section of the constitution must be construed, if possible, as allowing full force and effect to section 1, art. 2, vesting the full legislative power of the state in the general assembly. Implied limitations of legislative power are only admissible where the implication is necessary, or where language conveying a particular intent cannot have its proper force without such implication. The general assembly has the general power of legislation upon all subjects not prohibited by the constitution. 'The legislative department is intrusted with the general authority to make laws at discretion, and is only limited by express constitutional provisions.' Cooley, Const. Lim. 87-172. 'The constitutionality of a law must be presumed until the violation of the constitution is proved beyond all reasonable doubt, and a reasonable doubt must be solved in favor of legislative action, and the act be sustained.' Id. 132." Shaw, C. J., in speaking for the court in *Ex parte Wellington*, 16 Pick. 95, says: "When courts are called upon to pronounce the invalidity of an act of legislation passed with all the forms and ceremonies requisite to give it force of law, they will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light on the subject, and never declare a statute void unless the nullity and invalidity of the act are placed in their judgment beyond reasonable doubt."

In the light of these cases, we proceed to a consideration of the act of 1893. Before proceeding to a consideration of the specific objections urged against the constitutionality of the act, we desire to state at the outset that in our opinion the following propositions embody the principles governing this case: (1) That liquor, in its nature, is dangerous to the morals, good order, health, and safety of the people, and is not to be placed on the same footing with the ordinary commodities of life, such as corn, wheat, cotton, tobacco, potatoes, etc. (2) That the state, under its police power, can itself assume entire control and management of those subjects, such as liquor, that are dangerous to the peace, good order, health, morals, and welfare of the people, even when trade is one of the incidents of such entire control and management on the part of the state. (3) That the act of 1893 is a police measure. We are frank to say that if we are wrong as to either of these propositions the act should be de-

clared unconstitutional. We will now cite authorities to sustain these propositions. We think differences of opinion as to the constitutionality of this act arise from the attempt on the part of some to apply to it the law applicable to the ordinary commodities of life. The sale of an article may be lawful unless restrained by law, and yet it may be of such a nature as to endanger the peace, safety, health, and morals of a people. We do not suppose there is a more potent factor in keeping up the necessity for asylums, penitentiaries, and jails, and in producing pauperism and immorality throughout the entire country, than liquor, and yet it is argued that it is to be placed on the same footing with the breadstuffs and other ordinary commodities of life. Black, Intox. Liq. § 31, says: "For an unregulated and unrestricted traffic in liquor, it is admitted, threatens the public safety by generating vice and crime, imperils the peace and order of the community by the demoralization of its victims, and poisons the fountains of the public prosperity by its contributions of pauperism and squalor." The same author, in section 35, says: "Restraints upon the traffic in spirituous liquors are not like such as restrict the ordinary avocations of life which advance human happiness, or trade and commerce, that produce neither immorality, suffering, or want." Parker and Worthington on Public Health and Safety shows that the business of selling liquor is attended with danger to the community, and that a citizen has not the inherent right to follow such avocation. We quote the following from *State v. Turner*, 18 S. C. 106, in which Chief Justice McIver delivered the opinion of the court: "The power of the legislature to regulate the sale of spirituous liquors has been too long and too well settled to admit of question at this late day. Experience has demonstrated that the unrestrained traffic in spirituous liquors is dangerous to the peace and welfare of society, and therefore it has long been settled that the lawmaking power may throw such restraints around that traffic as in the judgment of that department of the government may be necessary to secure the peace and welfare of society." The court in *Crowley v. Christensen*, 137 U. S. 90, 11 Sup. Ct. 13, says: "It is urged that as the liquors are used as a beverage, and the injury following them, if taken in excess, is voluntarily inflicted, and is confined to the party offending, their sale should be without restriction, the contention being that what a man shall drink, equally with what he shall eat, is not properly matter for legislation. There is in this position an assumption of a fact which does not exist,—that when the liquors are taken in excess, the injuries are confined to the party offending. The injury, it is true, first falls upon him in his health, which the habit undermines; in his morals, which it weakens; and in the self-abasement which

it creates. But as it leads to neglect of business, and waste of property, and general demoralization, it affects those who are immediately connected with and dependent upon him. By the general concurrence of opinion of every civilized and Christian community there are few sources of crime and misery to society equal to the dram shop where intoxicating liquors in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every state show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. \* \* \* The police power of the state is fully competent to regulate the business, to mitigate its evils, or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail. It is not a privilege of a citizen of the state, or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authorities. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licenses for that purpose. It is a matter of legislative will only."

It is because liquor is not regarded as one of the ordinary commodities that the act of 1892, prohibiting its sale, was, as to that matter, construed to be constitutional. We cannot for a moment believe that the court would have declared an act constitutional that prohibited entirely the sale of corn, cotton, or other ordinary commodities. It is fallacious to argue, in the light of this distinction, so thoroughly sustained by the authorities, that if the government can take the exclusive control of the liquor traffic it can do so as to any other avocations in life. In Black, Intox. Liq. § 24, the police power is thus defined: "It cannot be doubted, however, that the origins of this power must be sought in the very purpose and framework of organized society. It is fundamental and essential to government. It is a necessary and inherent attribute of sovereignty. It antedates all laws, and may be described as the assumption on which constitutions rest; for the state, whether we regard it as an association of individuals, or as a moral organism, must have the right of self-protection, and the power to preserve its own existence in safety and prosperity, else it could neither fulfill the law of its being nor discharge its duties to the individual. And to this end it is necessarily invested with power to enact such measures as are adapted to secure its own authority and peace, and preserve its constituent members in safety, health, and morality. Theories of the state, according as they tend to enlarge or restrict the legitimate sphere of

its functions and activities, will create theories as to the proper limitations of the police power. But its existence in a measure proportioned to the rights and duties it is to guard is implied in the recognition of the state as a factor in law and civilization. 'It is a power,' as has been well said, 'essential to self-preservation, and exists necessarily in every organized community. It is, indeed, the law of nature, and is possessed by man in his individual capacity.' For these reasons, it appears that the nature and authority of the police power are best described by the maxim, 'Salus populi suprema lex,' while the principle 'Sic utere tuo ut alienum non laedas' furnishes in most cases a convenient rule for its application." We find the following in *Trageser v. Gray*, 73 Md. 250, 20 Atl. 905: "We are unable to conclude that every one, citizen or alien, can acquire rights which can in any way control, impair, impede, limit, or diminish the police power of a state. Such power is original, inherent, and exclusive. It has never been surrendered to the general government, and never can be surrendered without imperiling the existence of civil society." Mr. Justice Field, in his dissenting opinion in *Slaughterhouse Cases*, 16 Wall. 36, although he denied the application of the doctrine of police power to the cases then before the court, says: "If it really were a police regulation, it would undoubtedly be within the power of the legislature." Chief Justice Waite, in *Stone v. Mississippi*, 101 U. S. 814, says: "No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental powers is continuing in its nature, and they are to be dealt with as the special exigencies of the government may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself." The police power being fundamental in its nature, inherent in and so essential to government that its very existence is dependent thereon, the exercise of such power is necessarily one of the chief functions of government, and primarily devolves upon the government itself, although it has been allowed in certain cases to delegate and "farm out" such power to corporations and individuals. The licensed saloon keeper does not sell liquor by reason of an inalienable right inherent in citizenship, but because the government has delegated to him the exercise of such rights under its power of police. It would be an anomaly in the law to hold that the principal could delegate to an agent a greater power than the principal himself could exercise; yet that is contended in this case. The question admits of graver doubts as to the right of the government to delegate the power than to exercise it directly. There

are expressions of Mr. Justice McGowan in the case of *Town Council v. Pressley*, 33 S. C. 56, 11 S. E. 545, tending to sustain this view. That case also shows that the court cannot question the discretion exercised by the law-making body in adopting such measures as, in its judgment, seemed best under its power of police. In that case he says: "Undoubtedly, as a rule, every man may cultivate his own land in his own way, but even in that case he may use his land in such manner as to amount to 'a nuisance' indictable at common law. That, however, does not touch the question under the ordinance passed by virtue of the powers conferred upon corporate authorities by the legislature 'for preserving the health, peace, order, and good government of the town.' The ordinance, by its declared purpose, was a police regulation for preserving the health of Summerville, a small town in the pines, about 20 miles out of Charleston, which afforded a convenient summer resort for health. Assuming for the present that the town council had the power to pass the ordinance, no question can be made whether 'a nuisance' had been created, nor whether the restrictions complained of were necessary to accomplish the purpose in view. It was their exclusive right to judge what was necessary and requisite to preserve the health of the town. 1 Dill. Mun. Corp. § 144, and authorities in note." Again: "The state, through the lawmaking body, certainly possesses the police power, which from its very nature has no well-defined limits, but must be as extensive as the necessities which call for its exercise. Judge Dillon describes it thus: 'Every citizen holds his property subject to the proper exercise of this [police] power, either by the state legislature directly or by public corporations to which the legislature may delegate it.'" Again: "If the legislature itself had passed the Summerville ordinance just as it stands, it could not, as we think, be doubted that it was a constitutional exercise of the police power. It is said, however, that it was a mistake to suppose that the cultivation of the soil in certain crops was dangerous to health, and therefore the restriction was not a proper one. We suppose that the cultivation inhibited must have been considered as dangerous to health in the locality of Summerville. But, be that as it may, it was a question for the lawmaking body. 'The judiciary can only arrest the execution of a statute when it conflicts with the constitution. It cannot run a race of opinion upon points of right, reason, and expediency with the lawmaking power.' Cooley, Const. Lim. p. 201. Assuming that the legislature had the power to pass the Summerville ordinance, there can be no doubt that it had the right to delegate that power to the municipal authorities of Summerville, as the governmental agent of the state within the corporate limits of the town. 'The preservation of the public health and safety is often made a matter of municipal duty, and it

is competent for the legislature to delegate to municipalities the power to regulate, restrain, and even suppress particular branches of business if deemed necessary for the public good.' See 1 DILL. Mun. Corp. (3d Ed.) § 144, and *Harrison v. Mayor, etc., of Baltimore*, 1 Gill. 264." It will be seen from that case that the power of police is so great that under its exercise a person may be restricted as to the area of land he shall be allowed to cultivate under certain circumstances; yet it is contended that the state cannot take control and management herself of the liquor traffic. In *Mugler v. Kansas*, 123 U. S. 660, 8 Sup. Ct. 273, the court says: "But by whom or by what authority is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions so as to bind all must exist somewhere, else society will be at the mercy of the few who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what is known as the 'police powers' of the state, and to determine primarily what measures are appropriate or needful for the protection of public morals, the public health, or the public safety. If, therefore, a state deems the absolute prohibition of the manufacture and sale within her limits of intoxicating liquors for other than medical, scientific, and manufacturing purposes to be necessary to the peace and security of society, the courts cannot, without usurping legislative functions, overrule the will of the people as thus expressed by their chosen representatives. They have nothing to do with the mere policy of legislation." In the case of *State v. County of Wapello*, 13 Iowa, 419, the court says: "Will it be said that the state can confer a police power which she herself does not possess? We do not believe that such is the theory or nature of the legislative department of our state government. We know that she may confer powers upon the judicial and executive departments, and authorize them to do acts which she herself cannot do for the reason that these are distinct and co-ordinate branches of the government, the functions of which cannot be performed by the general assembly, but which nevertheless are to a certain extent under legislative control and regulation. When we say, therefore, that the legislature cannot bestow upon her subdivisions rights and powers reserved by the constitution from her, we mean of course a police power. These subdivisions receive their corporate existence and all their corporate duties and powers from the legislature. They are intended as instruments of government in the hands of the legislature to aid it in the administration of its public regulations with-

in certain prescribed localities. This being the case, it is competent for the legislature at any time to suspend these agencies and reclaim the powers which she had thus conferred and execute them directly herself." Cooley, Const. Lim. p. 119, says: "The constituent, when he has delegated an authority without an interest, may do the act himself which he has authorized another to do, and especially when that constituent is the legislature, and is not prohibited by the constitution from exercising such authority. Indeed, the whole authority might be revoked, and the legislature resume the burden of the business to itself, if, in its wisdom, it should determine that the common welfare required it."

We come now to an examination of the act of 1893 as to its main features. It has been shown in the case of *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, that what are known as the "police powers" of the government are to be determined primarily by the legislative department. The intention of the legislature is to be gathered from the words of the act. The title of the act is, "An act to declare the law in reference to and further regulate the use, sale, consumption, transportation, and disposition of alcoholic liquids or liquors within the state of South Carolina, and to police the same." The act provides that "all such liquors, except when bought from a state officer authorized to sell the same or in possession of one, are declared to be contraband and against the morals, good health and safety of the state, and may be seized wherever found," etc. The governor, attorney general, and comptroller general shall ex officio constitute a state board of control to carry out the provisions of this act. The act provides for the appointment of a commissioner who shall purchase all liquors for lawful sale under such rules and regulations as may be made by the state board of control, and furnish the same to such persons as may be designated as dispensers thereof. All liquors shall be tested by the chemist, and declared to be pure, before sale to the county dispensers. The state board of control shall appoint a county board of control, composed of three persons, who shall appoint certain officers known as "county dispensers." The dispensers can only sell by the package, which cannot be broken, nor the liquor drunk, on the premises where sold. The act shows that the legislature had in view the protection of the "morals, good health, and safety of the state" in dealing with this question. Many safeguards are thrown around the sale of the liquor. The commissioner is to be an ab-stainer from intoxicants. The liquor is to be tested by the chemist and declared to be pure. The liquor is to be sold only by the package, which cannot be opened nor drunk where sold. The sales can only be made in daytime. Persons cannot be appointed on the county board of control who are addicted to the use of intoxicating liquors. No per-



son can be appointed a county dispenser who has ever been adjudged guilty of violating the law relating to intoxicating liquors, nor who is keeper of a restaurant or a place of public amusement, nor who is addicted to the use of intoxicating liquors as a beverage. The county dispenser shall execute a bond in the sum of \$3,000, upon which suit for damages may be brought for a violation of the provisions of the act by a wife, child, parent, guardian, employer, or other person. A majority of the voters in a township may prevent the establishment of a dispensary. The county dispenser shall take an oath therein prescribed. A printed or written request must be presented for permission to purchase. The sale shall not be made to a minor, a person intoxicated, a person in the habit of drinking to excess, nor to a person unless known to the dispenser. It prevents the establishment of club rooms where liquors are used. One of the beneficial results of the law is brought about by selling only for cash. It has been argued that there was no necessity for this regulation by the state; that the same results could be accomplished by allowing private individuals to carry on the traffic, and for this reason the act is null and void. The necessity was a question exclusively for the legislative department, as shown by the foregoing authorities, particularly *Town Council v. Pressley*, 33 S. C. 56, 11 S. E. 545. The judiciary "cannot run a race of opinions upon points of right, reason, and expediency with the lawmaking powers." The state has the right, through its own officers,—in fact it is its primary duty,—to enforce its police regulations, which right inheres in government itself, and is paramount to any right inherent in citizenship. But referring to the foregoing objection, as matter of fact it would not be as efficiently enforced by private individuals, because there would be the constant temptation to make as large profits as possible. Chief Justice McIver, in *McCullough v. Brown*, says: "By its profit feature it holds out an inducement to every taxpayer to encourage as large sales as possible, and thereby lessen the burden of taxation to the extent of the profits realized." Now, if the indirect profits in the case mentioned are sufficient to induce the taxpayer to encourage large sales in which he would at most have only a very small interest, how great would then be the inducement to encourage large sales when the seller would get all the profits? The dispensary act itself is an outgrowth of a dissatisfaction on the part of the people with the manner in which the police power, when delegated, was abused. The law was enacted in self-defense, and vindicates the wisdom of our forefathers in allowing wide legislative discretion in the exercise of the police power. There is nothing in the act showing that its primary object is the raising of revenue. The sales are to be made under rules adopted by the county board of control, and approved by the state

board of control. It is certainly possible for the objects of the act to be carried into effect under proper rules adopted for that purpose. It is within the power of the boards of control to eliminate the profit feature altogether. It is presumed that public officials will discharge the duties of office in a lawful manner, until the contrary appears. When a case is brought before this court contesting the legality of the rules adopted by the boards of control, it will be time enough then for this court to pass upon the revenue feature. Suffice it to say no such question is now before us.

Objection has been urged against the act that it is repugnant to the provisions of the constitution as to taxation. This objection could only be sustained in case it should be decided that the object of the act is not the exercise of police power. Police power is a public purpose, and taxes levied to enable the government to enforce a law construed to be in pursuance of the police power have never been declared unconstitutional. Those interposing the objection above mentioned assumed that the act is not a police measure, and thus argue against its constitutionality. If the act is a police measure, a tax levied for its enforcement would be as lawful as a tax to raise funds to build a state house or railroad, which it has been determined beyond controversy the state always does under this power of police inherent in the government. Before this objection can properly arise, it will have to be determined whether the act is a police measure, which is always a public purpose. Objection is made as to the constitutionality of the act on the ground that it creates a monopoly. Those interposing this objection likewise assume that it is not a police measure. The objection is fully met by the decision of the court in the *Slaughterhouse Cases*, supra, in which the court says: "That wherever the legislature has the right to accomplish a certain result, and that result is best attained by means of a corporation, it has the right to create such a corporation, and to endow it with the power necessary to effect the desired lawful purpose, seems hardly to admit of debate." *Tied. Lim.* 318, says: "If it is lawful for the state to prohibit a particular business altogether, or to make a government monopoly of it, the pursuit of such business would, if permitted to any one, be a privilege or franchise, and, being like any other franchise, may be made exclusive. This is but a logical consequence of the admission that the state has the power to prohibit a trade altogether. Such an admission is fatal to a resistance of the power to make it a monopoly." The doctrine of "monopoly" cannot be applied to a state in exercising its governmental functions.

The first objection set forth in respondent's return to the writ of prohibition is that the act is in violation of section 1, art. 1, of the constitution of this state. That section is as follows: "All men are born



free and equal, endowed by their Creator with certain inalienable rights, among which are the rights of enjoying and defending their lives and liberties, of acquiring, possessing and protecting property, and of seeking and obtaining their safety and happiness." The act is not in violation of this section unless it has deprived the respondent of an inalienable right. It will be observed that the respondent is a municipal corporation, but, waiving all question as to the right of such corporation to claim the same "inalienable rights" as a citizen, we do not see that any "inalienable right" has been invaded. The case of *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. 13, and the other authorities hereinbefore cited, clearly show that a citizen has not an "inalienable right" to sell liquor, but, on the contrary, that laws are constitutional that prohibit the sale altogether.

The second objection is that the act is in violation of section 2, art. 1, of the constitution of South Carolina. That section is as follows: "Slavery shall never exist in this state; neither shall involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted." Counsel for respondent did not argue this objection, and, as it has no bearing whatever on this case, we are constrained to think there must have been a mistake in its insertion.

The next objection interposed by respondent is that the act is in violation of section 41, art. 1, of the constitution of this state. That section is as follows: "The enumeration of rights in this constitution shall not be construed to impair or deny others retained by the people, and all powers not herein delegated remain with the people." This section was construed in the case of *State v. Hayne*, 4 S. C. 420, in such a way as to be in accord with the established theory of the state government and of the power of the legislature. Chief Justice Willard, in delivering the opinion of the court, said: "Section 1, art. 2, declares that the legislative power of this state shall be vested in two distinct branches, the one to be styled 'the Senate,' and the other 'the House of Representatives,' and both together 'the General Assembly of the State of South Carolina.' Although the particular office of this section is to fix certain important features of the body through which the function of legislation is to be exercised, yet it describes in an authoritative way the nature of the power vested. It is no less than the legislative power of the state. It is not such and so much of the legislative power of the state as was intended to be used by that particular body, but it was the whole legislative power of this state, its whole capacity of making laws and providing the means for their enforcement. It was not intended that the legislature should exercise this power without limitation and restraint, for the constitution that uses these words of grant imposes many such

restrictions and limitations affecting the extent to which it may be effectively exercised. The form of expression here employed shows that the people of South Carolina entertain the same view of the nature of legislative power that is accepted by other similar communities, and intended that it should receive, in this respect, the construction ordinarily put upon grants of such powers in other similar instruments; that is to say, they intended a general grant of that branch of governmental power and faculty described as the 'legislative power of the state,' though subject to many restrictions affecting its exercise. But it has been argued that section 41 of article 1 narrows this from a grant of general capacity to one of limited power. It is said that the powers of the legislature of South Carolina must be held to be special and enumerated powers, like those of the congress of the United States, and that such as are not in terms granted must be regarded as withheld and retained by the people, and that such is the force and effect of section 41, art. 1." After quoting the section, he proceeds: "The true effect of this declaration is that it reserves to the people whatever is not granted by the instrument; as, for instance, the right to make changes in the form of government is not granted, and under this clause remains with the people, capable of exercise when they may see fit so to do. As the legislative power is granted in express terms, importing a grant of general powers, such general power of legislation cannot be regarded as reserved to the people under this section. Such general language as that contained in section 41, art. 1, cannot be allowed such force and effect as to change entirely the nature of legislative power, and to introduce anomalous ideas in the structure of the government." The court does use the following language in *Feldman & Co. v. City Council*, 23 S. C. 63, which is relied on to sustain the theory of implied limitations upon the legislative power: "When, in addition to this, we find that the constitution of 1868, in article 1, § 41, expressly declares that 'the enumeration of rights in this constitution shall not be construed to impair or deny others retained by the people, and all powers not herein delegated remain with the people,' we think there can be no doubt that, even in the absence of any express restrictions upon the taxing power of the legislature, such power can only be exercised for some public purpose, and that whenever it is attempted to be exercised for a private purpose it is the duty of the courts to declare such legislation void." The very definitions of taxation, making it clear that it must be for a public purpose, showed that there was no necessity for resort to the doctrine of reserved limitations to declare null and void a tax for a private purpose, and that the court would have been compelled to render the decision it did in that case, even if section 41, art. 1, had not been refer-

red to at all. A reference to section 41, art. 1, was incidental only, and cannot be regarded as authority to show that there are reserved limitations when there was nothing in that case calling for an adjudication of such question.

The cases cited in support of the doctrine of implied limitations upon the legislative authority were in regard to taxation, as to which it was not necessary to resort to such doctrine, for the simple reason that the very definition of taxation shows it must be for a public purpose, and therefore an act of the legislature attempting to raise money for a private purpose is null and void. Mr. Tiedeman, in his *Limitations of Police Power* (page 468), says: "A tax is, in the most comprehensive sense, any charge or assessment levied by the government for public purposes upon the persons, property, and privileges of the people within the taxing district or state." Black, C. J., in *Sharpless v. Mayor*, 21 Pa. St. 160, which is one of the leading cases against the doctrine of reserved constitutional limitations, shows that taxation necessarily means the raising of revenue for a public purpose. In that case he says: "The legislature has no constitutional right \* \* \* to lay a tax, or to authorize municipal corporations to do it, in order to raise funds for a mere private purpose. No such authority passed to the assembly by the general grant of the legislative power. This would not be legislation. Taxation is a mode of raising revenue for public purposes. When it is prostituted to objects in no way connected with the public interests or welfare, it ceases to be taxation, and becomes plunder." The case of *Allen v. Jay*, 60 Me. 124, quoted with approval in the case of *Feldman & Co. v. City Council*, supra, defines taxation as follows: "A tax is a sum of money assessed under the authority of the state on the persons or property of an individual. Taxation, by the very meaning of the term, implies a raising of money for public uses, and excludes the raising if for private objects or purposes." The case of *Lowell v. City of Boston*, 111 Mass. 454, also cited with approval in *Feldman & Co. v. City Council*, uses this language: "The power to levy taxes is founded on the right, duty, and responsibility to maintain and administer all the governmental functions of the state, and to provide for the public welfare. To justify any exercise of the power requires that the expenditure which it is intended to meet shall be for some public service, or some object which concerns the public welfare." It will thus be seen that the doctrine of implied limitations upon legislative action is not involved where simply the matter of taxation is before the court, which necessarily must be for a public purpose. For a fuller statement of the law and authorities against this dangerous doctrine of implied limitations, see the dissenting opinion of Mr. Justice Pope in *McCullough v. Brown*.

To hold that there are reserved limitations of this nature is to make the constitution give place to the will of the court upon legislative matters. Different judges might differ as to what was of common right, or against the spirit of civil liberty, and the law would thus be left in uncertainty. The unreasonableness of such construction is shown by the following illustration: It was formerly contended that "equity was not bound by rules or precedents, but acted from the opinion of the judge, founded on the circumstances of every particular case." In a note to Bl. Comm. bk. 3, p. 432, note y, the annotator, commenting on the doctrine just stated, says: "This is stated by Mr. Selden (Table Talk, tit. 'Equity') with more pleasantry than truth: 'For law we have a measure, and know what to trust to: Equity is according to the conscience of him that is chancellor; and as that is larger or narrower, so is equity. 'Tis all one, as if they should make the standard for the measure a chancellor's foot. What an uncertain measure would this be! One chancellor has a long foot, another a short foot, a third an indifferent foot. It is the same thing with the chancellor's conscience.'"

It is contended that the foregoing section prevents the legislature from embarking the state in a commercial enterprise. We have no doubt that if such was the object of the act, and it was not intended as a police measure, it would be unconstitutional, even in the absence of section 41, art. 1. As we have said, if the act is not a police measure, it is unconstitutional. It is quite a different thing, however, when trade is simply an incident to a police regulation. Buying and selling on the part of the federal, state, and municipal governments take place every day, and as long as the buying and selling are in pursuance of police regulations they are entirely free from legal objection. The federal government sells liquor and other articles that have been seized as contraband. Articles are purchased by the state to keep up the penitentiary and asylum and other public institutions and enterprises. We see it buying a farm to utilize the convict labor of the state, and selling the produce made on the farm. Municipal governments have the right to buy and dispose of property in administering their governmental affairs. The very distinction for which we contend is pointed out in the case of *Mauldin v. City Council*, 33 S. C. 1, 11 S. E. 434. In that case the court showed it was not wrong for the city to buy and sell for a public purpose, but that the act only became illegal when it was for a private purpose. We think the case was properly decided, and that the decision rested upon this distinction. The case of *Beebe v. State*, 6 Ind. 501, was upon the construction of a statute of Indiana somewhat similar to the act in question, and is relied upon as an authority to sustain the proposition that the state can-

not take direct control and management of the liquor traffic. In that case the court uses the following language: "The business [the manufacture and sale of liquor] was at and before the organization of the government, and is properly at all times, a private pursuit of the people, as much so as the manufacture and sale of *brooms, tobacco, clothes*, and the dealing in *tea, coffee, and rice*, and the raising of *potatoes*." (Italics ours.) This case is in conflict with the distinction made between liquor and the ordinary commodities of life, as enunciated in the case of *Crowley v. Christensen*, supra; *Black, Intox. Liq. supra*; *State v. Turner*, 18 S. C. 106; and other authorities hereinbefore mentioned. If liquor is to be placed on the same footing with the articles mentioned in the *Indiana* case, then that decision was right; but if there is that distinction for which we contend, then the case is valueless as an authority, being decided on erroneous principles. The principles upon which that case was decided would have forced the court that rendered it to have declared null and void a statute entirely prohibiting the traffic in liquor, although there is no longer any doubt as to the constitutionality of such statutes. The case of *Rippe v. Becker* (Minn.) 57 N. W. 331, is also relied upon to sustain the constitutional objection to the act of 1893. The title of the act construed in *Rippe v. Becker* was, "An act to provide for the purchase of a site and for the erection of a state elevator or warehouse at Duluth for public storage of grain." The syllabus of the case prepared by the court states: "The police power of the state to regulate a business is to be exercised by the adoption of rules and regulations as to the manner in which it shall be conducted by others, and not by itself engaging in it." The language of the court as applying to that case was proper, and we think the case was properly decided in the light of the distinction between liquor and the ordinary commodities of life which we have pointed out. There was nothing in the business dangerous to the health, morals, and safety of the people, and the act should have been declared null and void.

Respondent's next objections are that the act is in violation of the 4th, 5th, and 14th amendments to the constitution of the United States. Those amendments have no application to this case. In *Smith v. Maryland*, 18 How. 71, the court says: "If rested on that clause in the constitution of the United States which prohibits the issuing of a warrant but on probable cause supported by oath, the answer is that this restrains the issue of warrants only under the laws of the United States, and has no application to state process. *Barron v. Mayor*, 7 Pet. 243; *Livingston's Lessee v. Moore*, Id. 469; *Fox v. Ohio*, 5 How. 410." Chief Justice Fuller, delivering the opinion of the court in *Wilkinson v. Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865,

says: "The power of the state to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order, and prosperity is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the constitution of the United States, and essentially exclusive. And this court has uniformly recognized state legislation legitimately for police purposes as not, in the sense of the constitution, necessarily infringing upon any right which has been confided expressly or by implication to the national government. The fourteenth amendment, in forbidding a state to make or enforce any law abridging the privileges or immunities of citizens of the United States, or to deprive any person of life, liberty, or property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws, did not invest, and did not attempt to invest, congress with power to legislate upon subjects which are within the domain of state legislation. \* \* \* In short, it is not to be doubted that the power to make the ordinary regulations of police remains with the individual states, and cannot be assumed by the national government, and that in this respect it is not interfered with by the fourteenth amendment. *Barbier v. Connolly*, 113 U. S. 27, 31, 5 Sup. Ct. 357." Mr. Justice Harlan, delivering the opinion of the court in *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, sustains this view, and quotes with approval the following from the case of *Barbier v. Connolly*, 113 U. S. 31, 5 Sup. Ct. 357: "But neither the amendment [fourteenth], broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the state, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity."

The next objection to the constitutionality of the act interposed by respondent is that it is in violation of section 8, art. 1, of the constitution of the United States, and also of the act of congress regulating commerce between the states. The provision of the constitution referred to is that which empowers congress to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The act of congress passed in 1890, known as the "Wilson Act," which it is claimed the dispensary law violates, is as follows: "An act to limit the effect of the regulations of commerce between the several states and with foreign countries in certain cases. That all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale or storage therein, shall upon

arrival in such state or territory be subject to the operation and effect of the laws of such state or territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." 26 Stat. 313. On the one side it is contended that "arrival" means "destination," or "the place to which the liquors are consigned;" on the other side it is urged that "arrival in the state" means "when the territorial limits of the state have been entered." The act does not speak of the arrival of the liquors at their destination or the place to which they are consigned, but of their "arrival in the state," which would seem to indicate the time when the liquors cross the borders and enter the territorial limits of the state. We are, however, unwilling to rest our construction on so important a question upon a mere quibble as to the meaning of a word which is susceptible of being used in more than one sense, but to construe the act in the light of the circumstances that led to its adoption. The subjects affected by the laws of interstate commerce are divided into two classes: First, those that are local in their nature; and, second, those national in character. This distinction is announced in the case of *County of Mobile v. Kimball*, 102 U. S. 697, in which Mr. Justice Field, delivering the opinion of the court, says: "The subjects, indeed, upon which congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation affecting alike all the states; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries, or between the states, which consists in the transportation, purchase, sale, and exchange of commodities. Here there can, if necessary, be only one system or plan of regulations, and that congress alone can prescribe. Its nonaction in such cases with respect to any particular commodity or mode of transportation is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free. There would otherwise be no security against conflicting regulations of different states, each discriminating in favor of its own products and citizens, and against the products and citizens of other states. And it is a matter of public history that the object of vesting in congress the power to regulate commerce with foreign nations and among the states was to insure uniformity of regulation against conflicting and discriminating state legislation. Of the class of subjects

local in their nature or intended as mere aids to commerce, which are best provided for by special regulations, may be mentioned harbor pilotage, buoys and beacons to guide mariners to the proper channel in which to direct their vessels. The rules to govern harbor pilotage must depend in a great degree upon the peculiarities of the ports where they are to be enforced. It has been found by experience that skill and efficiency on the part of local pilots is best secured by leaving this subject principally to the control of the states. Their authority to act upon the matter and regulate the whole subject in the absence of legislation by congress has been recognized by the court in repeated instances." Under the decision of the supreme court of the United States liquor was held to be a subject of commerce, and national in its character. It was settled at an early date in the history of the national government that the state under its police power could legislate upon those subjects of local nature until congress saw fit to interfere and supersede the state law. It was, however, a vexed question for a long time in the courts of the United States as to the right of the state, under its police power, to subject to its laws those subjects of interstate commerce which were national in character, in the absence of congressional legislation upon the subject. In the case of *Lelsy v. Hardin*, 135 U. S. 131, 10 Sup. Ct. 681, the court had under consideration the act of Iowa which forbade any common carrier to bring within the state of Iowa, for any person or persons or corporation, any intoxicating liquors from any other state or territory of the United States without first having been furnished with a certificate under the seal of the county auditor of the county to which said liquor was to be transported or was consigned for transportation, certifying that the consignee or person to whom such liquor was to be transported, conveyed, or delivered was authorized to sell intoxicating liquors in such county. By a divided court it was held that such act was unconstitutional; that the police power of a state is subordinate to the commercial power, and consequently that a state could not prescribe conditions upon which liquors could be transported into such state from another state; and also that liquors transported into a state from another state could be sold in the original packages, even when the laws of the state into which such liquor was transported prohibited the sale. The decision in this case caused the passage of the act of congress of 1890, and the reasons leading to its adoption are well expressed in the dissenting opinion of Mr. Justice Gray (concurring in by Mr. Justice Harlan and Mr. Justice Brewer) in that case, in the following words: "How far the protection of the public order, health, and morals demands restriction or prohibition of the sale of intoxicating liquors is a question peculiarly

appertaining to the legislatures of the several states, and to be determined by them upon their own views of public policy, taking into consideration the needs, the education, the habits, and the usages of people of various races and origin, and living in regions far apart, and widely differing in climate and in physical characteristics. The local option laws prevailing in many of the states indicate the judgment of as many legislatures that the sale of intoxicating liquors does not admit of regulation by a uniform rule over so large an area as a single state, much less over the area of a continent. It is manifest that the regulation of the sale as of the manufacture of such liquors manufactured in one state to be stored in another is a subject which, far from requiring, hardly admits of, a uniform system or plan throughout the United States. It is in its very nature not national, but local, and must, in order to be either reasonable or effective, conform to the local policy and legislation concerning the state or the manufacture of intoxicating liquors generally. Congress cannot regulate this subject under the police power, because that power has not been conceded to congress, but remains in the several states; nor under the commercial power without either prescribing a general rule unsuited to the nature and requirements of the subject, or else departing from that uniformity of regulation which, as declared by this court in *Kidd v. Pearson* [9 Sup. Ct. 6], above cited, it was the object of the commercial clause of the constitution to secure. \* \* \* But an intention is not likely to be imputed to the framers of the constitution or to the congress of the United States to subordinate the protection of the safety, health, and morals of the people to the promotion of trade and commerce." (Italics ours.) Again: "The statutes in question were enacted by the state of Iowa in the exercise of its undoubted power to protect its inhabitants against the evils, physical, moral, and social, attending the free use of intoxicating liquors. They are not aimed at interstate commerce; they have no relation to the movement of goods from one state to another, but operate only on intoxicating liquors within the territorial limits of the state. They include all such liquors without discrimination, and do not even mention where they are made, or whence they came. They affect commerce much more remotely and indirectly than laws of a state (the validity of which is unquestioned) authorizing the erection of bridges and dams across navigable waters within the limits, which wholly obstruct the course of commerce and navigation, or than quarantine laws, which operate directly upon all ships and merchandise coming into the ports of the state." The intention of congress was to deprive liquor of its national character as a subject of commerce, make it local in its nature, and subject to the police power of the state, until

congress should see fit to legislate upon it. It was the intention of congress to subordinate the commercial power of the national government to the police power of the state on the subject of liquor. Such being the reasons that actuated congress in passing the act of 1890, we cannot think, in the absence of a plain expression, that congress intended to subordinate only a part of its commercial power to the police power of the state on this subject, but, on the contrary, that the sale, as well as the conditions upon which the liquor should be transported after it was introduced into the territorial limits of the state, should be left to state legislation. To give a different construction to the act would subject liquor to two powers—the commercial and police—within the territorial limits of the state. We cannot think this was the intention of congress when it deprived it of its national character. The first exception of respondent was on motion of respondent's attorney withdrawn by a formal order of this court, and will not, therefore, be considered. The principles herein announced render it unnecessary to consider the other exceptions. The conclusions herein announced are in conflict with the case of *McCullough v. Brown*, supra. That case, therefore, and those decided upon its authority, are overruled in so far as they are antagonistic to the principles upon which this case is decided. It is the judgment of this court that the judgment of the circuit court be affirmed for the reasons herein set forth.

POPE, J. I concur, and will hereafter file a separate opinion.

McIVER, C. J. (dissenting). As I cannot concur in the conclusions reached by the majority of this court in this case, I propose to state as briefly as practicable the grounds of my dissent. Inasmuch as it is distinctly admitted in the opinion prepared by Mr. Justice GARY, now under review, that while there are certain minor differences between the two acts of 1892 and 1893, relating mostly to the administrative features of the law, yet "that the principles upon which the act of 1892 was declared to be unconstitutional will make the act of 1893 unconstitutional if followed in this case," and inasmuch as the same admission is made in express terms by one of the counsel who argued this cause on the part of the state, and by the other impliedly, at least, there is no necessity to enter into any consideration of the terms of the two acts, respectively, in order to show that they both rest upon the same principles, and, if the one is unconstitutional, the other must be so also. The practical question, therefore, which is now presented, is whether the cases of *McCullough v. Brown* (S. C.) 19 S. E. 453, and the cases of *Barringer v. City Council*, and *Ex parte Brunson*, Id. 745, and *State v. O'Donnell*, Id. 748, recog-

nizing and following the case of *McCullough v. Brown*, shall now be overruled, and also whether the principles declared in *Feldman v. City Council*, 23 S. C. 57, and *Mauldin v. City Council*, 33 S. C. 1, 11 S. E. 434, relied upon to support the decision in *McCullough v. Brown*, shall now be disregarded. A sufficient answer to this question is, in my judgment, the well-settled and wholesome doctrine of stare decisis; for while no one, so far as I am informed (I certainly do not), doubts the power of this court to overrule a former decision, yet the wisdom or propriety of exercising such a power presents a very different question. Text writers, as well as courts of the highest authority, warn us against the exercise of this admitted power, even where the court may regard a former decision as erroneous in some respects. See Kent's twenty-first lecture, which will not be quoted from here, as it is largely quoted from in a decision of this court which will presently be cited. In *Wright v. Sill*, 2 Black, 544, the supreme court of the United States used this language: "Whatever differences of opinion may have existed in this court originally in regard to these questions, or might now exist, if they were open for reconsideration, it is sufficient to say that they are concluded by these adjudications." In *Minnesota Co. v. National Co.*, 3 Wall. 332, the same tribunal, in speaking of the importance of adhering to former decisions, used this language: "Parties should not be encouraged to speculate on a change of the law when the administrators of it is [are] changed." In the case of *Gage v. Charleston*, 3 S. C. 491, the supreme court of this state, when called upon to reverse a decision of their predecessors in the case of *State v. Mayor, etc., of Charleston*, 10 Rich. Law, 491, declined to do so, resting their decision solely on the doctrine of stare decisis. *Moses, C. J.*, in delivering the opinion of the court, rests his conclusion largely upon the authority of Chancellor Kent, who "bears his own testimony to the importance of adhering to a solemn decision as the highest evidence which we can have of the law applicable to the subject," and recommends and adopts the rule laid down by that eminent jurist as the rule by which this court must be governed. There can be no doubt that in the case of *McCullough v. Brown*, supra, this court, as it was then constituted, made "a solemn decision" of the identical question now presented, and there is as little doubt that such decision was recognized and affirmed in the three subsequent cases above cited. Here, then, we have a solemn decision, made, too, as is well known, after the most elaborate argument, and after the fullest consideration by the court, affirmed in three subsequent cases, which, as Chancellor Kent says, furnishes "the highest evidence which we can have of the law applicable to the subject;" and if all this does not furnish a proper case for the application of the wholesome doctrine

of stare decisis, it is difficult for me to conceive of a case for its application.

But I do not propose to rest my dissent solely upon the doctrine of stare decisis, but will proceed to consider whether the principles upon which the decision in *McCullough v. Brown* rests have been shown to be erroneous, for until that is done every one must admit, as Mr. Justice GARY frankly does admit, that such decision must be followed in this case. I do not, of course, propose to reproduce here the reasoning employed or the authorities cited in the previous decision, except in so far as it may be necessary to correct what appear to me to be certain misconceptions of the grounds upon which the former decision was rested. While, therefore, still relying upon, but not repeating here, such reasoning and authorities, I proceed to notice certain points in which, as it seems to me, the former decision has been entirely misunderstood. Inasmuch as it was distinctly declared in the former decision that "we fully concede the power on the part of the legislature to throw around such traffic [speaking of the liquor traffic] all safeguards necessary and proper to prevent, or at least minimize, such evils [alluding to the evils likely to flow from an unrestricted traffic in spirituous liquors], and while we may further admit for the purposes of this discussion that the legislature may go further, and absolutely prohibit the sale of intoxicating liquors within the limits of this state, yet the practical question still remains whether the dispensary act falls within either of these classes," that is to say, whether such act can properly be regarded either as a prohibition law or as a law to regulate the sale of spirituous liquors, for the opinion immediately proceeds to show that the dispensary act cannot properly be regarded as either the one or the other; and again, after discussing the question whether the dispensary act can properly be regarded as an act to regulate the sale of spirituous liquors, this language is found in the opinion of the majority of the court in *McCullough v. Brown*: "Now, while the power of the legislature to enact such laws as may be deemed necessary and proper to regulate the sale of intoxicating liquors by any person within the limits of the state in order to prevent, or at least reduce, as far as possible, the evils which are apt to flow from such a traffic, is conceded, yet we cannot regard the dispensary law as such an act." In view of these distinct and repeated concessions, it is impossible to understand why it should have been thought necessary, or even pertinent, to cite case after case to show that this court had previously held the law to be just what it was explicitly conceded to be in the former opinion. To say the very least, it was certainly a work of supererogation, or it disclosed a clear misconception of the positions taken in the previous case. Another misconception of the grounds upon which the decision in *McCullough v. Brown* was rested

will be found in the unwarranted assumption that the court in that case denied the power of the legislature to embark the state in a trading enterprise upon some vague ground that it is in violation of the fundamental theories of republican institutions, or, as it has been expressed, "under the guise of some philosophical abstraction that there is some power in them [the courts] by reason of some mysterious something, called, for the want of a better name, 'the social compact;'" or, as it is expressed by the attorney general in his argument in this case, the court, in the case of *McCullough v. Brown*, acting upon the theory "that there was an unwritten constitution prohibiting the encroachment on natural rights without and beyond the terms of the written constitution, logically took into that theory, and as necessary to it, the construction that section 41 of article 1 limited the powers of the written constitution, thus making a resort to some standard not laid down in the words of the charter" (the word "necessary," or some such word, being probably omitted by a mistake of the printer). A careful scrutiny of the opinion of the majority utterly fails to show that the denial of the power of the legislature to embark the state in any trading enterprise is rested upon any such vague, philosophical abstractions, or any such grounds as have been indicated above, as the basis upon which such denial rests. In that opinion the following language is used: "Finally the constitutionality of the dispensary act is assailed upon the grounds that the legislature has undertaken thereby to embark the state in a trading enterprise, which they have no constitutional authority to do; not because there is any expressed prohibition to that effect in the constitution, but because it is utterly at variance with the very idea of civil government, the establishment of which was the expressly declared purpose for which the people adopted their constitution; and therefore all the powers conferred by that instrument upon the various departments of the governments must necessarily be regarded as limited by that declared purpose." And again, after showing that this doctrine of implied limitations upon the legislative power had been recognized and applied in cases of taxation by the supreme court of the United States and by this court itself, as well as by the courts of other states, we find this language: "Upon the same principle it seems to us clear that any act of the legislature which is designed to or has the effect of embarking the state in any trade which involves the purchase and sale of any article of commerce for profit is outside and altogether beyond the legislative power conferred upon the general assembly by the constitution, even though there may be no expressed provision in the constitution forbidding such an exercise of legislative power. Trade is not and cannot properly be regarded as one of the functions of government. On the contrary, its function is to protect the citizen in the exercise of any

lawful employment, the right to which is guaranteed to the citizen by the terms of the constitution, and certainly has never been delegated to any department of the government." If there is anything in this language, which contains the gist of the argument upon which the proposition that the legislature had no power to embark the state in a trading enterprise is based, which contains any hint or suggestion even that the majority of the court rested its conclusion upon this point in the case upon any such principles as have been unwarrantably assumed to be the basis of the former decision as set out above, I must confess my inability to perceive it. On the contrary, the conclusion formerly reached was rested solely upon the ground that, although the constitution contained no express provision prohibiting the legislature from embarking the state in a trading enterprise, yet such a prohibition was necessarily implied by the terms used in the constitution expressly declaring the purpose for which that instrument was adopted, as well as by the express terms used in section 41 of article 1 of the constitution.

This brings me to notice another misconception of the view taken of that section in the former case. It seems to be supposed that the majority of the court in the case of *McCullough v. Brown* construed that section as meaning that a portion of the legislative power had been reserved by the people, and therefore the portion so reserved could not be exercised by the legislature, and the case of *State v. Hayne*, 4 S. C. 403, is again cited to refute such supposed view. In the former case the majority of the court used the following language: "It seems to us that the true construction of this clause is that, while there are many rights which are expressly reserved to the people, with which the legislature are forbidden to interfere, there are other rights reserved to the people, not expressly but by necessary implication, which are beyond the reach of the legislative power unless such power has been expressly delegated to the legislative department of the government." In view of this express statement of what the court in the former case regarded as the true construction of section 41 of article 1, it is somewhat difficult to understand how it can be supposed that the court regarded it as reserving any legislative power to the people. Indeed, the construction placed upon this clause of the constitution by the majority of the court in the case of *McCullough v. Brown* is practically the same as that adopted by Willard, C. J., in *State v. Hayne*, supra, for he says: "The true effect of this declaration is that it reserves to the people whatever is not granted by the instrument, as, for instance, the right to make changes in the form of government is not granted, and under this clause remains in the hands of the people, capable of exercise when they may see fit to do so." The form of expression used, "as,



for instance," shows that the right to change the form of government, used merely as an illustration, was not the only right reserved by this clause of the constitution; and I may venture to add another illustration, as, for instance, the right to settle any disputed question of science by legislative act is not granted, and therefore is beyond the competency of the legislature, though not expressly forbidden, but is forbidden by necessary implication. Why? Because it is altogether outside of the declared purpose in forming the constitution, and therefore beyond the purview of the legislative power therein granted. Other illustrations might be used, but, as time is pressing, I will, as Mr. Chief Justice Willard did, content myself with one. It is very obvious, therefore, why it was not deemed necessary to refer to the case of *State v. Hayne* in *Feldman v. City Council*, 23 S. C. 57. In this connection it may be well to notice the criticism of Mr. Justice GARY upon that case. His view, as I understand it, is that, while the decision in that case was right, it was placed upon an erroneous ground; that the very nature and definition of the term "taxation" necessarily implied that it could only be imposed for some public purpose. Hence, when the constitution conferred upon the legislature the general power of taxation, the use of that term necessarily carried with it the idea that it could only be imposed for some public purpose, although the constitution did not in express terms forbid the imposition of taxes for a private purpose. This, as it seems to me, is but the expression of the same principle upon which the decision in *Feldman's Case* rested, in a different and perhaps stronger form. The principle upon which the question turns is that the grant of any legislative power is necessarily limited by the nature and definition of the terms used in conferring the power. Hence, as I have argued in this as well as in the former case, the general grant of legislative power contained in the constitution must be regarded as necessarily limited by the expressly declared purpose for which such grant was conferred. To apply this principle to the present case, the constitution having been adopted for the declared purpose of forming a civil government, every grant of power therein to the different departments of the government, legislative or otherwise, must necessarily be limited to the accomplishment of that expressly declared purpose as ascertained by the nature and definition of the terms used in declaring such purpose, just as the general power of taxation, when conferred without any express limitation, is necessarily limited to the purposes for which such power is conferred, as ascertained by the nature and definition of the term used. Indeed, I understand it to be a settled rule of construction to be applied to any written instrument, whether it be a constitution or an ordinary contract between priv-

ate persons, that where the purpose of such instrument is expressly declared therein reference must be had to such declared purpose in ascertaining the scope and extent of its terms. I think, therefore, that until it is shown (which I think never can be) that trade is one of the appropriate functions of civil government, any statute purporting to embark the state in any trading enterprise is altogether beyond the competency of the legislature, because it exceeds the limitations upon the legislative power necessarily implied from the express terms used in the constitution. This doctrine of necessary implication has been expressly recognized and affirmed by the supreme court of the United States in at least two cases,—*Dobbins v. Commissioners*, 16 Pet. 435, where it was held that a state could not impose a tax upon the salary of an officer of the United States government; and the case of *Collector v. Day*, 11 Wall. 113, where it was held that the United States government could not impose a tax upon the salary of a state officer. In the case last cited Mr. Justice Nelson, in delivering the opinion of the court, uses this language: "It is admitted that there is no express provision in the constitution that prohibits the general government from taxing the means and instrumentalities of the states, nor is there any prohibiting the states from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation." As I understand it, Mr. Justice GARY, with that commendable frankness and candor which should always characterize a judicial opinion, concedes that if the object of the dispensary act was to embark the state in a commercial enterprise, and it was not intended as a police measure, it would be unconstitutional. It is due to him that I should quote the language used by him in this connection: "We have no doubt that if such was the object of the act, and it was not intended as a police measure, it would be unconstitutional, even in the absence of section 41, art. 1. As we have said, if the act is not a police measure, it is unconstitutional. It is quite a different thing, however, when trade is simply an incident to a police regulation."

The next inquiry, therefore, is whether this dispensary legislation can be regarded as a legitimate exercise of the police power. And first it will be necessary to determine where such legislation is to be found. It certainly is not to be found in the act of 1893 alone, for that view is clearly negatived by the title of that act, as well as by the terms used in its repealing clause. The title of the act of 1893 is as follows: "An act to declare the law in reference to, and further regulate the use, sale, consumption, transportation and disposition of alcoholic liquids or liquors within the state of South Carolina, and to police the same." Now, the use of the words "de-



clare the law" and "further regulate the use, sale," etc., "of alcoholic liquors," necessarily implies the continued existence of some previous law upon the subject; and the only statute of that kind which we have is the act of 1892 upon the same subject, which passed under review in the case of McCullough v. Brown. Then the repealing clause of the act of 1893, which is in these words: "All acts or parts of acts inconsistent with this act are hereby repealed,"—does not, in terms, purport to repeal any particular act, but only such acts or parts of acts as may be inconsistent with the act of 1893. Hence, upon the plainest principles of statutory construction, the act of 1893, even if regarded as constitutional, cannot be considered as repealing the entire act of 1892, but only such parts thereof as may be found inconsistent with the provisions of the act of 1893. It follows from this that the dispensary legislation must be found in both acts.

The next question is whether such legislation can properly be regarded as a legitimate exercise of the police power of the state. Without repeating here the reasoning and the authorities used in the majority opinion of this court in McCullough v. Brown to show that this legislation cannot be regarded as a legitimate exercise of the police power, though still relying upon the same, I will proceed to consider some other views upon this subject presented in the argument of the case now before the court, and in the consideration of this case by the court. Before doing so, however, I must be permitted to advert to what I consider a very dangerous doctrine, asserted in the former case, and again insisted upon in this case. That doctrine, as I understand it, is that the police power of the state is limited only by the will of the legislature, except perhaps in those cases where certain powers have been denied to the states by the provisions of the federal constitution. Hence it is argued that when the legislature passes an act declaring it to be intended as a police regulation, the court have no right to inquire whether such act is in fact a police regulation, and as such a legitimate exercise of the police power. I cannot subscribe to any such doctrine, for it would subject the rights of the citizen, secured to him by constitutional provisions, to the unrestrained will of the legislature, and would render absolutely useless all the safeguards provided in the constitution for the protection of his rights against invasion by the lawmaking power of the government. While this undefined, and therefore dangerous, power, called in general terms the "police power," is fully conceded, and, I may add, is essential to the welfare of the government and of the people composing it, yet I cannot agree that it can be exercised without limitation or restraint. It has its origin in and is based upon the doctrine of self-preservation, said to be the first law of nature. "*Salus populi est suprema lex.*" It

may be likened to the doctrine of self-defense as between individuals, which justifies even the taking of human life in a case proper for its exercise; and, as the courts have unquestioned authority to pass upon any case in which that doctrine is invoked, I do not see why, upon the same principle, the courts may not pass upon a similar power when it is invoked to sustain an act of the legislature. These views, which it seems to me are fully supported by reasoning from the nature of the case, are also sustained by authority. To show this it is only necessary to refer to the case of McCandless v. Railroad Co., 38 S. C. 103, 16 S. E. 429, and to what is said by Mr. Justice Harlan in the case of *Mugler v. Kansas*, 123 U. S., at pages 660, 661, 8 Sup. Ct. 273, a case quoted from in the opinion of Mr. Justice GARY. It seems to me that the use of the word "primarily" in the quotation is sufficient to show that the learned judge recognized the doctrine for which I contend,—that while the legislature must of necessity "primarily" determine what measures are needful or appropriate for the protection of the public morals, etc., yet such determination is not final or conclusive. But if there is any doubt as to the true meaning of the sentence quoted, that doubt is effectually dissipated by the language immediately following, which is not quoted: "It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. \* \* \* The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the court to so adjudge, and thereby give effect to the constitution."

I proceed next to inquire whether the dispensary legislation can be regarded as a legitimate exercise of the police power. It seems to me clear beyond dispute that it cannot. As is said in the quotation from Black on Intoxicating Liquors, found in Mr. Justice GARY'S opinion, the maxim, "*Sic utere tuo ut alienum non laedas*," furnishes the general rule for the application of the police power. In other words, that power can only be exercised for the purpose of restraining one citizen from so using his own rights or property as to work injury to the rights of another. To apply this abstract principle to the particular subject with which we are dealing, under the police power the lawmaking department of the government may throw such restraints

around the traffic in spirituous liquors as may be deemed necessary to protect the health, morals, and safety of the community, and may even go further, and absolutely prohibit such traffic, provided it is inherently and necessarily injurious to society. But this power is to be exerted for the purpose of restraining the citizen in the exercise of his rights to trade in any lawful article of commerce, and cannot be so extended as to authorize the state to engage in a traffic forbidden to the citizen. The police power reaches its limit when it restrains or prohibits a citizen from engaging in a traffic regarded as hurtful to society, and cannot be exercised for the purpose of enabling the state to engage in such traffic. This proposition has been distinctly decided in the only case, so far as I know, in which this proposition has been directly presented. In the case of *Rippe v. Becker* (Minn.) 57 N. W. 331, I find the following language in the syllabus, prepared by the court itself for the very purpose of showing what were the points decided in the case: "The police power of the state to regulate business is to be exercised by the adoption of rules and regulations as to the manner in which it shall be conducted by the others, and not by itself engaging in it." And in the body of the opinion I find this language: "The police power of the state to regulate a business does not include the power to engage in carrying it on;" and again the learned judge, speaking for the court, in regard to the true significance of the police power says: "The term means simply the power of the state to impose those restraints upon private rights which are necessary for the general welfare of all, and is but the power to enforce the maxim, 'Sic utere tuo ut alienum non laedas.'" It seems to me clear that when the police power has been exercised by enacting laws for the regulation of the traffic in spirituous liquor by the citizen, or absolutely prohibiting such traffic, the police power is exhausted, for there is nothing else upon which it can be exercised. Hence any legislation which, going beyond this, purports to invest the state authorities with the exclusive right to buy and sell spirituous liquors, cannot be vindicated as an exercise of the police power.

An attempt is made to draw a distinction between the application of the police power to the traffic in spirituous liquor and to other subjects to which such a power may be applied. I am unable to discover any foundation for such a distinction, either in reason or authority. While it may be true that the mode of exercising the power may be different, according to the subject to which it is applied, and the regulation may be much more stringent in one case than in the other, yet the foundation of the power, and the principle upon which it is exercised, is the same, no matter what the subject may be to which it is applied. The regulations which have, from time to time, been adopted by which the traffic in spirituous liquors has

been controlled, are fully justified as a legitimate exercise of the police power, because it is generally, if not universally, regarded as a traffic dangerous to society if unrestrained and unregulated by law. Upon the same principle the traffic in drugs, which of course includes poisons of all kinds, being regarded as attended with danger to the community unless subjected to proper regulations, may, under the police power, be so regulated; but the legislature, under the guise of the police power, has no more right to pass an act by which the state is to assume the exclusive business of buying and selling spirituous liquors, absolutely forbidding the citizen from engaging in such business, than it has to pass an act by which the state is to assume the exclusive business of buying and selling drugs, absolutely forbidding the citizen from engaging in such business. The same principle applies to all other subjects upon which the police power may be legitimately exercised. It seems to me also an entire mistake to argue that because the state may delegate the exercise of the police power to some subordinate governmental agency,—as, for example, a municipal corporation,—it may also delegate such power to a private citizen, and that it does so delegate it when it issues a license to a saloon keeper to sell spirituous liquors. While it is not doubted that the state may and has delegated the police power to some subordinate governmental agency, such as a municipal corporation, within the limits of such corporation, I do most emphatically deny the power of the legislature to delegate any portion of its legislative power—police power or anything else—to a private citizen; and, so far as I am informed, neither this state nor any other has ever undertaken to do so. When the legislature passes an act forbidding the sale of spirituous liquors by any private citizen without a license, and prescribes the conditions upon which such a license may be obtained, this is done by the state, through its legislative department, in the exercise of the police power of the state, and when the person to whom the license has been issued sells any spirituous liquor he does so, not by virtue of any police power delegated to him, but by virtue of his compliance with the regulations prescribed by the state, in the exercise of its police power. But, as was held in the case of *Mauldin v. City Council*, 33 S. C. 1, 11 S. E. 434, even if the state delegates the police power to a municipal corporation in the broadest and most unlimited terms, the corporation could not, under the guise of an exercise of the police power, engage in any private business, for, as was said by Mr. Justice McGowan in that case: "All the powers given to the city council were for the sole and exclusive purpose of government, and not to enter into private business of any kind outside of the scope of the city government." The decision in that case, as was shown in *McCullough v. Brown*, rests upon

a principle which, as it seems to me, is conclusive of the question now presented.

There is another consideration which conclusively shows that this dispensary legislation cannot be regarded as a legitimate exercise of the police power. Both of the acts of 1892 and 1893 manifestly contemplate that as a part of the scheme the state authorities shall sell spirituous liquors outside the limits of this state, and upon this construction of the act of 1892 the state authorities have acted, as may be seen by reference to the case of *South Carolina v. Seymour*, 153 U. S. 353, 14 Sup. Ct. 871, where, in the oath of the governor in support of the petition for the registry of the trade-mark adopted by the state, it is stated "that the said trade-mark is used by the said state in commerce with foreign nations or Indian tribes, and particularly with Canada." This feature of this dispensary legislation, together with its profit features, commented on in the former decision, show to my mind very clearly that the whole scope and intent of this legislation was to enable the state to monopolize the liquor traffic, to the entire exclusion of the citizens, with a view to the profit of such traffic. This is made more apparent when it is seen that the same legislature which passed the act of 1893 passed another act on the same day, providing that the profits of the dispensary in the county of Clarendon should be applied to the past indebtedness of that county. See Acts 1893, p. 452. As a justification for the state entering into the business of buying and selling liquors, reference is made to the fact that the federal, state, and municipal governments buy and sell articles without question as to their authority so to do, and reference is made to the practice of the penitentiary and lunatic asylum, both of which institutions buy articles for the support thereof, and sell the products of the labor of the inmates thereof. But this, as it strikes me, is a very different thing from the state's engaging in the liquor traffic. In the one case the articles are bought for the purpose of carrying on the government and the institutions above alluded to, and when no longer needed for such purposes sold again, while under the dispensary legislation liquor is bought, not for any governmental purpose, but for the express purpose of being sold again at a profit. It also seems to have escaped attention that the two institutions specially referred to—the lunatic asylum and penitentiary—are both contemplated and provided for in the constitution (the former expressly, and the other by necessary implication, as may be seen by reference to sections 1, 2, art. 11, of the constitution), and therefore any appropriate means for carrying them on may lawfully be provided for by statute.

But, without pursuing the subject further, it seems to me that it has been shown in this and in the opinion of the majority of the court in the case of *McCullough v. Brown*

that spirituous liquor is a lawful article of commerce; and this is so acknowledged by the supreme court of the United States ever since the passage of the Wilson bill, as may be seen by reference to the case of *In re Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865, cited by Mr. Justice GARY under the name of *Wilkinson v. Rahrer*,—a case which arose after the passage of that bill,—where Mr. Chief Justice Fuller uses this language: "Unquestionably, fermented, distilled, or other intoxicating liquor or liquids are subjects of commercial intercourse, exchange, barter, and traffic between nation and nation, and between state and state, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of congress, and the decisions of courts." That, this being so, every citizen of this state has a constitutional right to engage in such traffic, subject, however, to the right of the state government, in the exercise of its police power, to throw such restraints around such traffic by the citizen as may be deemed necessary to protect the morals, health, and safety of the community against the evils incident to such traffic, or, if such traffic is inherently and necessarily injurious to society, may absolutely prohibit the same. That the dispensary legislation is neither the regulation of the traffic nor a prohibition of the same, but, on the contrary, is a scheme by which the state proposes to monopolize such traffic, to the entire exclusion of the citizen, and to force every consumer who may desire to obtain spirituous liquors for any purpose to purchase the same from the state authorities at such a profit to the state as may be fixed by the designated state authorities, and hence such legislation cannot be regarded as a legitimate exercise of the police power; and finally, that any legislation which, like the dispensary law, undertakes to embark the state in trade, is without constitutional authority. I must therefore conclude that this dispensary legislation, whether presented in the form of the act of 1892 or in the form of the act of 1893 or both combined, is in violation of the constitution of the state, and therefore null and void, except in so far as the provision in the act of 1892 forbidding the granting of licenses to sell spirituous liquors beyond the time therein limited is concerned. Having reached this conclusion, it is scarcely necessary to go further and inquire, especially in a dissenting opinion, whether the legislation which has been under consideration violates the federal constitution. But I may add, without going into any discussion of federal questions, that it seems to me that so much of this dispensary legislation as purports to forbid a citizen of this state from importing, either from a foreign country or from another state of this Union, any spirituous liquors for his own use, is in violation of section 8, art. 1, of the constitution; for it will be observed that even

the Wilson bill does not forbid such importation, nor does it authorize any state to do so. On the contrary, its language necessarily implies that liquor may be transported from one state into another, and all that such bill purports to do is to subject such liquor, upon its arrival in a state, to the laws of such state.

(42 S. C. 271)

**MELCHERS et al. v. BATES**, Treasurer, et al.  
(Supreme Court of South Carolina. Oct. 11, 1894.)

Petition by Theodore Melchers and another against W. T. C. Bates, treasurer of the state of South Carolina. Dismissed.

J. P. K. Bryan and Mitchell & Smith, for petitioners.

**GARY, J.** This is an application to this court, in its original jurisdiction, for an injunction to restrain the defendants, as state officers, from enforcing the provisions of the act of 1893, known as the "Dispensary Act," on the ground that it is unconstitutional. This case was heard in connection with that of State v. City Council of Aiken, 20 S. E. 221, and is ruled by the decision in that case, which has just been filed. It is therefore the judgment of this court that the petition be dismissed.

**POPE, J.**, concurs.

**McIVER, C. J.** I dissent. As this case was heard with the case of State v. City Council of Aiken, 20 S. E. 221, and, as I understood, the two cases were to be finally disposed of and the opinions filed at the same time, I feel at liberty to dissent in this case upon the same grounds as I did in the case of State v. City Council of Aiken.

(36 Ga. 503)

**BURBAGE v. AMERICAN NAT. BANK.**

(Supreme Court of Georgia. Oct. 22, 1894.)

**SUMMONS—SERVICE ON PERSON TEMPORARILY ABSENT.**

When one and his family are temporarily absent from the city and county of his permanent residence, by reason of the prevalence of an epidemic, he is still subject to suit by ordinary action in the superior court of that county, and service of process upon him may be effected by leaving a copy of the same at his residence during such absence.

(Syllabus by the Court.)

Error from superior court, Glynn county;  
**J. L. Sweat, Judge.**

Action by the American National Bank against W. E. Burbage and others on a promissory note, in which defendant Burbage filed a traverse to the sheriff's return of service on him. There was an order sustaining the return of service, and defendant Burbage brings error. Affirmed.

The following is the official report:

The American National Bank sued Mayer, survivor of Mayer & Ullman, as makers, and Burbage and Jeter as indorsers, of a certain promissory note. The suit was brought in the superior court of Glynn county, and in the petition it was alleged that Mayer and Burbage were of that county. The return of service upon Mayer and Burbage was dated

November 17, 1893. A traverse to the sheriff's return as to service upon Burbage having been filed, the issue thus made was tried before the judge of the superior court, by consent of counsel, upon the following agreed statement of facts: Burbage was residing at Brunswick, with his family, prior to the breaking out of an epidemic of yellow fever there in the summer and fall of 1893, in a house that was then his permanent home and residence, and had been for 10 years past. Upon the breaking out of the yellow fever, he, on August 12, 1893, refugeeed with his family to a point outside of Glynn county, and was so away from said county, with his family, at the date of said service, which was made by leaving a copy of the writ at the residence first mentioned. He left his residence with the full intention of returning to it as soon as the epidemic was over, and only on account of the epidemic, and with no intention of remaining away permanently. He did return to said residence, with his family, as soon as the epidemic was over, to wit, on December 8, 1893, where he has since resided, and which residence is now his permanent residence. He had a temporary residence in Atlanta, Ga., while absent as above mentioned, and during his absence his home in Brunswick was occasionally visited by his hired servant, to whose care he committed it when he refugeeed. The judge passed an order sustaining the return of service, to which ruling Burbage excepted.

Goodyear & Kay and Orvatt & Whitfield, for plaintiff in error. Owens Johnson, for defendant in error.

**PER OURIAM.** Judgment affirmed.

(36 Ga. 512)

**DECKER et al. v. GWINN et al.**

(Supreme Court of Georgia. Oct. 22, 1894.)

**SALE—CONTRACT—WHEN COMPLETE.**

A contract for the sale of goods was not complete where there was an offer to buy at a given price, which was answered substantially in these terms: "Will accept. Reasonable time for delivery. Please name limit,"—no limit being at any time named, so far as appears.

(Syllabus by the Court.)

Error from superior court, Glynn county;  
**J. L. Sweat, Judge.**

Action by Decker & Fawcett against Gwinn & Franklin to recover damages for failure to deliver grits according to a certain contract of sale. There was a judgment dismissing the petition, and plaintiffs bring error. Affirmed.

The following is the official report:

The petition of plaintiffs was dismissed upon the oral motion of defendants, to which decision the plaintiffs excepted. The suit was by Decker & Fawcett against Gwinn & Franklin. It alleged: Defendants are indebted to petitioners \$1,410, because of the following: On April 18, 1892, Davant & Hunt,

brokers, sold petitioners, for the account of defendants, 10 cars of grits, at \$1.13 per sack, which sale was based on a telegram sent by defendants to Davant & Hunt, in the following language: "Brunswick, Ga., April 18, 1892. Davant & Hunt: Will accept for ten cars grits in sacks. Reasonable time for delivery. Please name limit. Gwinn & Franklin." Defendants failed to deliver the goods at the price they had agreed to deliver, \$1.13 per sack, for 10 cars of grits, which by "the said telegram they had agreed to do," whereby petitioners were compelled to buy, and did buy, through Moore & Co., of Savannah, Ga., 10 cars of sacked grits, at \$1.60 per sack, making a difference of 47 cents per sack, amounting in the aggregate to \$1,410, difference in price over the price at which defendants had agreed to sell, the 10 cars of grits containing 3,000 sacks of grits, which is a loss to petitioners, and for which they are entitled to reimbursement. The motion to dismiss was upon the grounds that the telegram sued upon, the basis of the contract, was not a complete contract, in that there was no allegation that Davant & Hunt had named limit in answer to the last part of the telegram.

Garrard & Meldwin and Goodyear & Kay, for plaintiffs in error. Symmes & Bennet and Harrison & Peeples, for defendants in error.

PER CURIAM. Judgment affirmed.

(95 Ga. 516)

#### FURGERSON v. BAGLEY.

(Supreme Court of Georgia. Oct. 22, 1894.)

ADVERSE POSSESSION—WHAT CONSTITUTES—ACTUAL POSSESSION OF PORTION OF LARGE TRACT.

The rule of the Code (section 2681) that the actual possession of a part of a tract of land by one having paper title to the whole extends by construction over the whole tract is satisfied where a bona fide purchaser for value, after taking a conveyance, incloses even as small a portion as one acre of a lot containing 490 acres, adds to it half an acre in the following year, and in that year cultivates the whole inclosure; then, in subsequent years, builds upon the tract, and otherwise improves it, maintaining his possession openly and notoriously, under a claim of right, until the full term of seven years has expired from the date of completing his first inclosure. These facts will enable him to assert a prescriptive title against an action brought by the true owner after the seven years have expired, and the court may so instruct the jury as matter of law.

(Syllabus by the Court.)

Error from superior court, Ware county; J. L. Sweat, Judge.

Ejectment by James M. Furgerson against Berrien Bagley, in which there was a verdict for defendant. There was a judgment overruling a motion for a new trial, and plaintiff brings error. Affirmed.

The following is the official report:

Furgerson sued Bagley in ejectment for lot No. 443 in the fifth district of originally Appling, now Ware, county. There was a verdict for the defendant, and, plaintiff's motion

v.20s.E.no.9—16

for a new trial being overruled, he excepted. The motion for new trial was upon the grounds that the verdict was contrary to law, evidence, etc., and contrary to a certain specified portion of the charge. It appeared from the briefs of counsel on both sides that the action was brought December 28, 1892. Upon the trial, plaintiff put in evidence a grant from the state of the lot in question to John Mathis, dated August 14, 1841, and deed dated December 27, 1837, from John Mathis to John Furgerson, conveying the lot in question. It does not appear that this deed was ever put upon record. Plaintiff testified: He is the only surviving heir of John Furgerson, his father, who died in 1852; that he had a brother, who had a wife and some children, but they are all dead; that his brother died about six years ago, his wife and all his children having preceded him in death; that he did not see his brother dead, but was informed of his death; and that it was the general understanding and reputation among the family here. Defendant introduced a deed from John Mathis to H. L. Saulsbury, dated April 26, 1842, recorded December 14, 1881; deed from H. L. Saulsbury to J. S. Fleming, dated March 8, 1859, recorded December 14, 1881; deed from J. S. Fleming to W. T. McArthur, dated October 20, 1878, recorded December 14, 1881; deed from W. T. McArthur to Warren Lott, dated February 10, 1882, recorded October 20, 1892; deed from Warren Lott to defendant, dated August 18, 1884, and recorded August 18, 1890. These deeds conveyed the property in dispute. The defendant testified that he bought the land from Lott in 1884, in good faith, for full value; that it was then a woodland lot; that during that winter he fenced about one acre, and prepared it for cultivation, but did not cultivate it that year; that during 1885 he added not over a half acre to the inclosure, and cultivated the inclosure; that in 1886 he commenced to build on the lot, and continued to clear more of it; that in 1887-88 he continued to build, and in 1888 or 1889 moved upon the land, and has resided there ever since, cultivating it each year, and now has a large farm on it; that there was a small crib on the land, when he took possession in 1884; and that his improvements are worth at least \$1,500.

G. J. Holton & Son, for plaintiff in error. L. A. Wilson, for defendant in error.

PER CURIAM. Judgment affirmed.

(95 Ga. 475)

#### STAMPS v. STATE.

(Supreme Court of Georgia. Oct. 15, 1894.)

USING OBSCENE LANGUAGE—SUFFICIENCY OF EVIDENCE.

The language, "I want to stay here a while," addressed by a man to a woman, is not, per se, either obscene or vulgar; and although the indictment charged that, by the use of this language, the former meant to ask the latter to have sexual intercourse with him,

the evidence entirely failed to support this charge, and therefore the conviction of the accused of the offense of using obscene and vulgar language in the presence of a female was contrary to law and evidence, and the court erred in overruling the certiorari.

(Syllabus by the Court.)

Error from superior court, Greene county; W. F. Jenkins, Judge.

Allen Stamps was convicted of using obscene and vulgar language in the presence of a female, and he brings error. Reversed.

The following is the official report:

Stamps was tried in the county court of Greene county upon an indictment charging that he, a colored person, used to and in the presence of Mrs. McJunkin, a white lady, the following indecent and vulgar language, "I want to stay here a while,"—that is, in the house with Mrs. McJunkin,—meaning by said language to ask the said Mrs. Sarah M. McJunkin to have sexual intercourse with him, said language then and there tending to cause a breach of the peace." He demurred to the indictment, upon the ground that it set forth no crime, and that the language alleged as being indecent and vulgar was not indecent or vulgar in contemplation of law. The demurrer was overruled. The state introduced the following evidence: The home of Mrs. McJunkin is in Greene county, about 300 yards from the public road from Siloam to Veazey. During the morning of February 12, 1894, while she was at home alone, defendant came to her house, and asked for a drink of water. She went into the house, got the water, and gave it to him. He asked her if her husband was at home. She told him it was none of his business, and ordered him to leave the place. He did not go, but said to her, "I want to stay here a while." He came to the house on a mule, and rode round to the back door, and asked for the water. While she was getting the water, he got off the mule, and came to the door, and she handed him the water from the door. At first she did not know who he was. She asked him who he was, and he said his name was Allen Stamps; that he was Julia Stamps' son. He stayed around there about 15 or 20 minutes after she ordered him to leave, and then got on his mule, and rode off without saying anything. He did not come into the house. The house had been occupied by negroes prior to the McJunkins moving into it, in January, 1894; and there was a negro house on the public road about a half mile away. Defendant stated he went to the house to get a drink of water. Had been to Siloam, and was on his way home. He thought negroes lived there. He asked for a drink of water, and Mrs. McJunkin gave it to him. Did not mean any harm by what he said to her, and did not intend anything wrong. He was found guilty. He took the case by certiorari to the superior court, alleging error in overruling the demurrer, and that the judgment finding him guilty was contrary to law

and the evidence, and without evidence to support it. The certiorari was overruled, and he excepted.

Hart & Sibley and Edward Young, for plaintiff in error. H. G. Lewis, Sol. Gen., J. B. Park, Jr., Sol. Co. Ct., and A. H. Davis, for the State.

PER CURIAM. Judgment reversed.

(33 Ga. 320)

### STRINGER v. STRINGER.

(Supreme Court of Georgia. Jan. 27, 1894.)

STATUTE OF FRAUDS—SALE OF LAND—ACTION FOR PRICE—LIMITATIONS—PETITION—SUFFICIENCY.

1. Where, in consideration of a parol promise, a deed to land is executed and delivered, the maker of the promise is not relieved from performing it by the statute of frauds, there having been full performance by the maker of the deed and acceptance, together with possession thereunder, by the other party.

2. Where it does not affirmatively appear upon the face of the declaration that the cause of action is barred by the statute of limitations, this defense cannot be made by general demurrer, setting up that the action is barred by the statute, but is matter for plea.

3. As to a contract to furnish support to another "when called on for help," the statute of limitations does not begin to run till a demand for support has been made; and where the declaration, which was filed June 10, 1892, alleges that the demand was made in the year 1888, it does not affirmatively appear that the cause of action was barred. It would not be if the demand was made in 1888, after the 10th day of June.

4. The court erred in sustaining the demurrer to the declaration.

(Syllabus by the Court.)

Error from superior court, Hall county; C. J. Wellborn, Judge.

Action by Alexander M. Stringer against John G. Stringer to recover the price of certain land sold and conveyed by plaintiff to defendant. There was a judgment sustaining a demurrer to the petition, and plaintiff brings error. Reversed.

The following is the official report:

The petition alleges: Defendant is indebted to plaintiff \$500. On July 22, 1871, he sold defendant a tract of land, described in a copy of the deed attached, for \$500. Defendant never paid anything for the land, and under the contract was not to pay anything at that time, and in all probability would never be required to pay anything, as petitioner was then in good circumstances, and thought he never would call on defendant for payment, thinking he would be able to give the land to defendant; but, in abundance of caution, he contracted with defendant (his son), at the time and before the deed was made, and it was expressly agreed by them, that he (petitioner) would make the deed, and should he at any time during his life lose his money and property, become in needy circumstances, and call on defendant for help, defendant was to furnish him a support as long as the same was needed by him, or until defendant had fur-

nished \$500,—the price and value of the land. Some time in 1885 or 1886 petitioner's mind gave way, and because of this, in a short time thereafter, his money and property were all swept away, and he was left penniless, 65 years old, and unable to do any kind of work to support himself and a helpless wife; and on or about April 15th, he was adjudged to be insane, and sent to a lunatic asylum. He remained in the asylum for a considerable time, when it was thought he was restored, and he came home; and some time in 1888 he saw defendant, and made known to him his condition, and called upon him for a support, according to the terms of their contract; and defendant failed and refused to comply with the contract, and refused to assist him in any way. In a short time after this he was again adjudged to be insane, and was sent to the asylum, July 22, 1890, and remained there a considerable time, when again it was thought his mind was restored, and he returned home; and, finding himself restored to his right mind, again repeatedly called on defendant to carry out the contract, and defendant refused and failed to do so. At the time he so called on defendant, he was, is now, and has been all the time since his return from the asylum, old and feeble, without means for support, and unable to work for a living. Had he been, he would not have called on him for help. He prayed for a judgment or decree requiring defendant to specifically carry out his contract; that defendant pay him such an amount of money each year during his (petitioner's) lifetime as might appear to be sufficient for a support and maintenance for him, or until he had paid him the amount of \$500; and for general relief. The petition was filed June 10, 1892. The demurrer was upon the grounds that there was no cause of action set forth, no equity in the complaint, and because the petition showed on its face that, if any such contract was ever made as that set forth, it was barred before the commencement of the suit.

Jas. M. Towery, for plaintiff in error.  
Saml. C. Dunlap, for defendant in error.

PER CURIAM. Judgment reversed.

(94 Ga. 714)

NEAL LOAN & BANKING CO. v. CARR  
et al.

CARR et al. v. NEAL LOAN & BANKING  
CO.

(Supreme Court of Georgia. Sept. 17, 1894.)  
SETTLEMENT WITH CREDITOR — JUDICIAL SALE —  
EFFECT ON THIRD PERSONS.

1. The verdict, under the evidence and the law applicable thereto, was contrary to the truth of the case. The daughters of Mrs. Carr had no interest in her parol agreement with Neal which was not subject to her absolute control; and she, by uniting with her husband in effecting the settlement made through McCalla, bound herself and her daughters by the results

of that settlement, she having acquiesced in the same until after judgment was rendered against McCalla upon the notes given by him, and up to the time when the property was sold by virtue of that judgment. By the sale the title passed to the Neal Loan & Banking Company. The numerous specific questions made in the record, many of them minute and of slight relevancy, are rendered immaterial by the controlling facts on the merits.

2. There was no error as to either of the matters excepted to in the cross bill of exceptions.

(Syllabus by the Court.)

Error from superior court, Rockdale county; R. H. Clark, Judge.

Action by the Neal Loan & Banking Company against B. F. Carr and others to recover land. Judgment was rendered, and both plaintiff and defendants bring error. Reversed.

The following is the substance of the official report:

This action was to recover parts of lots 339, 340, and 352; the west half of lot 329; 20 acres in the southeast corner of lot 329; all of lot 314, except 50 acres; 40 acres of lots 337 and 354, except a half interest therein claimed by one Summers; the whole of the land sued for being 650 acres. The abstract of title relied upon consisted of a deed from W. H. M. Austin, sheriff, to petitioner, covering the premises in dispute, and 23 a. fas. from the justice court of the 475th district, G. M., of Rockdale county, in favor of T. B. Neal et al., executors of John Neal, against A. C. McCalla. It does not appear from the record when the petition was filed, but presumably it was between July 25, 1888, and August 1, 1888, as the petition is dated July 25, 1888, and service thereof was acknowledged August 1, 1888. There was a plea, sworn to by B. F. Carr "as agt. for others," of not indebted. Also, "that there was an understanding with T. B. Neal, myself, B. F. Carr, and Mrs. Mary E. Carr, my wife, that this sale should not be so considered as to affect no claims or interest as to the amount of money so paid by Mrs. B. F. Carr." Also, "there was an arrangement to this, on the day of sale, through Mr. Jos. H. Almand and myself, B. F. Carr, in the sheriff's office, before this sale." Also, "T. B. Neal agreeing to couch the same in writing." B. F. Carr having died intestate, Huson, his administrator, was made party defendant. The defendants Mrs. Carr and Kitty and Fannie Carr filed an answer, in the nature of a cross bill, at the March term, 1891, of the court, to which an amendment was allowed, and the executors of the estate of John Neal made parties. To the action of the court in allowing the amendment over objections of plaintiff's counsel, the original plaintiff and the executors excepted pendente lite, and upon it assign error in their final bill of exceptions, alleging that the court erred because the relief sought was not germane to the original issue, and the executors should not have

been made parties, and that the court erred in allowing the answer and special pleas, because the matter claimed in the answer is barred by the statute of limitations, being more than four years from the time of the alleged payments to the filing of the claim set forth in the answer

After a plea of the general issue by the respondents mentioned, their answer alleged:

Mrs. Carr was the wife of B. F. Carr, and the other defendants were their children. Respondents were the heirs at law with the other children of B. F. Carr, and the latter died seised and possessed of the lands mentioned in the petition. Long prior to the death of B. F. Carr, respondents had a separate estate, belonging to Mrs. Carr for her life, and after her death to such children as she might leave living at her death, which consisted of 667 acres lying in Rockdale county, which was their separate estate, and free from the contracts or debts of Benjamin Carr, all of which more fully appears by a decree creating the separate estate, dated August 22, 1873, and recorded November 27, 1873. The lands thus settled were paid for originally by the father of Mrs. Carr, and constituted a portion of the share given her on her marriage, or afterwards, by her father; that is, the money paid for the lands was intended by her father as a gift to her, but the separate estate was not by deed created and secured to her until August 22, 1873. At the time of said deed or settlement, B. F. Carr had also a valuable estate,—much more than sufficient to pay all his debts. Since the creation of said separate estate, Mrs. Carr and her children have been in the use and enjoyment thereof. About March, 1874, B. F. Carr, needing money to pay debts, negotiated with John Neal (the predecessor of the Neal Loan & Banking Company, which, under the will of John Neal, succeeded after his death to all his moneyed estate and choses in action) for borrowing certain money, and did borrow of him \$880, giving to him nine notes due nine months after date, with interest at 18 per cent., dated March 4, 1874, eight of the notes being for \$100 each and the other note for \$80. Neal agreed and did assume to Carr, or to pay off for Carr, a *fi. fa.* in favor of Mathewson against Carr amounting to \$620.06; but, so far as they know, Carr gave no note therefor to Neal, and the only evidence they have of any such loan or payment is in the bond for titles made by Neal subsequently to Carr. About the same time, to secure the payment of said notes, Carr made to Neal a deed to about 650 acres of land in the sixteenth district of Rockdale county, comprising largely the lands mentioned in the petition; and for the purpose of completing the contract, and to show that the deed was simply as a security for the loan, Neal, on April 9, 1874, made to Carr his bond to reconvey the land mentioned, and now in dispute, which

bond is set forth. The recital in this bond that Carr was to pay on the Mathewson *fi. fa.* \$620.06, with interest at the rate of 18 per cent. per annum, was usurious and void, as respondents are informed that Carr never, in writing signed by himself, agreed to do so, as the statute then required, but in law Carr was only bound to pay lawful interest. When Mrs. Carr learned of this loan, well knowing that Carr was not, from his habits or business methods, well qualified to meet the loan, she had an interview with Neal, who expressed his doubts as to Carr ever being able to meet the loan without sale of the land. She proposed to Neal that she would undertake to pay the debt—so much as was legally and justly due—from the income of her separate estate, if he would agree to reconvey the land to her daughters Kitty and Fannie, who were interested in her separate estate, and who had agreed with her to surrender their interest as remainder-men, in favor of the other children, in consideration of receiving a deed to the land conveyed to Neal by Carr. This proposition was accepted by Neal, as he expressed more confidence in securing his money from respondent than from Carr.

Relying fully upon this agreement, and Carr also agreeing thereto, respondent at once, with a view of discharging the indebtedness to Neal, began, by the strictest economy, and closest attention to the management of her separate estate, to raise crops, etc., and from the crops raised on her separate estate, in March or April, 1875, she shipped to A. Leyden 14 bales of cotton, which brought \$783.55, which was received by Neal in part payment of the debt. On October 20, 1876, she shipped to M. L. Stoval 18 bales of cotton, which brought \$756.54, and on October 21, 1876, two bales, which sold for \$82.25; the twenty bales aggregating \$838.79, which was to be applied to the debt of Carr, as the same was shipped by respondent to be placed to the credit of John Neal, and which was so done. After this she paid to Neal, through his attorney, Sims, of the proceeds of certain cotton of hers shipped to McMahan & Stokely, an amount which she does not remember. Neal has received on the debt, from her separate estate, up to October 26, 1876, \$1,622.34, in addition to \$650 from the sale of 92 acres made to H. P. Almand, as well as other sums hereinafter mentioned. Having the utmost confidence in Neal, she did not look personally to the application of these payments to the debt of her husband. But Neal, notwithstanding said payments, without giving credit therefor, on April 11, 1879, instituted nine suits against Carr in the justice's court of the 475th district, G. M., of Rockdale county, on the nine notes heretofore mentioned; and the same went to judgment, without defense, at the May term, 1879, of said court. All of this was without the knowledge or consent of any of respondents, and the full amount seemingly due was recovered, without any



credits for the sums which had been paid by Mrs. Carr, and which should have been applied to the notes, as stipulated in the bond of Neal. If said payments had been properly applied, the notes would have been fully paid off before said suit. Respondent can account for this omission only upon the grounds that Neal lived in Atlanta, away from the scene of the suits, was greatly advanced in years, and was immersed in a large business; and can only account for the negligence of Carr, in suffering the judgments to be rendered, from his well-known carelessness in his business, and her great confidence that in her final settlement these payments would be properly allowed and recognized. Having procured these judgments, Neal executed and filed a deed reconveying said land to Carr, on May 24, 1879, recorded May 29, 1879; and on the same day the deed was recorded the nine fl. fas. were levied upon the land by a constable, by making the following entry upon each: "I have this day levied the within fl. fa. on the following tracts of land, to wit, in the 16th district of Rockdale county, parts of lots numbers 340, 339, 352, 329, 314, and 337; all together containing 650 acres, more or less, same being now in possession of defendant B. F. Carr, and the property pointed out by plaintiff's attorneys, this May 29, 1879." Signed by the constable. These entries were made by the constable in exact conformity to written instructions given by plaintiff's attorney. Said levies, under which the land was afterwards sold, are illegal and fatally defective, in that they fail to describe plainly the property thus levied upon, as the statute required, and hence no legal sale could be made thereunder. In addition to the payments above mentioned, Mrs. Carr paid Neal, in 1876 or 1877, \$100 on said debt; but, notwithstanding, Neal had the lands advertised for sale under the levies mentioned on the first Tuesday in May, 1883, and bid them off at the sale at the price of \$2,500, according to the recitals in the sheriff's deed. Neither respondents nor Carr ever regarded this sale as legal or binding, for, so far as they know, no credit was ever allowed Carr for the pretended price given for the land, either on the fl. fa. under which the sale was had, for said amount would have largely overpaid any balance, if any there was, or the debt claimed by Neal to be due him from Carr, and the subsequent conduct of Neal showed that he claimed a portion of the debt to be due, and he never asked to evict Carr from the land under the sale. So far as respondents know, Neal paid no money on said sale, and they do not know what amount he bid off the land at; but the sale did not affect the agreement made with Neal by Mrs. Carr, that, whenever she paid the amount due on said debt, Neal was to reconvey the land to Kitty and Fannie Carr, and upon this she and Neal acted after said sale. The only

modification of the original agreement was that on her application to Neal he agreed, on January 25, 1877, to reduce the rate of interest she was to pay on the debt, "but unpaid interest at the rate of twelve per cent. instead of eighteen." No credit was allowed to Carr from the sale of the land, nor were the fl. fas. credited with any amount received therefrom. On January 19, 1884, and after Neal held his pretended title to the land, he insisted he should be paid \$800 on the debt, and Mrs. Carr having no means of knowing then what was the balance due on the debt, but being anxious to do all she could for her daughters, to procure a deed to them, she and Carr consented for Neal to sell to Almand 92 acres of the land for \$650, and to make out the balance of the \$800 she gave a check on her son-in-law George S. Jones for \$150, which was accepted, and she paid \$10 (?) in cash besides, which check was duly paid; and on this payment, with her consent and that of Carr, Neal made a deed to Almand for the 92 acres, and said amount was to be credited on the debt of Carr. In all of these payments she never had an opportunity of investigating the amount of the debt, and she does not remember having seen any papers, but trusted implicitly, in making all of the payments, to the statements of Neal, and if the papers had been submitted to her she would not have been able to determine, herself, how the debt had been enlarged by accumulated interest. Neal, probably being satisfied that the title he held under the sheriff's sale was not good, sold the land to A. C. McCalla, taking his notes therefor, and giving him bond for title. McCalla paid no money, and subsequently these notes were put in judgment, the lands levied on, and Neal again became the purchaser at sheriff's sale, with a view to fortify his title. This nominal sale to McCalla was in violation of the contract Neal made with Mrs. Carr, and is not binding upon her. At the time of this sale she did not know what balance Neal claimed to be due him from Carr, but supposed, from the payments she had made, she had discharged a large portion, if not the whole, of the debt. She is informed that, at the time of this sale, McCalla knew of the agreement she had made with Neal. The portion of lot 229 (?) included in the deed made by Carr to Neal was not at the time the property of Carr, but was the separate property of Mrs. Carr. Respondents prayed for an accounting between them and plaintiff, successor of Neal, under the agreement made with Neal, so as to ascertain the amount originally loaned by Neal to Carr, at what rate of interest, and whether any portion was usurious, what payments had been made on the debt, what remains unpaid, what overpaid, and what is the amount of the excess; that the levy and sale in May, 1883, be decreed void; that, if the payments made on the debt be found to have satisfied the claim, plaintiff be decreed to

execute title to the land to Mrs. Carr for the use of Kitty and Fannie Carr, and the action of ejectment be perpetually enjoined; that if it should appear that there is a balance due on the debt, if it be paid off by respondents, they may have decree for specific performance, as above prayed for. Since the commencement of the suit, Carr has died insolvent, and respondents have no effectual remedy against his estate. They further prayed that if they were not entitled to the decree asked for above, recovering the land, Mrs. Carr have decree for the money she paid Neal out of her separate estate, with interest, on the debt of Carr, and which was received by Neal, knowing it was her separate estate; and for general relief.

The amendment to this answer alleged: In reference to the pretended sale made in 1887 by the sheriff under the *f. fas.* against McCalla, neither of respondents was present at this sale. They were informed the land was bid off by Thomas B. Neal, representing his father, John Neal, and they did not know to whom title was made until long afterwards, and no possession passed out of respondents; but they have since learned that the title was executed to the Neal Loan & Banking Company, and that it, though a corporation, is composed of all the legatees under the will of John Neal, and therefore privy in estate, and holding under John Neal, under the will, and as stockholders in said company, without paying any consideration therefor. In view of these facts, respondents pray that the executors of John Neal, of Fulton county, be made parties defendant to this cross bill, and ask that if it be found that they (respondents) are entitled to specific performance, as prayed for in the cross bill, the sheriff's deed to the Neal Loan & Banking Company be canceled, and the executors decreed to execute a deed to Kitty and Fannie Carr as agreed by John Neal. As in their original cross bill and answer they pray for an accounting as therein mentioned, it becomes necessary that the executors should be made parties, with a view to have such accounting and decree thereon. The sale under which plaintiffs claim title was illegal and void. Before the sale was made, Thomas B. Neal and B. F. Carr, on the day of sale, had a conference, and instructed the officer selling not to cry the property, but to knock it off on the first bid; and in pursuance of these instructions said Neal made the first bid, at \$1,500, for nearly 600 acres of land, which was immediately knocked off to him in pursuance of said agreement, when in fact the land was worth some \$5,000, thus greatly injuring the respondent, who had paid the whole of the debt of Carr to Neal before that time, under the agreement heretofore set forth.

The executors of Neal were made parties at the March term, 1891, and pleaded the statute of limitations. At the September term, 1891, they pleaded to the jurisdiction

on the ground of nonresidence in the county of Rockdale, alleging that they are residents of Fulton county, and that the superior court of that county alone had jurisdiction of them. They also pleaded not indebted.

By direction of the court the cause was referred to an auditor, who made a report. To this report the banking company and the executors filed exceptions of law and fact. After hearing and considering the same the presiding judge passed an order disposing of the exceptions as follows: "First. That there are so many exceptions, divided into those of law, those of fact, and mixtures of law and fact, that it is impossible to make a distinction between many of them, nor is such necessary to a proper adjudication upon each exception. Second. That there are a few exceptions which lie at the foundation of the case, and an adjudication upon them will control, and are inclusive of the minor exceptions. Third. That I sustain the exception to the auditor's report as to the calculation made by the auditor, and the result arrived at from said calculation, upon the evidence submitted and proposed to be submitted upon the issue as to the state of the indebtedness between the parties. Fourth. That I sustain the auditor's report to the effect that all the transactions between the parties are yet open to adjustment, inclusive of the sheriff's sale, and that the Neal Loan & Banking Company are the successors of John Neal, and is bound by whatever the executors of John Neal would be bound. Fifth. That all exceptions to auditor's report incident to the controlling exceptions stated are either sustained or not sustained as they may relate to each of said exceptions. Sixth. That upon the trial before the jury of the issue made upon the exceptions to the report the evidence accompanying the report may be used, wherever applicable, to illustrate first what amount is yet due the executors of John Neal, or the Neal Loan & Banking Company, upon the several transactions with either, subject to the judgment of the presiding judge as to the admissibility or nonadmissibility, and that whatever amount, if any, shall be found due, that the judgments, deed, and bonus for titles, and the like, shall retain their respective liens and rights."

To some of these rulings the exceptants excepted *pendente lite*, and as to them assign error in their final bill of exceptions. These assignments of error are: That the judge erred in the fourth finding. That he erred in not passing on and deciding each exception of law and fact made by exceptants *seriatim*. That he erred in not submitting all of the questions of fact raised by the exceptions to a jury, under the constitution and laws of the state. Especially is this so in this case, as the judge submitted certain questions of fact to a jury, as shown by his judgment on the exceptions. That he erred in overruling plaintiff's exceptions to the report that the plea of the statute of limitations was not sus-

tained. That he erred in overruling plaintiff's exceptions to the auditor's report, in which he held that Mrs. Carr was not estopped by the agreement entered into on January 10, 1884, between her and her husband, on the one part, and A. C. McCalla, on the other, from contesting the amount due on the McCalla notes. And that the judge erred in not sustaining plaintiff's exceptions to the auditor's report, in which he found that the testimony in regard to transactions between John Neal and said Carrs was competent testimony against plaintiff. In behalf of the executors of John Neal, it was alleged that the judge erred in not sustaining their exceptions to the auditor's report, in which he found that the plea to the jurisdiction by the executors was not well taken.

The questions and issues of fact on the exceptions ordered submitted to a jury, as above set forth, were tried, and a verdict was rendered in favor of the defendants. A motion for new trial was made by the banking company and the executors, which motion was overruled, and to this ruling, also, they excepted.

By cross bill of exceptions, Mrs. Carr, Kitty Carr, and Huson, administrators, alleged: On the trial the banking company offered in evidence a paper purporting to be a calculation as to a certain indebtedness and the payments, which was shown to be in the handwriting (the figures) of A. B. Sims, deceased, the attorney of John Neal, which was found among the papers of Sims after his death. To the introduction of this calculation in evidence defendants objected on the grounds: (1) They were simply the sayings of Sims, attorney of Neal, and incompetent as evidence against defendants. (2) There was no sufficient evidence that these defendants, or any of them, were present when the calculation was made, or that the calculation was ever submitted to them, or either of them, for examination or approval. (3) There was no evidence that such calculations were ever made by Sims at their direction or by their consent, or that they were ever made the basis of any note or paper or settlement between these defendants and John Neal. These objections were overruled, and this ruling is alleged as error.

A. C. McCalla, G. W. Gleaton, and Geo. Westmoreland, for plaintiff in error. A. M. Speer, J. R. Irwin, Stewart & Daniel, and C. Anderson, for defendants in error.

PER CURIAM. Judgment on the main bill of exceptions reversed; on the cross bill, affirmed.

(95 Ga. 475)

#### POUNDS v. STATE.

(Supreme Court of Georgia. Oct. 15, 1894.)

RAPE—INSTRUCTIONS—CAPACITY TO CONSENT—REMARKS OF COUNSEL.

Where, upon the trial of an indictment for rape alleged to have been committed upon a

female between the ages of 10 and 11 years, it appeared that sexual intercourse was accomplished, and the main question at issue, therefore, being whether the female was in fact capable of consenting to the act or not, and the court having several times, in substance, instructed the jury that, although she was over 10 years old, yet, if she was a child in stature, constitution, and physical and mental development, and they believed from her age and appearance that she was incapable of consenting, the accused would be guilty, although she made no objection to the intercourse, it was also the duty of the court to charge the jury that if they believed she was capable of consenting, and did actually consent, the accused should be acquitted. The failure to so charge is cause for a new trial in a close case like the present, taking this omission in connection with the fact that the court allowed the solicitor general, in his concluding argument, to state to the jury, over objection of counsel for the accused, that "the age of consent in many states is higher than in this state, and should be made higher here; and a committee of ladies waited on the judiciary committee of the last house of representatives, and urged that the age of consent be raised to 12 years in this state."

(Syllabus by the Court.)

Error from superior court, Haralson county; C. G. Janes, Judge.

Jesse Pounds was convicted of rape, and brings error. Reversed.

B. S. Griffith and Edwards & Edwards, for plaintiff in error. A. Richardson, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

PER CURIAM. Judgment reversed.

(93 Ga. 356)

#### PHILLIPS v. GEORGIA RAILROAD & BANKING CO.

(Supreme Court of Georgia. Nov. 27, 1893.)

CARRIER OF PASSENGERS—CONTRACT LIMITING LIABILITY—RETURN TICKET—CONDITION AS TO USE.

According to the Code (section 2068), a common carrier cannot limit his legal liability by any notice or entry on tickets sold. Without making an express contract with the passenger, a railroad company cannot, after selling a return ticket, and receiving pay therefor, exact of the passenger, as a condition of returning on the ticket, that he shall sign it, and that the signature shall be attested by a given agent, who shall stamp it. This is true, although the ticket delivered to the passenger be sold at a reduced price, and limited as to time, and may indicate on its face that it is to be signed, attested, and stamped, and that it cannot be used unless these requisites be complied with.

(Syllabus by the Court.)

Error from city court of Richmond; W. F. Eve, Judge.

Action by Mrs. Lizzie Phillips against the Georgia Railroad & Banking Company. There was a judgment for defendant, and plaintiff brings error. Reversed.

Fleming & Alexander and Arnold & Arnold, for plaintiff in error. Jos. B. Cumming and Bryan Cumming, for defendant in error.

BLEOKLEY, C. J. The law of this case is contained in section 2068 of the Code, which

reads as follows: "A common carrier cannot limit his legal liability by any notice given, either by publication or by entry on receipts given or tickets sold. He may make an express contract and will then be governed thereby." Here the ticket was prepared in contemplation that an express contract would be made, but none was made in fact. The purchaser of the ticket was not requested to make any; and, even if he had noticed the terms of the instrument, he might well have concluded that the purpose indicated thereby—of having an express contract—had been abandoned by the company. It is not disputed that payment was made for transportation both ways; that is, to go to Augusta and return. This payment and its acceptance raised a legal obligation on the part of the carrier to furnish, not a part only, but the whole of the transportation paid for. It is now insisted that this legal liability was limited by an express contract, which rendered the undertaking of the company with reference to return transportation conditional upon acts to be done in Augusta. The whole controversy is thus resolved into the question whether there is evidence that such a contract was made. It is quite clear that the contract which the company intended to create was never created. There is no written evidence of such contract, and, as far as the parol evidence goes, it tends to disprove, rather than to prove, the making of any express contract whatever. The ticket was bought with an understanding that it was limited in point of time, and the attempt to use it was within that limit. After selling it, and receiving pay for it, without making any contract that it was to be resigned, attested, and stamped in Augusta, the company had no right to impose that condition upon the use of it. As to what is an express contract, and the difference between it and a contract implied in fact, see Keener, *Quasi Cont.* p. 5. Judgment reversed.

(95 Ga. 502)

#### TRIPP v. STATE.

(Supreme Court of Georgia. Oct. 8, 1894.)

#### CARRYING PISTOL—SUFFICIENCY OF EVIDENCE— NEW TRIAL.

The evidence warranted the verdict, the newly-discovered evidence is cumulative only, and there was no error in denying a new trial. (Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Robert Tripp was convicted of carrying a pistol concealed, and brings error. Affirmed.

The following is the official report:

Tripp was indicted for carrying a pistol concealed, and was found guilty. His motion for a new trial was overruled, and he accepted. The motion contained the general grounds that the verdict was contrary to law, evidence, etc.; also because of certain newly-discovered evidence. The evidence for the

state was to the following effect, in substance: Defendant, with Will Jones and others, came to the door of one Bonner, in Floyd county, at about 9 o'clock at night, when a dance was going on. Will Jones called out through the back room door, "The desperadoes have come." Shortly afterwards the defendant came into the room where the dancing was in progress, and went over to where Bonner was, and took Bonner's girl over to a corner opposite the chimney. Some of the boys came crowding after him. Thereupon defendant told them not to crowd him, and immediately pointed two pistols upwards, and fired into the ceiling. The lights were not put out. The pistols were concealed under defendant's coat tail. Bonner then came up to defendant, and asked him to give up the pistols, and not to raise a row. Defendant said he would put the two pistols up, and thereupon raised his coat tail, and simultaneously put his pistols in each of the rear pockets of his pantaloons. Defendant was not scuffling with any one over a pistol at Bonner's. Will Jones claimed the two pistols defendant had. For the defendant the testimony was to the following effect: Defendant went with Jones, Joe Campbell, and others to Bonner's. They were getting along all right, when Campbell commenced cursing defendant, and threatening to shoot him. Defendant tried to grab the pistol in Campbell's hands. Scuffling started, and the pistol went off, the ball hitting up on the side of the wall higher than a man could reach. Defendant did not bring any pistol to the dance. Defendant gave the pistol back to Campbell. Jones did not ask Bonner to get the pistol away from defendant for him, nor did he claim that the pistol was his. In support of the ground as to newly-discovered evidence defendant produced the affidavit of Evans to Campbell: He went with defendant and others to the dance at Bonner's. A pistol was fired in the house, and he came immediately to see who was doing the shooting. He saw defendant with one pistol in his hand. Defendant never put the pistol in his pocket while they were in the house, but kept it in his hand, in full view. Deponent stayed in the house with the defendant until defendant, deponent, Jones, and others left together to go home. Defendant still had the pistol in his hand, carrying it. After they had gotten about half a mile from the house, defendant gave Jones the pistol, as Jones claimed it was his. Defendant never had the pistol concealed from the time of a second or two after it was fired in the dancing room until they parted. Deponent never saw two pistols in defendant's hands on that night. Also the affidavit of Lizzie Griffin: She was at the dance. Defendant had some words with Campbell, and then a pistol went off. Defendant fired only one shot, and had only one pistol there that night. About a minute after the pistol fired, Bonner came to defendant, and said something deponent could not hear.

Defendant had the pistol in his hand then. Bonner then walked away, defendant still having the pistol in his hand, unconcealed. Campbell then came up to defendant, and they went out doors, defendant carrying the pistol in his hand. After they stayed out doors a short while, they came back, and commenced talking in a friendly manner, defendant still carrying the pistol in his hand, so it could be easily seen. The dance broke up very soon after this. Deponent did not see defendant conceal or put the pistol in his pocket, and did not see but this one pistol or hear of but this one there that night. Also the affidavit of Singleton Ford: He was at the dance. When the pistol was fired, he, together with Joe Newton (one of the main witnesses for the state), Bonner, and others, were in the room adjoining where the pistol was fired. As soon as it was fired, deponent and Bonner went into the room, but Newton rushed out of the house, and never returned, so far as deponent knows. Newton called to his wife to go back and bring his fiddle, a circumstance that caused a good deal of amusement at the time, in that he was willing to put his wife into what he thought was danger, but declined to go himself. There was only one shot fired, and deponent saw no pistol when he went into the room with Bonner. Deponent was one of the witnesses subpoenaed by the state in the case. Also the affidavit of counsel for the defendant as to their ignorance of the alleged newly-discovered evidence until after the trial, and as to their diligence in preparing for trial. Also the affidavit of defendant: He did not have an opportunity to look up any evidence, or talk to any of the parties, except those in jail with him, who were at the dance at Bonner's, on account of his being in jail since November 27, 1893. (The offense was alleged to have been committed November 28, 1893.) He did not know what Evans or Campbell would testify to, not knowing what knowledge Campbell had, nor having any opportunity to talk to him about the case. He supposed Will Jones was hostile to him, as the same charge was brought against Will, and for that reason did not talk to Will about the case.

J. W. Ewing and A. G. Ewing, for plaintiff in error. W. J. Nunnally, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(94 Ga. 74)

#### MANSFIELD et al. v. STATE.

(Supreme Court of Georgia. April 16, 1894.)  
"CRIMINAL CASE TRIED" — WHAT CONSTITUTES—  
BILL OF EXCEPTIONS—TIME OF FILING.

Where a criminal case, originating in the county court, and resulting in a conviction, was carried by certiorari to the superior court, and there dismissed, it was, within the meaning of the act of September 7, 1891, a "criminal case tried" in the latter court. Consequently,

where the bill of exceptions assigning as error the dismissal of the certiorari was not tendered and certified within 20 days from the date of the decision complained of, the writ of error must be dismissed.

(Syllabus by the Court.)

Error from superior court, Decatur county; B. B. Bower, Judge.

Tom Mansfield and others were convicted of assault and battery, and bring error. Writ of error dismissed.

W. M. Harrell, A. H. Russell, D. A. Russell, and Harrison & Peeples, for plaintiffs in error. F. S. Harrell, Sol. Co. Ct., and W. N. Spence, Sol. Gen., for the State.

LUMPKIN, J. Mansfield and others were jointly tried for assault and battery in the county court of Decatur county, and convicted. They took the case by certiorari to the superior court, and there, on the trial, the presiding judge, on motion, dismissed the certiorari, because, in his opinion, the affidavit attached to the petition was insufficient in law. In this court a motion to dismiss the writ of error was made and sustained, because the bill of exceptions, assigning as error the dismissal of the certiorari, was not tendered and certified within 20 days from the date of the decision complained of, as required by the act of September 7, 1891. This act provides that bills of exceptions in criminal cases shall, as to the time and manner of signing, filing, serving, transmitting, and hearing, be governed in all respects, where applicable, by the laws of force at the time of its passage in reference to bills of exceptions in cases of injunction. In these latter cases the bill of exceptions must be tendered and certified within 20 days. The question is, was the case at bar a "criminal case tried," within the meaning of that act? We think it was. It was a case of some kind, and there is no class of cases to which it could possibly belong, except criminal cases. It was a prosecution by the state against the accused for a criminal offense against the laws of the state. The fact that it originated in the county court, which has jurisdiction to try and finally dispose of misdemeanors, does not make it any the less a criminal case; and, besides, the policy of the act, in providing for the more speedy determination of criminal cases, is fully as applicable to cases originating in the county court as in any other court of criminal jurisdiction. Writ of error dismissed.

(94 Ga. 73)

#### JONES v. STATE.

(Supreme Court of Georgia. April 16, 1894.)  
HOMICIDE—NEW TRIAL—TRIVIAL ERRORS.

On the facts in evidence, a verdict for murder followed as a necessary consequence; and there was no error in denying a new trial, although some minor errors and inaccuracies may have been committed in the course of the trial.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Daniel Jones was convicted of murder, and brings error. Affirmed.

M. H. Blandford and J. M. McNeill, for plaintiff in error. S. P. Gilbert, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

**LUMPKIN, J.** How such cruelty as was disclosed by the record in this case is possible, can be accounted for only upon the doctrine of total depravity. The accused brutally and unmercifully beat to death his niece, a helpless girl, to whom he owed, in loco parentis, every duty of kindness and protection. It is unnecessary to mar the pages of this report with the heart-sickening details of his atrocious conduct. It is probably true that he did not actually intend to cause the death of the girl, but there was no other reasonable or natural consequence of his acts. He is, therefore, to the full extent, responsible in law for what he did, and is beyond doubt a murderer, whether the actual intention to kill existed or not. His motion for a new trial contains many grounds, a close examination of which will perhaps disclose the commission of some minor errors and inaccuracies during the trial; but, as the verdict for murder was the only one which could be legally found, they are immaterial and unimportant. There would be no wisdom or justice in ordering another trial of a case which has already had a perfectly lawful and proper termination. The jury saw proper not to make a recommendation to mercy, and the accused has forfeited his life. We trust his awful fate will be a solemn warning to others who may be tempted to follow his unfortunate example. Judgment affirmed.

(95 Ga. 470)

#### WALLACE v. STATE.

(Supreme Court of Georgia. Oct. 8, 1894.)

CRIMINAL LAW — LIMITING ARGUMENT TO JURY — STABBING — SUFFICIENCY OF EVIDENCE — INSTRUCTIONS — ASSIGNMENTS OF ERROR — NEW TRIAL.

1. Although the accused was indicted for assault with intent to murder, yet where the solicitor general announced he would only ask a conviction for the offense of stabbing, which was a misdemeanor, and the trial judge stated he would instruct the jury there could be no conviction for the felony, and afterwards did so, there was no error in refusing to allow counsel for the accused two hours for argument, nor in limiting his argument to thirty minutes, under the rule applicable in misdemeanor cases. See *New Rules Superior Court*, No. 6. The cases of *Hunt v. State*, 49 Ga. 255, and *Williams v. State*, 60 Ga. 367, were decided before the rule in question was adopted.

2. The evidence was sufficient to warrant the jury in finding that the defendant was guilty of culpable negligence in using the knife. The charges of the court complained of were legal and pertinent, and were authorized by the

evidence. The assignments of error as to the admission of evidence, not stating what were the grounds of objection, cannot be considered; and there was no error in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Bibb county; J. M. Griggs, Judge.

Jim Wallace was convicted of stabbing, and brings error. Affirmed.

The following is the official report:

Wallace was indicted for assault with intent to murder, alleged to have been committed upon one Clara Bush with a knife. He was found guilty of stabbing. His motion for new trial was overruled, and he excepted.

His motion contained the general grounds that the verdict was contrary to law, evidence, etc., and contrary to the charge of the court. Also because the court erred in admitting the testimony of T. H. Brown, the prosecutor, over the objection of defendant's counsel in regard to certain declarations that he told the accused that Clara Bush had made to him, as follows: "I told him [the prisoner] that she told me she cut him [he cut her] with a butcher knife, and that the reason he cut her was that she had put on her dress, all but one sleeve, and she was going to the police to have him arrested." It was not stated in this ground what was the objection which was made to the evidence.

Error in admitting the following testimony of Brown over objection of defendant's counsel, in regard to what he told the prisoner about the cutting: "He just stated— When I told him what the woman had said, I told him that the woman said he had come there drunk, and abused her, and hit her, and that she was sick, and tried to get away, and said that 'Mr. Brown had arrested you a short time ago. That she told him you know that you were fined ten dollars. Brown came here, and got you for abusing me.' She said, 'I am not going to be bothered. She had one sleeve on, fixing it up, and he stuck the knife in her,—cut her with the butcher knife,—and then Wallace said, 'Here is the knife I cut her with.' He did not have anything more to say." It was not stated in this ground what objection was made to the evidence.

Error in charging: "If you believe from the evidence in this case, beyond a reasonable doubt, that this defendant stabbed the woman as charged in the bill of indictment, and that he did it intending to stab her, and that he was not justified in so doing, or that he did not intend to stab her, but that it happened through negligence upon his part, which you believe to be criminal negligence, then your verdict ought to be, 'Guilty of stabbing.'" Alleged to be error, because unauthorized by the evidence, there being no proof of criminal negligence and such a charge being misleading.

It appears from the record that the woman who was cut testified: "It was in the day,

about half past ten o'clock. He had not been in the house more than fifteen or twenty minutes. I was in my room. My sister was in the back room. I had my night clothes on, but when he called to see me I put on my wrapper. I was cut near the left hip bone on the left side, and was in bed from it nearly two weeks. The knife went through my wrapper. He was just about like he is now. Might have been drinking a little. He was not rearing and olching. He said he wanted to see me, and I said, 'I am sick tonight, don't bother me.' He said, 'You ain't much sick,' and commenced to play with me. He was grabbing hold of me, and going on; and I said, 'Wallace go away, my head hurts me;' but he kept on, and I shoved at him to keep him away, and the knife stuck in my side. There was no fuss or anything, but he had a knife in his hand. I saw the knife before it stuck into me. He had it in his hand. He had been coming to see me a little over a year, as near as I can remember. He had never beat me. He was playing with me, going on just as he had many other times, and I was trying to keep him from catching hold of me." She was shown two knives,—a butcher knife and a pocket knife,—and was asked with which one he cut her, and replied it was with the pocket knife; that it was a little knife. She could not testify that was the one, but it was not a butcher knife; it was a pocket knife. She further testified that he was not mad with her; that they had not a cross word; that he was playing with her, and she felt tired, had a headache, and said to him to stop, and he kept on playing, and she shoved him back, and the knife he had in his hand struck her in the side, and she told him he had cut her, and he said he would go after the doctor, and that she had not started out to get a policeman, etc.

Error in charging: "If you believe from the evidence that the defendant struck the blow that made the wound alleged to have been committed by accident or misfortune, I charge you that it must satisfactorily appear that there was no intention or evil design on the part of the defendant, or it must satisfactorily appear that there was no culpable negligence on his part. In order that you may clearly understand, I will repeat: If you believe from the evidence, beyond a reasonable doubt, that the defendant struck the blow which inflicted the wound alleged to have been made on the person of this woman,—if you believe that beyond a reasonable doubt,—then, before you acquit him, it ought to satisfactorily appear that there was no evil intention or design on his part, or any culpable negligence on his part." Alleged to be error, because argumentative; because there was no evidence that the offense was committed with any intention, or with any criminal negligence, or any culpable neglect on defendant's part, and such a charge was calculated to mislead; and because it did not submit

fairly the defense of one who commits crime through misfortune and accident.

Error in not submitting to the jury the law explanatory of section 4302 of the Code, upon which section defendant relied solely for his defense.

Error in admitting in evidence a butcher knife, over objection of defendant's counsel. Defendant contends that the knife is not identified by any of the witnesses as being the property of defendant. It is not stated in this ground what objection was made to this evidence when offered.

It appears from the record that Brown testified, among other things, that he arrested defendant at defendant's house, and accused him of cutting the woman with a butcher knife, and defendant said he cut her with a pocket knife (which had a long blade); that he got both knives at defendant's that night, and brought them away, defendant taking the pocket knife out of his pocket and handing it to him (witness).

Error in limiting the argument of defendant's counsel to 30 minutes, according to the law passed in misdemeanor cases. Movant alleges that he was put on trial, and pleaded not guilty to an indictment charging him with a felony, and exercised his legal right of 20 strikes in a felony case; and under these facts his counsel had a right to the full 2 hours for argument allowed in all felony cases. In a note to this ground the court states he limited counsel for both sides to 30 minutes, because the state's counsel announced in opening the case that he would not ask for a conviction for anything but stabbing. When the court announced to defendant's counsel that he would be limited to 30 minutes in argument, counsel replied that he was familiar with the rule. He did afterwards insist that under the indictment defendant could be convicted of felony, unless the court charged that he could not be so convicted, to which the court replied, "All right, then." The court did so charge.

J. R. Cooper, for plaintiff in error. W. H. Felton, Jr., Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(34 Ga. 76)

#### MAY v. STATE.

(Supreme Court of Georgia. April 16, 1894.)  
HOMICIDE—TRIAL—EXCLUSION OF DEFENDANT'S BROTHER—INSTRUCTIONS—FAILURE TO CHARGE AS TO LOWER OFFENSE—NEW TRIAL.

1. Nothing appears which would justify a reviewing court in ordering a new trial because the presiding judge, in the exercise of his discretion, applied the order for sequestration of witnesses to the brother of the accused, as well as to the other witnesses in the case.

2. The requests to charge the jury, in so far as they were legal and appropriate, were fully and fairly covered by the general charge as given. This being so, the refusal to charge in the language requested would be no cause for a new trial, even were the language free from inaccuracy.

3. Under no fair construction of the evidence was the element of manslaughter involved. The case was palpably one of murder or of justifiable homicide.

4. The correctness of the verdict depended upon the comparative credibility of the witnesses, and, the jury having credited those testifying in behalf of the state, there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Telfair county; W. F. Jenkins, Judge.

John May was convicted of murder, and brings error. Affirmed.

C. D. Lond, W. L. Clark, and D. W. Rountree, for plaintiff in error. Tom Eason, Sol. Gen., J. M. Terrell, Atty. Gen., and Hines & Felder, for the State.

LUMPKIN, J. 1. This case was before this court at the October term, 1892. 90 Ga. 793, 17 S. E. 108. A new trial was then ordered because, in the opinion of this court, the trial judge erred in rejecting evidence offered by the accused of an uncommunicated threat made by the deceased. No question of this kind arose at the last trial. It was also held when the case was here before that after ordering the sequestration of the witnesses the court should not, in permitting one of them, who was a brother of the accused, to remain in the court room to assist in the defense, have granted this permission on condition that he would not be introduced as a witness. At the last trial the witnesses were again sequestered, and the court applied the order of sequestration to this brother of the accused, as well as to the other witnesses in the case, and required him to retire from the court room during the trial. We thought when the case was here before, and we still think, that the court might, with propriety, have allowed the brother to remain and assist in the defense; but we shall not undertake to control the discretion of the trial judge in a matter of this kind, no reason appearing in the record which would justify this court in so doing.

2. The motion for a new trial assigns as erroneous numerous refusals of the court to give in charge to the jury requests presented by counsel for the accused. These requests contain no new or important legal principles which make it in the least necessary to state or discuss them. In so far as they were legal and appropriate, they were fully and fairly covered by the general charge as given. In some respects the language of the requests is not free from inaccuracy. It has been repeatedly ruled by this court that a refusal to charge even a correct and perfectly unobjectionable request in the very language in which it is presented will be no cause for a new trial, when the principle embraced in such request is fairly stated to the jury by the judge in his own language.

3. We have carefully and anxiously examined and studied the brief of evidence in the present record. When the case was

here the first time, we did the same thing as to the brief of evidence then brought up. There is no substantial difference in the two briefs, and we are still of the opinion that, "if the witnesses for the state told the truth, the accused was guilty of murder; if the version of the homicide given by the witnesses for the accused is correct, the accused was justifiable, and guilty of no crime at all." Consequently, the court did not err in falling or refusing to charge upon the law of manslaughter. The case was palpably one of murder, or of justifiable homicide.

4. It is apparent from what is above stated that the proper determination of the case depended entirely upon which set of witnesses the jury should believe. They evidently credited those testifying in behalf of the state; and, as they are the sole judges of the credibility of witnesses, we have neither the power nor the inclination to interfere with their exercise of this function. Judgment affirmed.

(94 Ga. 100)

#### WAYCROSS OPERA-HOUSE CO. v. SOSSMAN et al.

(Supreme Court of Georgia. April 30, 1894.)

MECHANIC'S LIEN—FOR WHAT OBTAINED—SCENERY FOR OPERA HOUSE.

Scenery and other articles constituting the stage and scenic outfit of an opera house are part and parcel of the edifice, as such, the same being essential to the completeness of a building of that class. This being so, the furnishing of such outfit, or of the materials composing the same, is furnishing material for the improvement of real estate; and the person by whom such furnishing is done is entitled to a lien upon the opera house and premises, under the provisions of section 1979 of the Code.

(Syllabus by the Court.)

Error from superior court, Ware county; C. C. Smith, Judge.

Action by Sossman & Landis against the Waycross Opera-House Company to establish and enforce a mechanic's lien. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

J. C. McDonald, for plaintiff in error. Hitch & Myers, for defendants in error.

LUMPKIN, J. Section 1979 of the Code gives to persons furnishing material for the improvement of real estate a special lien upon the real estate itself. The only question presented in this case is whether or not scenery and various other articles constituting the stage and scenic outfit of an opera house are such things as may be properly classed as material for its improvement. In a strict sense, these articles, or some of them, may not be fixtures, but they are nevertheless essential to the completeness of a building of that kind. They necessarily form a part and parcel of the edifice itself. A dwelling house may be absolutely complete and perfect as a building without a single article of furni-



ture in it; and although the ordinary articles of household furniture, such as beds, chairs, tables, carpets, draperies, and the like, may be indispensable to the comfortable use and enjoyment of a house as a dwelling, they are in no sense a part of the building itself. By a mere sale of the house, they never pass, but are, when sold, the subject-matter of special contract. This, we apprehend, is not true as to the furnishings and fittings of an opera-house stage. These things usually pass with a sale or lease of the building, without express stipulation. No one would ordinarily consider household furniture and belongings as a part of the premises, but every one would naturally regard the drop curtain, wings, borders, set houses, set trees, balustrades, etc., as being parts of an opera house edifice. These things usually remain permanently in the house where they are first set up, and are not moved about, as furniture is, from house to house, when the owners change their places of abode. It is true, perhaps, that some traveling theatrical companies carry with them special scenery to more properly and advantageously set off particular plays; but this is the exception to the general rule, and in such instances the permanent outfit of the house is only temporarily displaced. We therefore find little difficulty in reaching the conclusion that the articles furnished by the plaintiffs in the present case were properly considered by the trial judge as being in the nature of material furnished for the improvement of the real estate, and consequently he was right in holding that the plaintiffs were entitled to a lien for the value of the same upon the opera house and premises. In Tennessee, under a statute which is in substance the same in the respect indicated as section 1979 of our Code, decisions were made in the cases of *Grewar v. Alloway*, 3 Tenn. Ch. 584, and *Halley v. Alloway*, 10 Lea, 523, which are precisely in point, and sustain the ruling now made. Judgment affirmed.

(94 Ga. 725)

## ADAMSON v. MELSON.

(Supreme Court of Georgia. Aug. 31, 1894.)

NEW TRIAL—APPLICATION—BRIEF OF EVIDENCE—TIME OF APPROVAL.

A case was tried in December, 1892, during the September adjourned term of the superior court, and at that term an order was passed reciting that a motion for a new trial had been filed, and allowing movant "until the third Saturday in January, 1893, and until such time as may be then designated by the court, in which to perfect his motion, and prepare a copy of the written, and brief of the oral, testimony in said case." On the day last named the hearing of the motion was, by a consent order, continued until the 4th day of February. The hearing was then, by another consent order, again continued until the March term, 1893, of the court. Neither of these consent orders designated expressly any time within which the brief of evidence might be filed or approved, or made any reference whatever to this subject. At the March term there was a motion to dismiss the motion for a new

trial, and an order was then passed continuing the hearing of the motion for a new trial until the September term of the court, with leave to respondent to renew his motion to dismiss. This order also extended the movant's time for having the brief of evidence approved and filed until the September term. It does not appear that this was consented to by the respondent in the motion, but it was not excepted to by him. At the September term the hearing of the motion was again continued until the 16th of October, in vacation, "the movant to be in no way prejudiced by the delay." On that day it was against continued, "with all rights reserved to both sides," until November 11th, when the motion to dismiss the motion for a new trial was overruled, and a new trial was granted. The motion to dismiss recites that a brief of evidence was filed in the clerk's office August 29, 1893, but it does not appear that the same was ever approved before November 11th, the time when the motion was heard and disposed of. Under the facts recited, the two continuances by consent carried the whole matter into open court at March term; the order granted at that term did the same with reference to the September term; and the orders granted at the latter term, and subsequently thereto, are susceptible of a construction which would carry the whole matter down to November 11th, the time when the motion was actually heard and decided in vacation. The presiding judge having by his action adopted this construction, it was no abuse of discretion for him to approve the brief of evidence at that time, no actual injustice as to the merits of the litigation, so far as appears, having resulted from his so doing; and it was not error to refuse to dismiss the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Clayton county; R. H. Clark, Judge.

Suit between J. C. Adamson and W. A. Melson, in which there was a judgment for Adamson, and Melson moved for a new trial. There was an order denying Adamson's motion to dismiss the motion for a new trial, and sustaining the latter motion, and Adamson brings error. Affirmed.

G. D. Stewart and Watterson & Kimsey, for plaintiff in error. John L. Doyal, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 41)

## BYRD v. CAMPBELL PRINTING-PRESS &amp; MANUF'G CO.

(Supreme Court of Georgia. June 18, 1894.)

SALE—ACTION FOR PRICE—DEFENSES—MISTAKE IN WRITTEN CONTRACT.

If the terms of a contemplated sale be orally agreed upon by the buyer and the agent of the seller, with the understanding that the former is to reduce the same to writing, and transmit the writing to the seller for his acceptance or rejection, and certain vitally material stipulations, favorable to the buyer, are by mistake omitted from the writing, and with knowledge of this omission the seller accepts the buyer's proposal, and thereupon the latter (both parties fully understanding the terms of the sale to be the terms orally agreed upon) executes and delivers his promissory notes for the price, and afterwards, by reason of the failure of the seller to comply with the stipulations omitted from the writing, the consideration of the notes so fails, or partially fails, that in equity the buyer would be entitled either to a rescission,

or to a material abatement in the price, these facts may be set up as a defense (complete or partial) to an action on the notes; the defendant in his plea alleging, not only that the seller accepted the written proposal with knowledge of the oral stipulations, and of their omission by mistake from the writing, but that he has admitted in writing that this was true, and the plea not being demurred to specially on the ground that the writing to prove this admission was not set forth either by description or by copy of the same.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by the Campbell Printing-Press & Manufacturing Company against C. P. Byrd on a promissory note. There was a verdict for plaintiff, and defendant brings error. Reversed.

D. W. Rountree, for plaintiff in error. B. F. & C. A. Abbott, for defendant in error.

LUMPKIN, J. The Campbell Printing-Press & Manufacturing Company sold and delivered to Charles P. Byrd a printing press, the latter giving his promissory notes for the purchase price of the same. An action was brought by the Campbell Company upon one of these notes, which, notwithstanding the defenses set up, and attempted to be set up, by the defendant, resulted in a verdict and judgment in favor of the plaintiff. That case is reported in 90 Ga. 542, 16 S. E. 267. Afterwards, the Campbell Company brought a second action against Byrd upon another of the notes above mentioned. To this action the defendant filed a special plea, to which the plaintiff demurred. Pending argument on the demurrer, the defendant offered an amendment to this plea, which the court refused to allow, and then passed an order sustaining the demurrer, and striking the defendant's special plea. There was a verdict for the plaintiff for the full amount of the note, and the defendant brings the case to this court for review, assigning as error the refusal of the court to allow the amendment offered to his special plea, and the striking of that plea on demurrer. The questions dealt with in the present case were not passed upon or decided in the former case between these parties. In order to set forth clearly the questions involved in the controversy now presented for adjudication, we will state at some length the substance of the special plea, and of the amendment which the defendant desired to make to the same. Although, in pursuing this course, there may be, to a considerable extent, a repetition of the facts contained in the statement and opinion reported in 90 Ga. and 16 S. E., supra, this seems, nevertheless, the better method of dealing with this somewhat complicated case.

As to the facts connected with the sale of the press to Byrd, and the negotiations leading up thereto, the defendant's special plea furnishes the following history: In June, 1889, Byrd entered into a written contract

with the Campbell Company touching the purchase by him of a printing press, by the terms of which contract he was to have three months' trial of the press, with the right to reject the same if it failed to come up to certain express warranties as to workmanship, suitability, etc. After a trial of the press, it was found, for a number of reasons, to be entirely unsatisfactory; and accordingly Byrd, within the time stipulated in the contract, exercised his option to reject the press, and notified the resident agent of the Campbell Company to take the press out of his office. The Campbell Company recognized the existence of the defects in the press pointed out by Byrd, and the trade was declared off. Subsequently, the company wrote Byrd that it was "making some radical changes, which would make the bed of said press as accessible in front of the cylinder as it is on any back-delivery, two-revolution press," and asked to be permitted to make these changes on the press then in Byrd's office. Under orders from his company to try every means possible to induce Byrd to keep the press, the agent called upon Byrd, and prevailed upon him to allow the press to remain in his office, free of charge, pending negotiations for a trade upon the basis of remedying all defects, which the agent assured Byrd could be done by making certain alterations and improvements, and exhibited a letter from the company to that effect. Some time elapsing, and no steps having been made by the company to perfect the press as proposed, Byrd again requested the agent to remove the same, stating he had recently purchased another of a different kind, and had no need of an additional press. The agent, however, in accordance with instructions from his principal, "persisted in trying to make a trade, and insisted that Byrd should make him a proposition to buy said press, upon the express condition that such alterations and improvements would be made on it as would remedy all the defects on account of which it had been rejected, and would bring it up to the standard fixed in the original contract." Byrd thereupon told the agent he would not buy the press at any price, in the condition in which it then was, but, after much importunity, proposed to the agent to buy it upon certain terms, upon the express condition that all defects would be remedied as aforesaid. At the request of the agent to reduce this offer to writing, Byrd wrote the following letter, which he read over to the agent, and then delivered the same to him, to be forwarded to the Campbell Company: "Atlanta, Ga., Dec. 14th, 1889. Campbell P. P. & Mfg. Co., New York—Gentlemen: In reference to the Oscillator press, I have only to urge the objections with which you are already familiar. For long runs it is a good press, but, for the ordinary run of book and job work, it is altogether too unhandy. That I am honest in this position is evidenced by the fact that I took the Pony press in its stead. The trade

for the Pony press has been consummated, the press is satisfactory, and I have no desire to make any change, so far as it is concerned. With the Whitlock, the two-revolution Campbell, and the Pony, I can do all the work at my command, and I do not need any other press. It was with the understanding that the Oscillator was rejected that the Pony was put in, as I had no intention of keeping the Oscillator when the Pony was ordered. In this assertion, your Mr. Fiske and Mr. Seitzinger will bear me out. I am very much crowded, and have no room for the number of machines now in my office. Now, with the above facts before you, I make you the following proposition, which is the very best I can do, and which shall be final: I will give you my notes for \$2,000.00, payable one-third in 12 months, one-third in 24 months, and one-third in 36 months, without interest, dated January 1st, 1890. I make the time long because I have about as much to pay in the meantime as I care to, and I make it without interest because I cannot afford to pay interest on a comparatively idle press. Of course, I understand that there is an object in having an extra press, but I consider I am paying well for such an object when I pay \$2,000.00 for it. I am careful to give my notes in such a way as to be absolutely certain of meeting them. I might give you notes for a shorter time, and disappoint you, and mortify myself, by being unable to pay them, but I do not propose to do this. So far, my record is clear of such transactions, and I propose to so conduct my affairs as to maintain this record. If you see fit to accept the proposition, you may forward your papers for closing the trade. Awaiting your reply, I remain, very truly, [Signed] Chas. P. Byrd."

As to the circumstances connected with the writing of this letter, Byrd, in his plea, explains that it was written at night, after closing time, when both he and the company's agent were anxious to go home; and while it was the mutual intention of both to incorporate in the letter Byrd's true offer, as above set forth, yet, by the inadvertence, oversight, and mistake of both of them, the letter failed to contain any mention of the express stipulation that said offer was made upon the condition that the defects in the press should be remedied as proposed. Under these circumstances, Byrd insists that the writing of the letter was in effect the work of both himself and the agent, and charges, moreover, that the mistake thus caused by their inadvertence and oversight was well known to the Campbell Company when it received this letter, and that the company answered the letter and accepted said offer with full knowledge that said condition or stipulation was a part and parcel of the proposition submitted by Byrd. It is further alleged in the defendant's plea that, when the notes mentioned in his letter were presented to Byrd to be

signed, he declined to do so until the contract was fully understood by both parties thereto to be as above indicated, and which defendant insisted was the real contract of purchase. Subsequently, the Campbell Company admitted in writing that said condition was a part of the contract of purchase, and undertook to have the necessary alterations, additions, and improvements made upon the press in accordance with its contract; but its efforts utterly failed, and the same defects existed after such efforts as before; and Byrd, after a full trial of the press as thus changed and added to, finding it not improved, but almost worthless, again rejected it, on account of said defects, and so notified the Campbell Company, which, however, declined to accept it. After the failure of the company to perfect the press, Byrd knew of no way to remedy its defects, and it is now, as it has always been, practically worthless. It has been used, in consequence, very little, but has been carefully kept, and is in good condition. Byrd has hitherto frequently offered to return it to the company, and pay liberally for its use, and is still willing and offers to do so.

Upon the maturing of the first note given by Byrd, the Campbell Company instituted suit upon the same. To this action, Byrd filed a plea of failure of consideration; but the court held this plea to be bad, for the reason that it did not, upon its face, set forth a legal defense, being lacking in both clearness and certainty, not only as to details, but as to substance, and was otherwise defective. Judgment was accordingly rendered against the defendant for the full amount of the note, which judgment Byrd has since paid in full.

To amplify the allegations of his plea in regard to the subsequent recognition by the Campbell Company of his mistake in omitting from his letter a substantial feature of the proposition he really intended to make, Byrd further offered at the trial the amendment mentioned in the beginning of this opinion, alleging that he "absolutely refused to sign said notes until said agent, in accordance with the specific written instructions of said plaintiff, agreed and undertook to make said improvements and alterations, and thus correct all defects, upon the faith of which agreement and undertaking the notes were signed and delivered to said agent."

Passing by as immaterial everything which had occurred up to the time when the agent of the Campbell Company succeeded in inducing Byrd to submit to the company a written proposition stating the terms upon which he (Byrd) would be willing to purchase the press, we think the latter was entitled to plead and prove that by mistake or inadvertence he omitted from his written proposition the vitally material stipulations and conditions favorable to himself specified in the plea, and the fact that this omission was known to the Campbell Company when it accepted his prop-

osition to purchase. We are also of the opinion that it was the right of Byrd to plead and prove that both parties fully understood the terms of the sale to be those agreed upon orally between Byrd and the company's agent at the time the written proposal was made, and that the notes given by Byrd for the price of the press were executed and delivered with this understanding on the parts, not only of Byrd and the company's agent, but also on the part of the company itself; the plea also alleging that the Campbell Company had admitted in writing its acceptance of Byrd's written proposal with knowledge of the oral stipulations referred to, and of their omission, by mistake, from the writing. In this connection it is well to bear in mind that there was no special demurrer to the plea on the ground that the writing to prove this admission was not set forth either by description, or by copy of the same. If Byrd was entitled to plead as above indicated, it would follow, of course, that he had the right to plead further the failure of the Campbell Company to comply with the stipulations omitted from the writing, and that in consequence of such failure the consideration of the notes failed, either totally or partially; and if, under these pleadings, he can establish by evidence a total failure of consideration, he will be entitled to a general verdict in his favor. If he establishes only a partial failure of consideration, he will be entitled to have a deduction from the note now sued on, in accordance with the facts. The amendment which the court rejected was merely an amplification of the allegations contained in the special plea, and this constitutes a sufficient reason why it should have been allowed. Taking a comprehensive view of all the allegations contained in the plea and the amendment, considered together, they are not necessarily inconsistent with Byrd's written contracts, as evidenced by his letter of December 14, 1889, to the Campbell Company, its acceptance of the terms proposed in the letter, and his promissory notes executed and delivered in pursuance thereof. On the contrary, Byrd is simply seeking an enforcement of the contract he actually made, a vital part of which was, in consequence of a mistake which was well known both to the Campbell Company and its agent, omitted from the letter. The recognition of the existence of this mistake can be shown, if the plea speaks the truth, by the company's written acknowledgment. This acknowledgment, if in fact made, will show that the oral contract made by the company, and in consideration of which Byrd gave his notes, was not only the sale and delivery of the press, but also the making of certain alterations and improvements which would remedy its defects, and cause it to do satisfactory work. The company's written acknowledgment, as described in the plea, would be competent and sufficient evidence against the company to show what the contract really was. See *Foster v.*

*Leeper*, 29 Ga. 294, cited approvingly in *Georgia Refining Co. v. Augusta Oil Co.*, 74 Ga. 508. See, also, *Bank v. Janes*, 66 Ga. 286, holding that where a promissory note did not itself express the entire contract between the parties, but the remainder was contained in a letter written by one of them in connection with the making of the note, such letter was admissible in evidence in a suit against the maker by one who took the note after its maturity. If all the statements in the plea are true, it would be grossly unjust to cut off entirely Byrd's defense, and allow the company to recover upon the notes just as they stand. If the plaintiff accepted his written offer of purchase, knowing of the omission, and afterwards accepted his notes, fully understanding they were given by Byrd upon the basis of his letter as it would be with the omitted stipulations in it, and if afterwards the company admitted in writing these things to be true, it cannot in good conscience claim that its entire contract with Byrd is evidenced only by the notes and the literal import of the letter. To sustain such a claim on its part would be to allow the company to perpetrate and consummate a gross fraud upon Byrd, which, under the facts as alleged by him, is neither lawful nor allowable. We do not, of course, know what Byrd will be able to prove; but, for the purpose of dealing with the demurrer, the allegations of his plea are to be taken as true. So regarding them, he has a right to go before the jury, show the written acknowledgment of the plaintiff, mentioned in his plea, and, by proving the other facts alleged, establish his defense, either complete or partial, as may appear when the evidence all comes out. Judgment reversed.

(94 Ga. 731)

**PRITCHETT v. COMMISSIONERS OF  
ROADS AND REVENUES OF  
BARTOW COUNTY.**

(Supreme Court of Georgia. Aug. 31, 1894.)

**APPEAL—REMITTITUR—WITHDRAWAL BEFORE FILING IN TRIAL COURT—DEATH OF PLAINTIFF IN ERROR.**

Where a case was argued in this court on the 31st day of January, 1894, during the October term, 1893, and the plaintiff in error died on the 7th day of February, 1894, and this court, without being informed of this fact, rendered a judgment of reversal in the case on the 4th day of June, 1894, during the March term, 1894, and after the remittitur was transmitted to the court below, but before it was filed therein or entered on the minutes of that court, the death of the plaintiff in error was suggested in this court, it is within the power of this court at any time before the final adjournment of the March term, 1894, to pass an order declaring that the judgment of reversal shall be of force and effect as of January 31, 1894, when the case was argued and submitted for decision, and to order a withdrawal of the remittitur first issued, and the issuing of a new remittitur, in accordance with the facts above recited. *Mayor, etc., v. Dasher*, 16 S. E. 75, 90 Ga. 195; *Mitchell v. Overman*, 103 U. S. 62, and cases cited.

(Syllabus by the Court.)

On motion to withdraw remittitur previously issued, and declare the judgment of effect as of the date of the argument in the supreme court. Motion granted.

For prior report, see 19 S. E. 896.

PER CURIAM. Ordered accordingly.

LUMPKIN, J., of the Atlanta circuit, presiding in the place of BLECKLEY, C. J., disqualified.

(94 Ga. 30)

**MAYOR, ETC., OF CITY OF ALBANY v. SIKES.**

(Supreme Court of Georgia. April 23, 1894.)

EMINENT DOMAIN — RIGHT TO COMPENSATION — NEW TRIAL—CONDITIONAL ORDER.

1. If, in the exercise of a power conferred by statute to erect and maintain city waterworks, a municipal corporation arrests or obstructs the natural flowage of surface water, and causes it to flow upon adjacent land, whereby the market value of the land is diminished, the owner may recover compensation for this damage under that provision of the constitution which declares that private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid.

2. In view of the conflict and uncertainty in the evidence as to whether the depreciation in the value of the plaintiff's property was occasioned by the flooding incident to the erection of the waterworks, and, if so, to what sum the depreciation from this cause amounted, it was error to make the grant of a new trial conditional upon reducing the recovery from \$1,500 to \$300. The new trial should have been granted unconditionally.

(Syllabus by the Court.)

Error from superior court, Dougherty county; B. B. Bower, Judge.

Action by Ella B. Sikes against the mayor and council of the city of Albany, Ga., to recover damages for injury to plaintiff's land, caused by arresting and obstructing the natural flow of surface water, and causing it to flow on such land. There was a judgment for plaintiff, and defendants bring error. Reversed.

Wooten & Wooten, for plaintiffs in error. S. T. Jones and W. T. Jones, for defendant in error.

LUMPKIN, J. 1. Before the ratification of the present constitution of this state, the owner of private property actually taken for public use was undoubtedly entitled to compensation; but, where such property was merely damaged in the prosecution of a public work, it was *damnum absque injuria*. Our constitution now provides that "private property shall not be taken, or damaged, for public purposes, without just and adequate compensation being first paid." Code, § 5024 (Const. art. 1, § 3, par. 1). It follows that where a municipal corporation, in the exercise of a statutory power authorizing it to erect and maintain city waterworks, in so doing injures or damages the private property of a citizen, that corporation will be

liable to make compensation in damages, if an individual would be liable for causing injuries or damages of the same kind. In connection with all that is said above, see *Smith v. Floyd Co.*, 85 Ga. 420, 11 S. E. 850. Construing so much of the declaration as was left after a portion of it had been stricken on demurrer, together with the evidence offered by the plaintiff in support of her cause of action, the main question presented for our consideration is, can she recover from the mayor and council of Albany compensation for arresting or obstructing the natural flowage of surface water, and causing it to flow upon her land, thereby diminishing the market value of her property? The evidence tends to show that, before the erection of the city waterworks, the lot upon which the reservoir now stands was more elevated than that of the plaintiff, and that, consequently, rain water falling upon the upper lot ran down upon the lot of the plaintiff, but that, since the erection of the waterworks, rain water which fell upon other land, and ran upon, and was more or less absorbed by, the present city lot, has been diverted from it, and caused to overflow the plaintiff's lot, so that it now receives a much greater quantity of surface water than it did before. Whether the city is liable for this increased flowage of surface water upon the plaintiff's land depends upon whether or not we adopt what is known as the "common-law rule" or the "civil-law rule," bearing upon the subject of surface water. According to the rule of the common law, surface water, like the waters of the sea, was regarded as a common enemy, and it was the right of any landowner to expel it from his own land, without regard to the injury which might thereby be occasioned the proprietor of a lower estate. By the rule of the civil law, while the lower proprietor is bound to receive the surface water which naturally flows from the estate above, the owner of the latter has no right, by diverting surface water which he ought to receive from an estate above his own, and to which his estate is servient, thus to relieve his own estate of the servitude which nature placed upon it, and cast the whole burden upon the estate of his neighbor below. It is not our present purpose to discuss at length the merits of these two conflicting rules. They have been stated and discussed by numerous judges in many of the courts of this country, and any one desiring to pursue the investigation will find the sources of information indicated in the authorities below cited. According to Gould, the rule of the common law has been accepted in Massachusetts, Maine, Vermont, New York, New Hampshire, Rhode Island, New Jersey, Michigan, Minnesota, and Wisconsin; that of the civil law in Pennsylvania, Illinois, North Carolina, Alabama, Tennessee, California, and Louisiana, and it has been referred to with approval by the courts of Ohio and Missouri. Gould, *Waters* (2d Ed.) §§ 265,

266. Perhaps a majority of the American states have adopted the civil-law rule. In *O'Connell v. Railway Co.*, 87 Ga. 246, 18 S. E. 489, many of the cases bearing upon this question are referred to. This case is also reported and annotated in 13 *Lawy. Rep. Ann.* 394, and in the notes a large number of pertinent cases may be found cited. See, also, *Washb. Easem.* (4th Ed.) pp. 23, 485 et seq.; *Moak, Underh. Torts*, 457-478, 712-714; *Martin v. Jett*, 12 La. 501, 82 Am. Dec. 120. An examination of the cases of *Ogburn v. Connor*, 46 Cal. 346, and *McDaniel v. Cumming*, 83 Cal. 515, 23 Pac. 795, will show that the supreme court of that state, while endeavoring in the former case to state the common-law rule, really stated the rule of the Roman civil law, and in the latter case, notwithstanding the error thus committed, allowed the civil-law rule to prevail on the doctrine of *stare decisis*. In *Livingston v. McDonald*, 21 Iowa, 160, that eminent jurist, Judge Dillon, said, in discussing a similar question then involved, that: "It would be inexcusable to overlook the doctrines of the civil law respecting it. That law, embodying the accumulated wisdom and experience of the refined and cultivated Roman people for over a thousand years, though not binding as authority, is often of great service to the inquirer after principles of natural justice and right." In the note to *Martin v. Jett*, found in 32 Am. Dec. 120, the common-law rule is spoken of as the law of force, and the civil-law rule as the law of justice. We concur in this view, and for this reason have followed the latter rule.

Our only reason for doubting which rule we ought to follow is the fact that so much of the common law of England as was in force in the province of Georgia prior to May 14, 1776, and which was then applicable to the condition and habits of our people and consonant with our form of government, is still, except in so far as the same has been expressly repealed, modified, or superseded, a part of the law of this state; and therefore we were not quite certain that the rule in question is not binding upon us as a portion of our system of laws derived from the mother country. After a careful, diligent, and somewhat extensive, though not completely exhaustive, search among the old English reports and law writers, we have been unable to find any distinct, clear, and definite statement of what was, at the time above mentioned, the common law applicable to the precise question involved in the present case. We are perhaps perfectly safe in saying that there was not in England, prior to the beginning of the American Revolution, any such authoritative announcement, judicial or otherwise, of the rule concerning surface waters now insisted upon by counsel for the plaintiff in error, as to make the same binding upon us. If there was then such a rule at common law, it certainly has never yet been established and recognized in

Georgia, and we doubt exceedingly if it would be applicable to the condition and habits of our people, or adapted to the true spirit and genius of our institutions. Our declared constitutional policy, as already shown, is to require compensation to be made for injuries inflicted. The growth of this policy is evidenced by the trend of our legislation for many years, and the corresponding modification of judicial opinion. In view of these things, we do not care now to turn backwards, and there is nothing, we think, which prevents our following, as the true law of this state, the rule of the civil law, it being, of the two, the sounder, the more consistent with natural justice and right, and the more in harmony with our system of law and the general conditions of the commonwealth of this state. In the case of *Phinley v. City Council*, 47 Ga. 260, the plaintiff alleged that the city had injured his land by introducing within the corporate limits, by means of a canal, water for manufacturing purposes, and then turning this water into artificial drains, so as to increase the amount of water flowing upon his land; and it was held that the city was liable. The question as to the liability of the city for causing surface or rain water to be thrown, through these drains, in a concentrated stream upon the land of the plaintiff, was also, to some extent, involved in the case. There seems to have been a difference of opinion as to the law relating to surface water, between Judges McCay and Montgomery on the one side, and Chief Justice Warner on the other. We are decidedly of the opinion that the views entertained by the latter were correct. Indeed, most of the authorities follow the doctrine that, even as to surface water, one landed proprietor has no right to concentrate and collect it, and thus cause it to be discharged upon the land of a lower proprietor in greater quantities at a particular locality, or in a manner different from that in which the water would be received by the lower estate if it simply ran down upon it from the upper by the law of gravitation. The case of *Goldsmith v. Elsas*, 53 Ga. 186, is not precisely in point for our present purpose, but it recognizes the rule that the lower of two city lots owes a servitude to the higher, so far as to receive the water which naturally flows therefrom, but the owner of the higher lot has no right to increase such flow by artificial means. We wish to be understood as ruling in the present case that the only compensation to which the plaintiff would be entitled, under the circumstances, is for the damage (if any) arising from the alleged increased flow of surface water to which the defendant has subjected her lot, and the consequent diminution of the market value of the same. If we correctly understand the case as presented, such is, indeed, the only compensation which the plaintiff seeks to recover.

2. The jury found for the plaintiff the sum

of \$1,500. The court ordered that a new trial be granted unless, by writing off, the recovery be reduced to \$300. There was a decided conflict in the evidence as to whether the depreciation in the value of the plaintiff's property was occasioned by any increased flooding resulting from the erection of the waterworks, and, if so, to what sum the depreciation from this cause amounted. The evidence did not, in any view, warrant any fixed and absolute conclusions upon these questions, but left the proper determination of them in such uncertainty that the solution of them was peculiarly a matter for the jury, and not one for the judge. It is evident the judge was dissatisfied with the finding of \$1,500, and that he would not, in any event, have permitted a recovery for this amount to stand. Upon the question of granting or refusing a new trial without condition or qualification, he undoubtedly would have set the verdict aside. The granting of a new trial generally would have met the full approval of this court; and, looking at the verdict rendered as one which ought not to be sustained (as the court below evidently did), we think, under the circumstances, a new trial should have been granted, absolutely and without condition. This case, as to the point now under consideration, is not like that of *Railway Co. v. Glover*, 92 Ga. 134, 18 S. E. 406. There, the value of a life was involved, and it was capable of being ascertained with some degree of certainty. It could at least be shown that, under the evidence most favorable to the plaintiff, a verdict beyond a certain amount would be necessarily excessive. The ruling in that case was simply to the effect that if the plaintiff, by writing off, voluntarily relinquished all of the recovery which could certainly be treated as excessive, the amount of the verdict, after this was done, would no longer be a cause for a new trial. Judgment reversed.

(95 Ga. 501)

## DAVIS v. STATE.

(Supreme Court of Georgia. Oct. 8, 1894.)

HOMICIDE—INSTRUCTIONS—VERDICT—SUFFICIENCY OF EVIDENCE—NEW TRIAL.

The charge of the court was warranted by the facts in evidence, and was free from error; the requests to charge were properly denied; and the evidence warranted the verdict. There was no error in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Eddie Davis was convicted of murder, and brings error. Affirmed.

The following is the official report:

Davis was found guilty under an indictment charging him with murder. His motion for a new trial was overruled, and he excepted. The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also because the court

erred in refusing to give the following written requests of defendant to charge: "There is no presumption of malice from the use of a deadly weapon when, without fault, the defendant is put under the fears of a reasonable man, and slays his assailant in self-defense." "If the defendant was assailed by the deceased, and, in his defense, used the gun which he had accidentally and hastily taken up, this would go towards disproving that malice which the law implies from the preparation and use of a deadly weapon." "When one is in 'his own right,' and he is feloniously assaulted and his life endangered, he is not called upon to wait until his assailant is on equal terms, but may slay him as soon as he is reasonably assured that a mortal combat is unavoidable." Error in charging: "The law does not permit confessions to be received in evidence, and considered by the jury, if they are induced by the slightest hope of reward or the remotest fear of injury. If there appear any confessions of the defendant in evidence before you, consider whether that evidence shows that they were induced by the slightest hope of reward or the remotest fear of injury. If they were so induced, reject them from your consideration; if, however, they were not so induced, but were made voluntarily, then it would be your duty to consider any such confessions, if they appear in evidence, along with the other evidence in the case, in determining your verdict. A person cannot be convicted on his confession alone, without corroborating circumstances. That is another principle of law. But, as I have said, if you should find that such confessions appear in evidence, and they were made voluntarily, and were not induced by the slightest hope of reward or the remotest fear of injury, consider them, in connection with the other evidence in the case, in determining your verdict." Alleged to be error because denominating as confessions of guilt certain admissions or acknowledgments of the prisoner of a fact that he neither has denied nor now denies, and of which fact there were eye-witnesses, all of which tended to induce a wrong opinion on the jury, to the prejudice of defendant. Because the court erred in charging the jury as follows: "The prisoner at the bar, as I understand his counsel, interposes the defense of 'justification,' without adding, 'in addition to other matters in defense,'" said charge overlooking any claim that the prisoner might have made looking to the reduction of the homicide from murder to manslaughter, and tending to induce the jury to think that the prisoner had either to be convicted of murder, or declared altogether innocent. Because the court erred in charging the jury as follows: "If it appears from the evidence, and you believe it to be true, that the prisoner at the bar went down to the scene of the homicide with no evil intention whatever towards the decedent, having a peaceful purpose, and the decedent, seeing him there,



made an assault upon him with an axe, or placed the defendant in such a position that, acting under the fears of a reasonable man, under the law as given you in charge, he was about to be assaulted, in a manner indicated by the defendant, with the axe, and he suddenly seized the gun to defend himself, and, acting under the fears of a reasonable man that his life was in peril, he fired the fatal shot, then, under the law, he would be justified. But if it appear from the evidence, and you believe it to be true, that at the time of this homicide the decedent was quietly chopping wood with his axe, unconscious of the presence of the defendant; that the other parties with him were unconscious of his presence; that the gun of the decedent was lying quietly where he placed it, on the stump; that the defendant quietly came up, without any one seeing him, seized the gun, pointed it at the decedent, declaring what he intended to do, and the decedent, attracted by the snapping of the cap or the language of the defendant, turned suddenly, and found the defendant in the act of firing upon him,—then the decedent had the right to protect himself. The law gave the dead man, under the circumstances, the right to protect himself against the felonious intention of the prisoner, if such appear; and the act of the decedent in turning upon the prisoner, even if he advanced upon him with his hand partly sheltering his head (if such appear from the evidence), would be justifiable on the part of the decedent, but would not justify the act of the defendant in shooting him under such circumstances.”—without adding further an hypothesis consistent with manslaughter, and based on the heat of passion, something as follows: “If you believe that the prisoner went to the woods with a peaceable intention, or even with an intention of renewing the former quarrel, but with no malicious intention, and that he started to go by the stump where the gun was lying, over to the log where his father sat, and that he saw the deceased, who had but lately beaten him, standing on a log, axe in hand, and that the defendant was suddenly fired with anger, and grabbed up the gun, as the nearest weapon at hand, to renew the quarrel, and that about the same time the deceased was standing on a log sideways to the stump where the gun lay, and that he was still smarting under the alleged insulting words used to him at the house, and under the excitement of the former quarrel, and that, when he saw the prisoner nearing the stump where the gun lay, he started at him, axe in hand, with an intention of renewing the former difficulty, and you find it was under these circumstances that the deceased was shot, whether the gun went off accidentally or otherwise, then it would be your duty to find the defendant guilty of manslaughter.”—said omission tending to strengthen further with the jury the opinion that the killing was either murder or nothing.

Nicolson & McKethan, for plaintiff in error. W. W. Fraser, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

(93 Ga. 686)

TRUETT et al. v. FUNDERBURK et al.  
(Supreme Court of Georgia. April 9, 1894.)

DOWER—WHEN BARRED—ELECTION TO TAKE UNDER WILL — DEATH OF WIDOW BEFORE DOWER IS BARRED—EFFECT—NEW TRIAL.

1. A widow's right to dower is not barred by an election to take in lieu of dower a provision made for her in her husband's supposed last will, he in fact dying intestate.

2. Inasmuch as the right to dower vests in the widow at her husband's death, if she dies before barring that right or divesting herself of it, she takes no interest in his lands which she can transmit to her heirs or devisees. She cannot have a vested right in a child's part so long as she has a legal right to dower.

3. There was no abuse of discretion in not granting a new trial because of the charge of the court or the finding of the jury touching the question of advancements.

(Syllabus by the Court.)

Error from superior court, Harris county; W. B. Butt, Judge.

Suit between A. F. Truett, administrator, and others, and S. A. Funderburk and others. There was a judgment for Funderburk and others, and Truett, administrator, and others, bring error. Affirmed.

Willis & Persons, B. H. Walton, and Peabody, Brannon, Hatcher & Martin, for plaintiffs in error. C. J. Thornton and L. L. Stanford, for defendants in error.

LUMPKIN, J. 1. Elijah Brakefield left a paper purporting to be his last will, by which he devised nearly all his property to his wife and her two children. He also left surviving him a number of children by a former wife. The widow, supposing this paper to be a genuine and valid last will, elected to take under it, instead of claiming dower, and herself made a will devising to her children the property which, by the supposed will of her husband, had been devised to her. Mrs. Brakefield died within one year of the death of her husband, and her death occurred pending litigation over the paper propounded as the will of her husband, and before there had been any administration on his estate. She had not applied for or claimed dower in the estate, nor had she elected to take a child's part. The litigation over the alleged will of her husband resulted in setting that paper aside. We do not think, under these circumstances, the widow's election to accept the provision made for her in that paper barred her of her right to dower. Had she lived until the litigation was ended, she could have obtained dower in his estate, because her election previously made under an entire misapprehension as to the real character and effect of the supposed will could not, in law,



equity, or morals, have been binding upon her. Therefore, in point of fact, her right to dower was never lost, but was a subsisting and valid right up to the time of her death. Had she deliberately elected to take a child's part of the estate in lieu of dower, the case would have been different. The present case differs essentially from that of *Brown v. Cantrell*, 62 Ga. 257, in which it was held that where a widow, during the time within which she had the privilege of electing against dower, sold the whole of the deceased husband's land, or an estate in it beyond the term of her own life, her election not to take dower was complete and final, although the effect of the conveyance by her was simply to pass her distributive share in the estate.

2. Under the act of December 9, 1841 (Cobb's Dig. p. 230), amending the act of December 10, 1807 (Cobb's Dig. p. 227), it was "the duty of every widow, within one year after letters testamentary or of administration [had] been granted on her husband's estate, to make her election or portion out of the estate of the deceased;" and upon failure to do so she was declared subject to the disability specified in the original act of 1807, viz. that in such event she should "be considered as having taken her dower or thirds, and [should] forever after be debarred from taking any other part or portion of the said estate." These acts were construed in *Beavers v. Winn*, 9 Ga. 189, in which it was held that where a widow died in less than one year after administration on the estate of her husband, without having elected to take a child's part of the real estate, her executor could not, after her death, recover from the administrators of her husband such child's part. Judge Nisbet says on pages 193, 194: "By the statute the widow has one year within which to elect, and, if the election is made on the last day of that year, it would entitle her to a child's part or portion. The statute declares that, failing to elect, she is to be considered as having taken her dower, and shall be debarred of all further or other part or portion of the estate. If, then, at the expiration of the year, she has not elected, she being still in life, she is considered as having taken her dower. So, also, at any other period within the year, up to which period she has made no election, she is considered as, at that period, having taken her dower. At all times within the year, she is considered, by the terms of the statute, as taking her dower, unless she has furnished evidence to the contrary, by proof of having elected to take a child's part. The choice is between dower and a child's part. She chooses to take dower, negatively, by doing nothing. She chooses a child's part, affirmatively, by declaring, in some overt act, susceptible of proof, her choice. If, then, at any time within the year, she dies, not having at that time elected to take a child's part, the conclusion of the law is that at that time she had elected to take her dower. She is by law a tenant in

dower." Again, in *Wilson v. Bell*, 45 Ga. 514, the same ruling was made upon the authority of the case above cited. See, also, *Nosworthy v. Blizzard*, 53 Ga. 668. In each of these cases there was an intestacy of the husband, and they were all decided under the act of 1841, which, in effect, was construed to mean that the widow had primarily a right to take a child's portion of the estate of her deceased husband, provided she exercised her election so to do within the year prescribed by the act; but, if she died during that year without having made such election, her right to a child's portion was lost, because neither her executor nor her administrator could, after her death, make the election for her. Upon the death of a husband the right to dower immediately vests in the widow. This right is barred by her election, "within twelve months from the grant of letters testamentary or of administration on the husband's estate, to take a child's part of the real estate, in lieu of dower." Code, § 1764, par. 3. Again, in section 2484, par. 3, it is provided, "If the wife elects to take her dower, she has no farther interest in the realty." Therefore, the widow's right to a dower is perfect and complete, so far as a choice between it and a child's part is concerned, until she bars herself of the right to take dower by electing to take in its stead a child's part. In case she dies during the year elapsing from the grant of letters testamentary or of administration on her husband's estate, without barring or divesting herself of the right to dower, it is certainly true that up to the time of her death this right existed. Until she has herself defeated the same, she may be regarded as holding on to it; and so long as she does this she certainly cannot have a vested right in a child's part in the realty, which would at her death become a part of her estate, and be transmitted to her heirs or devisees. This conclusion follows, we think, from the reasoning of Judge Nisbet in the *Beavers Case*, supra, though, of course, the facts of that case were not precisely the same as in the case at bar, nor were the terms of the statute he was construing identical with the provisions of the Code, as contained in the sections above cited.

3. The motion for a new trial complains of various charges of the court as to the law of advancements. While we do not fully indorse all the language of the court upon this subject, we find no error requiring the grant of a new trial, especially as we are satisfied with the finding of the jury touching the question of advancements. There was some evidence which might have authorized the jury to find that Mr. Brakefield had made an advancement or advancements to one or more of his children by giving them a slave or slaves; but the evidence did not require the jury to so find, and in view of the subsequent emancipation of all slaves, and the fact that Mr. Brakefield lived until 1837, it is quite probable that, even if he had so intended original-

ly, he himself ceased to desire that such gifts should be counted as advancements.

In the argument here, counsel on both sides treated the fund in the hands of his administrator for distribution as if it was derived entirely from realty. No question was made as to the right of Mrs. Brakefield to a child's part in any of the personal estate of her deceased husband, or as to any right of her children to receive the same under her will. Judgment affirmed.

(94 Ga. 22)

BEDELL, Survivor, v. RICHMOND & D. R. CO.

(Supreme Court of Georgia. April 9, 1894.)

CARRIERS OF GOODS — CONTRACT — FAILURE TO TRANSPORT—EVIDENCE—NONSUIT.

1. The declaration alleging a contract for the transportation of cotton by the defendant from Columbus, Ga., to Liverpool, England, and setting forth no consideration except an agreed rate of freight per hundred pounds, and the evidence showing that the actual shipment of the cotton from Columbus was made upon a bill of lading, which the defendant, by its agent, another railroad company, which it designated to receive the cotton for it, delivered to the plaintiffs at the time of receiving the cotton for shipment, which bill of lading they accepted and used by attaching the same to a draft drawn by them upon other parties for money, this bill of lading, and not prior stipulations, must be regarded as embracing the final contract on which the plaintiffs, as well as the defendant, acted touching the business of transporting the cotton; and it not being produced, nor its contents proved, the plaintiffs could not recover for an alleged breach of the contract of transportation by failure of the defendant's steamship to sail with the cotton on board from an American port on a particular day.

2. As the declaration alleged no solicitation by which plaintiffs were induced to purchase and ship, but declared upon the contract of transportation only, the court did not err in excluding evidence of conversations and stipulations, some of which occurred prior to the purchase of the cotton by the plaintiffs, and all prior to the execution and acceptance of the bill of lading.

3. Irrespective of other questions in the case, the failure of the plaintiffs to prove the contract declared upon by legal evidence rendered the judgment of nonsuit not only proper, but necessary.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Action by Bedell & Bowers against the Richmond & Danville Railroad Company to recover damages for failure of defendant to transport certain cotton from Columbus, Ga., to Liverpool, England, at a particular time. Pending the action in the supreme court, plaintiff Bowers died, and the action was continued in the name of Bedell, survivor, for the use of the firm of Orr & Hunter. There was judgment of nonsuit, and plaintiff brings error. Affirmed.

L. F. Garrard and Tol. Y. Crawford, for plaintiff in error. Peabody, Brannon, Hatchner & Martin, for defendant in error.

LUMPKIN, J. This case was before this court at the October term, 1891. It was then

held that as the declaration alleged that the defendant, a common carrier, contracted with the plaintiffs that a consignment of cotton would be carried out of a certain port, on a certain day, and that the vessel did not, in fact, leave until a subsequent day, whereby the plaintiffs were damaged, a cause of action was set forth. 88 Ga. 591, 15 S. E. 676. The case again came on for trial in the superior court at the May term, 1893, and, having resulted in a nonsuit, was once more brought to this court. After it reached here, the death of Bedell was suggested, and an order was taken allowing the case to proceed in the name of Bowers, as survivor.

1. It was settled by the decision of this court, when the case was here the first time, that, if the plaintiffs made out by proof the allegations of their declaration, they would be entitled to a recovery. In view of our conclusion that the judgment awarding a nonsuit was proper, it becomes important to carefully observe precisely what the plaintiffs alleged and what they proved. The declaration states that on the 16th day of September, 1889, the Richmond & Danville Railroad Company "agreed to transport one thousand bales of cotton from Columbus, Ga., to Liverpool, England, over their line of railroad and steamer Empire, agreeing, by the terms of said contract, that the steamer Empire would sail from West Point, Virginia, on the 5th day of October, 1889, at an agreed rate of one dollar and ten cents a hundred pounds, as the rate of transportation from the city of Columbus to Liverpool, England; \* \* \* that, in accordance with said contract, they delivered to said defendants one thousand bales of cotton, to be transported over defendants' line of road and said steamer Empire, sailing as aforesaid, to Liverpool;" but "that said vessel did not leave West Point, Virginia, on October 5, 1889, with said cotton on board, until the 12th day of October, 1889, a period of seven days' delay, and arrived in Liverpool seven days later than it should have arrived had it sailed from West Point on the 5th day of October." The declaration further alleged that the plaintiffs were damaged "by reason of said defendants' failure to carry out their contract as aforesaid," specifying how the damage was occasioned, the particulars as to which, in the view we take of the case, are not now material. It will be noticed that no consideration for the defendant's undertaking is set forth, except an agreed rate of freight per hundred pounds. The evidence shows that the agent of the defendant directed the plaintiffs to deliver the cotton to the Georgia Midland Railroad Company, which they did, receiving at the same time from this company a bill of lading, which they accepted and used by attaching the same to a draft drawn by them on Orr & Hunter, for whom the cotton had been purchased. This conduct on the part of the plaintiffs certainly amounted

to a clear and unequivocal recognition by them of the bill of lading as the contract under which the cotton was actually shipped from Columbus, and therefore we think it must be regarded as embracing the final contract on which both the plaintiffs and the defendant acted touching the business of transporting this cotton. This bill of lading was not produced nor offered in evidence, nor were its contents proved. Therefore the plaintiffs entirely failed to show what was the real contract under which the cotton was shipped. In order to prove the breach of a contract, it is absolutely essential to show, first, what the contract was. As the plaintiffs failed to do this, they could not show that the contract, whatever it was, was broken by the failure of the defendant to have the steamer *Empire* sail from West Point, Va., on October 5, 1889, with the cotton on board. Without having this bill of lading before us, we are unable to say that, by the terms of the contract between the plaintiffs and the defendant, it was stipulated that the steamer should sail on that particular day. It is true, as stated, the declaration does allege that such was the contract, and sets forth the facts constituting a breach of the same; but the plaintiffs were not entitled to recover for this alleged breach, for the simplest and best of all reasons,—they did not prove it.

2. The plaintiffs insisted upon a right to recover, because, as they contended, they were induced to purchase and ship the cotton at the solicitation of one Halle, representing the defendant as soliciting freight agent, and upon the faith of a contract made by him in the defendant's behalf to the effect that the steamer should positively sail on the 5th day of October, 1889. In support of this contention, they offered in evidence a letter addressed to them by Halle, of which, omitting the heading, the following is a copy: "Columbus, Ga., Sept. 16, 1889. Mess. Bedell & Bowers, City—Dr. Sirs: T. M. Engagement # 42. 1,000 bales cotton from Columbus, Ga., to Liverpool, England, Str. *Empire*, sailing from West Point, Va., Oct. 5th, 1889; through rate, (\$1.10) one 10/100 dolls. per hundred pounds. We have this day made the above engagement for you, and same is confirmed. Respy., J. C. Halle, Sol. Agt." This letter was rejected by the court. Plaintiffs also offered in evidence, for the purpose of proving the alleged contract, testimony as to various conversations and stipulations between themselves and Halle, some of which occurred prior to their purchase of the cotton, and all prior to the execution and acceptance by them of the bill of lading. This evidence was also rejected. We think the court was right in excluding both the letter and the other evidence offered. The declaration did not allege any solicitation on the part of Halle by which the plaintiffs were induced to purchase and ship the cotton, or that they, in fact, did purchase and ship the

cotton because of such solicitation, or upon the faith of any representations or promises by Halle in this respect. The only contract declared upon was the contract of transportation already mentioned. The evidence rejected was therefore irrelevant; and, besides, all the conversations and stipulations referred to were, so far as we are aware, merged into the final contract evidenced by the bill of lading.

3. Numerous questions were made by the bill of exceptions to which no specific allusion has been made, because to do so is unnecessary. The plaintiffs failed to prove by legal evidence the contract declared upon, and therefore it was not only right to grant a nonsuit, but this was the only proper disposition to be made of the case. Judgment affirmed.

(93 Ga. 682)

#### WELLS v. DILLARD et al.

(Supreme Court of Georgia, April 9, 1894.)

ASSIGNMENT OF DOWER—ESTOPPEL OF WIDOW TO ATTACH—DEED BY ADMINISTRATOR—EXCEPTION OF "WIDOW'S DOWER"—CONSTRUCTION—LIMITATIONS.

1. Where it appears that a widow made application for dower, that commissioners to assign the same were duly appointed, and that the dower land was in fact laid off, and the widow entered into possession and occupied the same for more than seven years, with the consent and acquiescence of the administrator and of the heirs at law, her privies in estate, as well as she herself, are estopped from controverting the regularity and validity of the assignment on the ground that the commissioners failed to make any return, and that no judgment of the court was rendered, adopting or confirming the action of the commissioners. Inasmuch as the administrator and the heirs would be estopped by their consent and acquiescence, the widow and those claiming in privity with her are estopped also.

2. Where an administrator sells and conveys to a widow so much of a named lot of land as may be embraced in these terms of description, "Lot land 154 in 31st Dist. Marion county, except the widow's dower and ten acres off southeast corner," the administrator's deed also reciting that the widow "bought all of said lot, except the widow's dower and ten acres off of the southeast corner of said lot," the widow at the time of the sale being in possession of a definite portion of the west part of the lot, which portion had been previously laid off as her dower, the proper construction of the conveyance is that both this portion and the 10 acres in the southeast corner were wholly excepted from the sale made by the administrator; the phrase "the widow's dower," as used in the conveyance, meaning, not the legal right of dower, but the parcel of land itself over which that right had been asserted and exercised.

3. The heirs having consented to and acquiesced in the entry and occupation by the widow, raising no question as to the mode or legality of assigning and laying off her dower, they had no right to the possession until after her death, inasmuch as, under section 2260 of the Code, no forfeiture resulted by reason of her conveying the fee to another. The statute of prescription, therefore, did not, before the death of the widow, commence to run against the heirs, and in favor of a person claiming under her or her vendee.

(Syllabus by the Court.)

Error from superior court, Marion county; W. B. Butt, Judge.

Action of ejectment by W. H. Dillard and others against D. B. Wells. Judgment was rendered for plaintiffs, and defendant brings error. Affirmed.

Blandford & Grimes and Geo. P. Munro, for plaintiff in error. W. D. Crawford and Peabody, Brannon, Hatcher & Martin, for defendants in error.

LUMPKIN, J. Dempsey Dillard died in 1853 or 1854, and in 1857 one Bell was appointed administrator of his estate. At the September term, 1857, of the superior court of Marion county, Mrs. Harriet Dillard, the widow of the intestate, filed an application for dower. Commissioners were appointed; the dower was in fact laid off, embracing 62 acres of the west half of lot No. 154 in the thirty-first district of that county; and a plat of the same was made by a surveyor in November of that year. The commissioners made no return to the superior court, and there was no judgment of that court adopting or confirming their action. Nevertheless, the widow, with the consent and acquiescence of the administrator and of the heirs at law, took possession of the land so set apart as her dower, and remained in possession of the same until about the end of the year 1869. Under an order from the court of ordinary, Bell, the administrator, on the first Tuesday in December, 1857, sold to the widow the land hereinafter described, the terms of the sale being one-third cash, and the balance on credit. The administrator, in pursuance of this sale, made a deed to Mrs. Dillard on the 10th of January, 1863. That deed recited the sale to Mrs. Dillard, her heirs and assigns, of "lot land 154 in the 31st Dist. Marion county, except the widow's dower and ten acres off southeast corner," and, further, that the widow "bought all of said lot, except the widow's dower and ten acres off of the southeast corner of said lot." On the 25th of December, 1869, Mrs. Dillard conveyed to Daniel Jones "fifty acres off of the north side of lot 154 in 31st Dist., Marion county." Afterwards, Mrs. Dillard died. W. H. Dillard and others, who are heirs at law of Dempsey Dillard, brought an action against Wells, who holds under Daniel Jones, to recover 20 acres of land in the northwest corner of the lot mentioned. The 20 acres in dispute are a part of the land set apart as dower, and are also embraced in the deed from Mrs. Dillard to Daniel Jones.

1. As will have been seen, it clearly appears that the widow occupied for about twelve years the land set apart to her as dower. As her right to dower would have become barred after the lapse of seven years, it should hardly require argument to prove that the administrator and the heirs, after having consented to and acquiesced in her right to the dower for more than seven years,

were estopped from controverting the regularity and validity of the assignment on the grounds indicated in the first headnote. In *Peters v. West*, 70 Ga. 343, there were irregularities in the assignment of the widow's dower; but this court held that where premises were assigned as dower to the widow, who went into possession of the same, the proceedings to obtain dower should not be rejected from evidence because of such irregularities. Jackson, C. J., said, "The widow occupied the land as dower, and that cured all irregularities, if any." See, also, *Brown v. Colson*, 41 Ga. 42. In *1 Woerner, Adm'n*, § 117, the author says: "The method of assigning dower to the widow is prescribed by statute in a number of states. At common law, and in the absence of a statutory provision to the contrary, it is not necessary to resort to legal proceedings for this purpose. The parties may bind themselves as effectually in the matter of assigning dower as in any other transaction. It may be done by parol. Nothing is required but to ascertain and assign her share to the widow, and then, if she has entered, the freehold vests in her." We entertain no doubt that, as against the administrator and the heirs at law, the assignment of Mrs. Dillard's dower was perfectly good. Of course, she herself was conclusively estopped from questioning in any manner the validity of her own dower; and it follows that her privies in estate are likewise estopped, for they can occupy no better position than she herself. Her interest in the land embraced in the dower was only an estate during her life, and consequently, so far as that land is concerned, nothing more than an estate therein for her life passed by her deed to Daniel Jones, unless she became the purchaser of the reversion at the administrator's sale already mentioned.

2. We think it quite clear that she did not become the purchaser of that reversion. In view of the recitals in the administrator's deed, the proper construction of that conveyance is that the land covered by the dower, and the 10 acres in the southeast corner of lot number 154, were wholly excepted from the sale. Undoubtedly, the administrator might have sold the fee in the entire lot, reserving the dower estate, but we do not think he did so. Taking his deed as a whole, there is scarcely a doubt that the phrase "the widow's dower" did not mean the legal right to dower, or the dower estate, but the parcel of land which had been set apart as dower, and of which the widow was in possession as such.

3. We have endeavored to show that, so far as the heirs at law are concerned, the widow's right to dower was in all respects as perfect and complete as if it had been duly and legally assigned in the manner prescribed by law, under proceedings entirely free from defect or infirmity. Consequently, these heirs had no right to possession until after the widow's death, because, under section 2260 of the Code, no forfeiture results from an at-

tempt by a tenant for life to sell the entire estate in the land. The purchaser, however, acquires the interest of the tenant for life. The heirs, therefore, had no right to bring an action for the land before the death of the widow; and, this being so, the statute of prescription did not begin to run against them, and in favor of Wells (who holds under Jones, the first vendee of the widow), until after her death took place. There was no contention that, counting from this time, the defendant had a good prescriptive title against them. The verdict in their favor was therefore manifestly right, under the law and the evidence, and the court properly declined to grant a new trial. Judgment affirmed.

(94 Ga. 14)

**JONES et al. v. CORDELE GUANO CO.**

(Supreme Court of Georgia. April 16, 1894.)

**SALE OF FERTILIZERS — EVIDENCE AS TO INGREDIENTS — ANALYSIS BY STATE CHEMIST — EFFECT ON CROPS.**

1. The act of December 27, 1890, touching the preservation and analysis of samples of fertilizers, is cumulative only, and not exclusive. Unless parties to the sale elect to co-operate in depositing a sample with the ordinary, the provisions of the act have no application to the given transaction.

2. Under the provisions of the Code (section 1553b), an analysis of a fertilizer by the state chemist must be an "official analysis," to render a copy of it, under seal of the department of agriculture, admissible in evidence. There can be no official analysis made at the instance of a purchaser for use in litigation, except by procurement of the ordinary, and compliance with the other provisions of the act of December 27, 1890.

3. Any analysis of a fertilizer by the state chemist, which is of record in the department of agriculture, is *prima facie* an official analysis, and a copy of the same, under the seal of that department, is admissible in evidence under section 1553b of the Code, if relevant to the matter in issue. Unless it otherwise appears, any sample of fertilizers analyzed by the state chemist is presumed to be furnished to him officially by an inspector of fertilizers.

4. The evidence of the state chemist taken by interrogatories was admissible in evidence to prove the chemical ingredients of the sample analyzed by him, which sample had been taken by the purchaser from the fertilizer in controversy, and preserved. After the reception of this evidence, the effect, or want of effect, of the fertilizer on crops, would be admissible as tending to corroborate the analysis, or, on the other hand, to discredit it.

(Syllabus by the Court.)

Error from superior court, Lee county; W. H. Fish, Judge.

Action by the Cordele Guano Company against S. P. Jones and others on a promissory note. Judgment was rendered for plaintiff, and defendants bring error. Reversed.

Fort & Watson and Wooten & Wooten, for plaintiffs in error. Clarke & Hooper, for defendant in error.

LUMPKIN, J. 1. The act of December 27, 1890 (Acts 1890-91, vol. 1, p. 142), provid-

ing that it shall be lawful for any purchaser of fertilizers to require the person selling to furnish a sample of the same for deposit with the ordinary, and also providing for the preservation and transmission of such sample by the latter to the state chemist, the analysis of the same by this officer, and the sending by him of a copy of the result back to the ordinary, is cumulative only, and not exclusive. This act contains nothing to prevent a purchaser of fertilizers from taking, on his own account, a sample of the same, having it analyzed by whomsoever he pleases, and introducing evidence, for whatever it may be worth, when the same is relevant, as to the result of this analysis. Of course, in order to make the statement of the state chemist transmitted to the ordinary conclusive evidence, the provisions of the act in question must be complied with. Where this is not done, the act has no application at all.

2. Section 1553b of the Code declares that "a copy of the official analysis of any fertilizer or chemical, under seal of the department of agriculture, shall be admissible as evidence in any of the courts of this state, on the trial of any issue involving the merits of said fertilizer." As it requires express legislation to render any copy of an analysis of a fertilizer admissible as original evidence, necessarily the terms of the law must be fully and exactly complied with, in order to obtain the benefit of its provisions. Therefore, the analysis must be an official one, or a copy of it taken from the records of the department of agriculture cannot be introduced. As we understand our system for the inspection and analysis of commercial fertilizers, samples are taken by the inspectors, and submitted for analysis to the state chemist, who makes reports to the commissioner of agriculture, which reports are recorded in the office of the latter. Analyses thus made are official. We know of no law making official an analysis by the state chemist at the instance or request of a purchaser of fertilizers. Indeed, as we understand it, the state chemist is under no obligation to make an analysis for any private person at all. If he does so, it is simply a matter of courtesy; and although he may report an analysis thus made to the department of agriculture and it may be entered upon the records of that department, this will not give to that analysis an official character, by virtue of which a copy of it will be rendered admissible as evidence in the courts.

3. Strictly speaking, the commissioner of agriculture should not have recorded in his department any analysis made by the state chemist, except such as the law requires the latter to make, and report to that department. It follows that any analysis which is of record in the agricultural department is *prima facie* official, because, presumably, any analysis of fertilizers made by the state chemist, and reported by him to the com-

mission of agriculture, is of a sample, or samples, furnished the chemist officially by an inspector of fertilizers. Therefore, unless it appears that an analysis of fertilizers made by the state chemist was of a sample received from some other source, a copy of an analysis made by him, and certified under the seal of the department of agriculture, is admissible in evidence under the section of the Code above cited.

4. As intimated in the first division of this opinion, where a private person takes and preserves a sample of fertilizers purchased by him, and procures an analysis thereof to be made by the state chemist, that officer is a competent witness to prove the chemical ingredients of the sample analyzed by him, and his evidence should, in a proper case, be allowed to go to the jury, who are to judge of its value. This would be true as to similar evidence by any other competent chemist. After the reception of this expert evidence, it would be admissible for either party to show the effect, or want of effect, of the particular fertilizer on crops, either for the purpose of corroborating the analysis or of discrediting it. While it is true that the note sued on in the present case contained an express stipulation that the makers purchased on their own judgment, and waived any guaranty as to the effects of the fertilizer on their crops, we think they were nevertheless entitled to show their crops derived no benefit from the use of the fertilizer in question. It was competent for them to do this, not for the purpose of repudiating or varying the terms of their written contract, or of holding the guano company to a guaranty it had expressly declined to make, but to show that in point of fact the guano did not come up to the guaranteed analysis branded on the sacks, as required by law. In other words, it was the right of the defendants to show that this guano did not contain the chemical ingredients set forth in that analysis. If the guano failed to produce any beneficial effect on the crops under favorable auspices, this fact would at least tend to show it did not contain the fertilizing elements in the proportions specified in the analysis branded on the sacks. In *Allen v. Young*, 62 Ga. 617, this court ruled that: "The effect of accepting a special guaranty that a fertilizer is of a given analytical standard, with restriction of the seller's liability accordingly, and excluding practical results, is to entitle the purchaser to a commodity corresponding chemically, in all respects, to the standard. The means of test may not be exclusively direct; possibly there may be indirect means also, but actual production is neither, without evidence as to cultivation, season, soil," etc. In that case, *Bleckley, J.*, said, in substance, that the effect of the fertilizer on the crops could not alone furnish the test of determining whether or not the fertilizer came up to the given standard. Again, in *Hamlin v. Rogers*, 78 Ga.

631, 3 S. E. 259, it was said: "Where there is other testimony,—as, for instance, where another analysis is put in evidence to show that the fertilizer does not come up to the standard laid down by the state chemist,—those facts may be used in aid of such other analysis." In this latter case the note given for the fertilizers expressly stipulated that the purchaser was to take the fertilizers without regard to their effect on crops. See the cases referred to on page 633, 78 Ga., and page 259, 3 S. E.; also, *Scott v. McDonald*, 83 Ga. 28, 9 S. E. 770. There are doubtless other decisions of this court which, either in terms or on principle, sustain what is now ruled on the point under consideration, but the above will suffice. Judgment reversed.

(93 Ga. 709)

#### KNIGHT v. HAWKINS.

(Supreme Court of Georgia. April 23, 1894.)

##### RELEASE OF SURETY—EXTENSION OF NOTE.

Where the holder of a past-due promissory note, in consideration of the prepayment in advance of usurious interest by the maker, extends the time of payment without the knowledge or consent of the surety, the latter is discharged; the creditor, at the time of granting the indulgence, knowing the fact of suretyship.

(Syllabus by the Court.)

Error from superior court, Decatur county; B. B. Bower, Judge.

Action by B. F. Hawkins against G. W. Knight and others on a promissory note. Judgment was rendered for plaintiff, and defendant Knight brings error. Reversed.

Russell & Russell, for plaintiff in error. Donalson & Hawes, for defendant in error.

**LUMPKIN, J.** This was an action upon a promissory note brought by B. F. Hawkins against E. G. Duren, G. W. Duren, and G. W. Knight. The note was payable to "B. F. Hawkins, or bearer;" but this B. F. Hawkins died at or about the time the note matured, and before suit was brought. The plaintiff was his son, and bore the same name. He brought the suit in his own name, and not as administrator, and therefore presumably owned the note as bearer. Knight defended, alleging in his plea that he was only a surety on the note, which fact was known to "the plaintiff" when the note was given; and that, at the maturity of the note, the holder, the plaintiff, without this defendant's knowledge or consent, and knowing he was only a surety, extended the time of payment in consideration of the prepayment by the Durens of usurious interest upon the note. There was evidence to sustain this plea, but the court, nevertheless, directed a verdict for the plaintiff, and this is the error complained of.

The record in this case is a fair sample of the many which come to this court filled with errors, discrepancies, and inaccuracies, and which consequently greatly increase our labors, and often occasion considerable diffi-

culty in understanding what a record really means. It appears that the note was admitted in evidence over the objection of the defendant Knight, but no error was assigned upon its introduction. The objection is stated to have been that the copy of the declaration served upon him showed he was sued on a note for \$150, principal, with no credits thereon; whereas the note offered in evidence was for \$165, principal, with a credit of \$15 on it. It is impossible to ascertain from the record what the truth really was in these respects, for the copy of the declaration contained in the record shows that the note declared on was for \$150.10, principal; while the copy of the note attached thereto showed that it was a note for \$165, with no credit on it. The note was dated October 24, 1888, and due 12 months after date, which would be October 24, 1889. The case was tried on the 9th day of January, 1893. The verdict, which the court directed the jury to find for the plaintiff, was for \$150, with interest from October 24, 1893; while the judgment entered up was for \$150, principal, with interest from October 24, 1889. How so many discrepancies and inconsistencies could find their way into so short a record, and one concerning a matter so very simple, is beyond our comprehension.

Again, the only question argued in the brief filed by counsel for the defendant in error was that "plaintiff in error pleaded that he was only a surety on the note. He sought to establish this plea by the proof of himself and his co-obligor, Duren,—Hawkins, the other original party to the contract, being dead;" and "the court ruled that the defendants could not establish their defense by these witnesses, the original party being dead." There is not the slightest intimation in the record that any such question was made. On the contrary, it affirmatively appears that Knight and E. G. Duren both testified as witnesses, and that their testimony was received without objection. Indeed, upon the question of admitting the note in evidence, Knight was called and sworn at the instance of the plaintiff himself. There is about as much confusion in the evidence set forth in the bill of exceptions as there is in the other parts of the record; but, after a careful study of it, we think, as already stated, it was sufficient to sustain the plea of the defendant Knight. Therefore, the case ought to have been submitted to the jury; for, if the allegations of this plea are true, this defendant was discharged. Even the prepayment in advance of legal interest on a debt is of itself sufficient to work the discharge of a surety. 2 Brandt, Sur. § 352. The precise question made in the case at bar was decided by this court in the case of Scott v. Saffold, 37 Ga. 384, in which it was held, under similar facts, that the surety was discharged. Again, in Randolph v. Fleming, 59 Ga. ... it was held that where, after a note became due, interest was accepted by

the payee from the makers for a short period in advance, a contract for indulgence arose by implication, and an indorser on the note was discharged. See, also, Parmelee v. Williams, 72 Ga. 42.

Under the facts as we gather them from the record, it was error to direct a verdict for the plaintiff, and there should be a new trial. Judgment reversed.

(94 Ga. 27)

#### FARKAS v. DUNCAN.

(Supreme Court of Georgia. April 23, 1894.)

##### CHATTEL MORTGAGE ON MULES — SUFFICIENCY OF DESCRIPTION — RIGHTS OF PURCHASER.

The owner of two mare mules, called, respectively, "Dilsie" and "Kate,"—the former being "a light bay, or mouse colored," and the latter "of light yellowish or sorrel color,"—executed and delivered a mortgage, which was duly recorded, on one of these mules, described in the mortgage as "one bay mare mule named 'Katie,'" and afterwards sold and delivered the mule called "Dilsie" to a third person. The mortgage was foreclosed and levied on the mule called "Dilsie," and the purchaser filed a claim. Under these facts, and others embraced in the parol evidence, it was a question for the jury—First, to which mule the mortgage applied; and, secondly, if it applied to Dilsie, whether, notwithstanding the misnomer, the description in the mortgage was sufficient to identify her so as put the purchaser on notice.

(Syllabus by the Court.)

Error from superior court, Dougherty county; B. B. Bower, Judge.

Action by W. A. Duncan against Sam Farkas for the possession of a mule. Judgment for plaintiff, and defendant brings error. Reversed.

D. H. Pope, for plaintiff in error. R. Hobbs and W. T. Jones, for defendant in error.

LUMPKIN, J. In addition to the facts briefly summarized in the headnote, it is also proper to state that there was a conflict in the evidence as to whether the mortgagor intended the mortgage to apply to the mule he called "Dilsie," or the one he called "Kate," and upon this single issue a verdict either way would have been warranted. This question, however, was not really submitted to the jury, because, by his charge, the judge, in effect, instructed them that, if the mortgagee accepted a mortgage upon a mule described in the mortgage as bearing the name of "Kate," he could under no circumstances subject to the mortgage a mule bearing the name of "Dilsie," and that consequently the purchaser from the mortgagor of a mule bearing the latter name would in any event be protected. In other words, the court made the case turn entirely upon the question of name, ignoring altogether the question of color. In doing this, we think the court restricted the jury within limits too narrow to enable them to pass fairly upon the issues involved. It would seem that the color of a mule is more important, as an element of description, than a mere name. The color is

certain, permanent, and easily observed. The name is arbitrary, not discoverable by inspection, and may be changed, or even falsely stated in the first instance, for a fraudulent purpose. We do not mean to say anything of this kind was done in the present case; but we entertain no doubt that the case should have been submitted to the jury, so that, taking into consideration the evidence as to names, colors, and all other facts and circumstances, they might be enabled to fairly decide the question of primary importance, viz. whether or not the mortgage really applied to the mule called "Dilsie." If, under proper instructions from the court, the jury should find it did not, that would end the case in the claimant's favor. On the other hand, should they find the mortgage did apply to Dilsie, and was so intended, it would then be a question for the jury whether, notwithstanding the fact that the mule mortgaged was erroneously described in the mortgage as "Kate," the description contained in the mortgage would be sufficient to so identify the mule thereby intended to be covered as to put a purchaser on notice. The truth is, the mortgage before us does not accurately describe either of the mules in question. It appears that the one called "Kate" was not a bay, and that the one which was in fact a bay was called "Dilsie." Still, it would not do to say absolutely that the mortgage was ineffectual to create a lien upon either. The maxim, "*falsa demonstratio non nocet*" ("mere false description does not make an instrument inoperative"), applies. See *Broom*, Leg. Max. 629, 630, where the doctrine is thus announced: "'*Falsa demonstratio*' may be defined to be an erroneous description of a person or thing in a written instrument, and the above rule respecting it may be thus stated and qualified: As soon as there is an adequate and sufficient definition, with convenient certainty, of what is intended to pass by the particular instrument, a subsequent erroneous addition will not vitiate it. '*Quicquid demonstratae rei additur satis demonstratae frustra est.*' The characteristic of cases within the principal maxim being that 'the description, so far as it is false, applies to no subject at all, and, so far as it is true, applies to one only.'" Numerous inaccurate descriptions occur in wills, but these documents are nevertheless often set up and established in spite of the same. Any one desirous of pursuing the investigation further may consult with profit the cases cited on page 630 of the work just referred to. See, also, *Burge v. Hamilton*, 72 Ga. 568. In the brief for defendants in error in that case, which was prepared by the present chief justice, who was at that time one of their counsel, numerous cases are cited on the general doctrine of the maxim above quoted. *Id.* 597, 598. Our conclusions in the present case are also supported by the text of Jones, Chat. Mortg. (4th Ed.) §§ 53-55. In *Nichols v. Hampton*, 46 Ga. 253, it was held that a paper

providing for a lien on a "bay mare," and showing that the mare was purchased by the mortgagor from the mortgagee, might be sufficient to put on notice any one who would read the paper. Judge McCay said: "The description will apply to any bay mare, but there is another description added, to wit, the bay mare sold by the plaintiff to Johnson." In *Stewart v. Jaques*, 77 Ga. 365, 3 S. E. 283, the words, "one bay mare, two mare mules, one horse mule," used in a mortgage, were held insufficient to put on notice, by its record, one who purchased from the mortgagor a black horse mule and a black mare mule of stated ages. There no color, with reference to the mules, was stated in the mortgage, nor were any other descriptive terms as to them used, and besides it appeared that the mortgagor had several places on which he had mules. After all, it is, in most cases, obviously impossible to so accurately and minutely describe articles of personal property in a mortgage as to enable any one, by a mere inspection of the mortgage, and without reference to any other source of information, to identify them. It is also certain that errors of greater or less importance will often occur, but they do not always vitiate. As stated by Jones in one of the sections above cited: "Descriptions do not identify, of themselves. They only furnish the means of identification." It would be difficult to lay down an inflexible rule for determining what description would or would not be sufficiently full and complete to put a purchaser of mortgaged property on notice, or what errors or inaccuracies in the matter of description should or should not be held to render the instrument insufficient for this purpose. In cases of doubt the matter should be left to the jury for determination in the light of all the facts and circumstances. Judgment reversed.

(95 Ga. 569)

In re ROSS, Judge.

(Supreme Court of Georgia. Oct. 8, 1894.)

BILL OF EXCEPTIONS—TIME FOR TENDER—REFUSAL OF NEW TRIAL IN VACATION.

The statute (Code, § 4252) allowing, in some instances, 60 days from the date of the decision complained of within which to tender a bill of exceptions, applies only to decisions made in term time, and has no application to the refusal of a new trial on a motion made in term, and by order of the court set down for determination at chambers during vacation. A bill of exceptions to such refusal must be tendered within 30 days after the decision, where no legal excuse appears for delay.

(Syllabus by the Court.)

Application by S. Blouenstein for mandamus nisi to compel John P. Ross, judge of the city court of Macon, to sign a bill of exceptions. Writ denied.

Freeman &amp; Griswold, for movant.

PER CURIAM. Mandamus nisi denied.



(95 Ga. 503)

**COX et al. v. STATE.**

(Supreme Court of Georgia. Oct. 15, 1894.)

**GAMING—EVIDENCE.**

The evidence warranted the finding of guilty by the judge, and it does not affirmatively appear with sufficient certainty that any error was committed in refusing to rule out testimony.

(Syllabus by the Court.)

Error from criminal court of Atlanta; T. P. Westmoreland, Judge.

Tom Cox and others were convicted of keeping a gaming house, and gaming therein, and bring error. Affirmed.

The following is the official report:

Tom Cox and another were charged with keeping a gaming house. John Marshall and William Norman, with others, were charged with gaming. By agreement, the cases were consolidated. All were tried jointly, and were permitted to testify for each other, and a jury was dispensed with. The court found the three named guilty as charged, and sentenced Cox to pay a fine of \$50, or serve six months in the chain gang, and the others to pay a fine of \$25, or serve four months in the chain gang. One bill of exceptions is taken by the three, alleging that the judgment of the court is contrary to the evidence, without evidence to support it, decidedly and strongly against the weight of the evidence, and contrary to law and the principles of justice; and that "the court erred in refusing to rule out the testimony of Dr. W. C. Jarnigan in failing to answer the statutory question of the impeachment of a witness on direct examination." It appears from the evidence that on September 12, 1893, defendant Cox and certain associates obtained from the superior court a charter under the name of the "Classic City Club," which association, as stated in their petition, was "organized, not for pecuniary profit, but to promote good feeling, friendship, and social intercourse among its members." On July 2, 1894, the corporation leased a hall on the third floor of a house in the city of Atlanta; and about a month afterwards, at 11 o'clock of a Saturday night, the hall was raided by several members of a "detective force," piloted by one Mahoney, who obtained entrance (the door to the hall being fastened on the inside) by giving his name and a password. The detectives rushed in, two of them drew pistols, and a stampede resulted among the persons inside, there being about 25. Some went out the window, and down the fire escape. Twenty-two were arrested, and carried to the station house, these including the defendants on trial and one Austin, who gave testimony for the state, admitting that he also had gambled with Mahoney and others in the clubrooms. It appears that the club had previously occupied a different location in the same city; and Austin testified that he had seen Cox, Norman, and Marshall play cards for money ("skin game") at both

places during the present year; also, that Cox had and claimed control of the premises at both locations, took five cents from each player in a game for every half hour the game lasted, and, by himself or one Freeman (who was in charge in his absence), served whisky and beer from the bar in the clubrooms. Mahoney gave similar testimony, except that he denied that he had gambled. He and Austin were members of the club, which membership was procured by the payment of \$2 entrance fee and 25 cents dues weekly. When the raiders entered, they saw two tables, with six or more persons sitting at each, playing cards. A few pieces of money dropped to the floor,—35 cents or more. Two boxes of cards were found in one of the apartments, six or eight packs in each box; and some cards were picked up from the floor. The testimony for the defendant was in direct conflict with that for the state as to the gaming. It was admitted that they played cards, but not for money. There was testimony tending to impeach Austin and Mahoney, and testimony tending to sustain them by proof of good character. It also appeared that Mahoney had had a serious quarrel with one of the members of the club; and some testimony tended to show that he reported the place to the detectives, and caused the raid to be made, from motives of revenge.

H. C. Erwin, for plaintiff in error. L. W. Thomas, for the State.

PER CURIAM. Judgment affirmed.

(95 Ga. 465)

**RUCKER v. STATE.**

(Supreme Court of Georgia. Oct. 15, 1894.)

**LARCENY UNDER TRUST—EVIDENCE.**

An indictment for larceny after trust, which charges that a person unknown, a passenger on board a car, intrusted a ticket to the accused, to be applied to the use of the railroad company, to whom it belonged after being so intrusted, is not supported by evidence that the accused received the ticket from the passenger in the course of his duty as porter on the car, his further duty to the company being to turn over the ticket to the conductor, which he failed to do, but fraudulently converted it to his own use. The trust proved was not one between the passenger and the accused, but one between the railroad company and the latter, inasmuch as the passenger acted for himself, and not for the company, in delivering the ticket to the porter, and by such delivery discharged himself from all liability to the company for the carriage to which the ticket related, the same as if the ticket had been surrendered directly to the conductor, or any other agent or officer authorized to receive it in behalf of the company. *McNish v. State*, 14 S. E. 865, 88 Ga. 499.

(Syllabus by the Court.)

Error from superior court, Fulton county; R. H. Clark, Judge.

Hunter Rucker was convicted of larceny, and brings error. Reversed.

Frank R. Walder and Geo. P. Roberts, for plaintiff in error. C. D. Hill, Sol. Gen., and Hillyer, Alexander & Lambdin, for the State.

PER CURIAM. Judgment reversed.

(95 Ga. 456)

YOUNG et al. v. STATE.

(Supreme Court of Georgia. Oct. 15, 1894.)

CRIMINAL LAW—REVIEW ON APPEAL—EXCLUSION OF EVIDENCE—INSTRUCTIONS—POSSESSION OF STOLEN PROPERTY—REASONABLE DOUBT.

1. It has been so repeatedly ruled that assignments of error in admitting evidence cannot be considered when it does not appear what objection was made to the evidence at the time it was offered in the trial court that the practice on this question ought to be considered as finally settled.

2. In charging the jury upon the law with reference to the possession of stolen property by one accused of the theft, the court should use the word "recent;" but the omission to do so is not cause for a new trial in a particular case, where it affirmatively appears that the possession in question was in fact a recent one.

3. Although the conviction was founded solely on circumstantial evidence, it is not cause for a new trial that the court, while instructing the jury as to the law of reasonable doubt, omitted to state in the same connection that the evidence must also exclude every other reasonable hypothesis but that of the guilt of the accused, the court having subsequently charged as follows: "In connection with indirect or circumstantial evidence, the court charges you that the rule of law is that the facts established by the evidence must not only be consistent with the defendants' guilt, but must exclude every other reasonable hypothesis."

4. Under the facts of this case, and in view of the rulings in *Jones v. State*, 67 Ga. 242, and *Green v. State*, 71 Ga. 487, it is no cause for a new trial that the court charged: "Circumstances satisfactorily proven which point to the guilt of the defendants, and which are irreconcilable with the hypothesis of their innocence, and which require explanation from them, and may be explained by them if they be innocent, but which are not so explained, are sufficient to satisfy the conscience of a juror, and justify him before that forum for rendering a verdict according to their almost unerring indication." See, also, *Everett v. State*, 62 Ga. 65 (text of opinion on page 72).

5. There was no error in refusing to give the following request to charge: "Where two or more persons reside in a house, the fact of stolen goods being found in the house is not evidence of the guilt of any one of the persons residing in the same; the possession must be traced to one or more of them specially."

6. There was sufficient evidence to warrant the jury in convicting the accused, and the trial court did not abuse its discretion in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Camden county; J. L. Sweat, Judge.

John Young and others were convicted of larceny, and bring error. Affirmed.

Geo. W. Owens, for plaintiffs in error. W. G. Brantley, Sol. Gen., and Harrison & Peebles, for the State.

PER CURIAM. Judgment affirmed.

(95 Ga. 478)

PHILLIPS v. STATE.

(Supreme Court of Georgia. Oct. 15, 1894.)

UNLAWFUL SALE OF LIQUOR—WHAT CONSTITUTES—FURNISHING CAPITAL FOR BUSINESS—IMPOSITION OF MAXIMUM FINE AND COSTS.

1. Under the facts disclosed by the record, there was no abuse of discretion in overruling the motion for a continuance.

2. Where one, by the use of his capital or credit, aids in procuring and furnishing whisky to another for the purpose of being unlawfully sold by the latter, and it is so sold, and the former, by the agreement for conducting the business, is to receive, and does actually receive, a given per cent. on the cost of all the whisky so furnished and sold, they are both guilty of selling the liquor unlawfully, whether, under the terms of such agreement, a technical partnership between them existed or not.

3. Where, in sentencing one convicted of a misdemeanor, the court imposes the maximum fine authorized by law for that offense, the punishment is not rendered excessive because the court adjudges that the accused shall also pay, in addition to the fine, the costs of the prosecution.

4. The evidence fully warranted the verdict, and there was no error in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from city court of Clarke; Howell Cobb, Judge.

W. F. Phillips was convicted of a misdemeanor, and brings error. Affirmed.

Following is the official report:

The indictment against Phillips contained three counts: One charged him with unlawfully selling liquor; one, with procuring, counseling, aiding, etc., John G. Johnson to sell liquor; and the last, with being accessory before the fact to the unlawful sale of liquor by Johnson. Phillips was found guilty, and sentenced to pay a fine of a thousand dollars, and all costs of prosecution, or work on the chain gang 12 months. He moved for a new trial, and, his motion being overruled, excepted. The motion contained the general grounds that the verdict was contrary to law, evidence, etc; also, that the sentence was excessive. Error in admitting a book claimed to be the account book of Johnson, the error being that the entries in the book were not made by Johnson, and his bookkeeper was not introduced to show that they were correct, and there was no evidence that any settlement was ever made by the bookkeeper, or that Johnson knew that it was correct. It was not stated in the motion that defendant objected to this evidence when it was offered. Because the court erred in its charge in summing up the claim of the state and the claims of defendant, the error being that the summing up was argumentative. Error in overruling the motion for continuance because of the absence of one Sailors, a witness for defendant, the showing made being regular in every respect; that the witness had been subpoenaed by counsel for defendant in person, and promised to attend on the subpoena; and that defendant expected to prove by Sailors that Johnson said he (W. F. Phillips) had

nothing to do with his business, and had no interest in the same. The motion was overruled by the court because the case had been passed on a former call, upon the showing that Sailors was absent, and not subpoenaed; and the court stated that the case would be passed, and opportunity given to subpoena him, and if he failed to attend an officer would be furnished to bring him. The officer had not been applied for. The case was called and the motion made and overruled the morning defendant's counsel returned from Atlanta, where he subpoenaed Sailors, and the morning Sailors promised to come to Athens, where the case was tried, on the subpoena. On the former day, when the motion to continue for the absence of Sailors was made, the court stated that from the counter showing the opinion of the court was that Sailors was under the control of defendant, and defendant could have him present if he so desired, and the court would not continue in any instance for the absence of Sailors. On the former motion, Dudley was absent, and subpoenaed, and the court sent for and had him in court when the last motion was made. Defendant, on the former motion, testified that Dudley would swear the same that Sailors would. The subpoena was served on Sailors two nights before the motion was overruled, counsel who subpoenaed him stating that he subpoenaed him one night, and Sailors promised to come to Athens the next evening, and he thought Sailors was in Athens until his own arrival, the morning the case was called. It appears from the record that defendant introduced several witnesses who testified that Johnson told them the business was his, and no one else was interested in it. Dudley testified that he did not remember Johnson telling him that he alone was interested in the business. Error in refusing to charge the following written requests: "The defendant is charged with selling intoxicating liquors, and the theory of the state is that the defendant did not sell in person, but that he was a partner of J. G. Johnson, and thereby liable for the sales made by J. G. Johnson. If the defendant was a partner of Johnson, in law,—that is, a partner in business of illegally selling liquors,—then he would be liable for the acts of his partner, and could be convicted for sales made by them in pursuance of such partnership." "If you believe from the evidence in this case that Phillips' connection with the business of Johnson was that he was to have twenty-five per cent, or ten per cent, or any other per cent, on the amount of liquors purchased, or on the amount of liquors sold, and this was his sole connection with the matter, then Phillips would not be a partner, and you cannot convict him in this case." "If you believe from the evidence in this case that Phillips simply went security for Johnson in the purchase of liquor, and Johnson was to pay him a certain per cent. for such securityship, and

that the liquors belonged to Johnson, solely, when he received them, and Phillips had no interest except his per cent. for going security, then Phillips would not be guilty, and you should so find." "Under this indictment, and the theory of the state's case, defendant cannot be convicted unless you believe he was interested as a partner with Johnson. If you believe from the evidence in this case that Phillips' connection was in furnishing the liquor to Johnson, and not in the sale by Johnson, and you further believe the liquors were furnished by parties living in North Carolina, or elsewhere out of the state of Georgia, and at the instance of Phillips, and that Phillips and Johnson were both liable for the purchase money of the liquors,—Johnson as principal, and Phillips as security,—then I charge you that you cannot convict Phillips in this case."

Geo. C. Thomas and John J. Strickland, for plaintiff in error. J. D. Mell, Jr., for the State.

PER CURIAM. Judgment affirmed.

(95 Ga. 478)

#### MARTIN v. STATE.

(Supreme Court of Georgia. Oct. 15, 1894.)

RECEIVING STOLEN GOODS—INDICTMENT—CONVICTION OF PRINCIPAL — PAROL EVIDENCE — VARIANCE.

1. According to the bill of exceptions (as now ascertained by examination of the same) in the case of *Jordan v. State*, 56 Ga. 92, there was a motion to quash the indictment, which the court entertained, but overruled; the motion being made when the panel of 48 jurors was put upon the accused, and before witnesses were sworn. This court held that the motion should have been sustained, and directed that the indictment be quashed, inasmuch as it was founded on section 4488 of the Code, and charged the accused with receiving stolen goods as accessory after the fact, without alleging that the principal in the larceny had been tried and convicted. Conceding this adjudication to be correct (which admits of grave doubt), the case is of no absolutely binding authority upon a motion in arrest of judgment for a like defect in the indictment; for the Code, in section 4623, declares that every indictment shall be deemed sufficiently technical and correct which states the offense in the terms and language of the Code, and in the next section it declares that no motion in arrest of judgment shall be sustained for any matter not affecting the real merits of the offense charged in the indictment. The real merits of being accessory after the fact, whether by receiving stolen goods or otherwise, are in no wise affected by the trial and conviction of the principal thief; these matters relating wholly to procedure and evidence, and not in any respect to the elements of the offense itself. For an analogous ruling, founded on the distinction between exceptions to the indictment before trial and motion after verdict in arrest of judgment, see *Lampkin v. State*, 18 S. E. 523, 87 Ga. 516.

2. On a trial for receiving stolen goods as accessory after the fact, parol evidence of the trial and conviction of the principal in the larceny, if received without objection, will suffice to establish these facts; and a new trial will not be granted merely because they were not established by the highest and best evi-

dence, to wit, the record of the conviction, nor because the court refused to charge the jury that the record was essential.

8. The term "storehouse" includes a "warehouse" where goods are stored for the purpose of being sold, either in the warehouse itself, or in a building near by within which trade is conducted. Consequently, there is no substantial variance where the indictment charges a larceny from a storehouse, and the evidence shows it was from such a warehouse.

(Syllabus by the Court.)

Error from city court of Carroll; W. F. Brown, Judge.

Ben Martin was convicted of receiving stolen goods as accessory after the fact, and brings error. Affirmed.

Oscar Reese, for plaintiff in error. T. A. Atkinson, Sol. Gen., and H. M. Reid, for the State.

PER CURIAM. Judgment affirmed.

(95 Ga. 497)

### HODGES v. STATE.

(Supreme Court of Georgia. Oct. 22, 1894.)

#### HOMICIDE—HARMLESS ERROR.

The evidence as to what occurred at the time of the homicide showing a plain and manifest case of murder, with no color or suggestion of justification or mitigation, if the court erred either in denying a continuance, applied for upon the ground that witnesses were absent by whom threats by the deceased could have been proved, or in charging the jury touching the law of justification, the errors were harmless, and constitute no cause for granting a new trial.

(Syllabus by the Court.)

Error from superior court, Charlton county; J. L. Sweat, Judge.

Willis Hodges was convicted of murder, and brings error. Affirmed.

Hitch & Myers, M. L. Mershon, and L. L. Thomas, for plaintiff in error. W. G. Brantley, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

(94 Ga. 50)

### BEARDSLEY et al. v. HILSON.

#### HILSON v. BEARDSLEY et al.

(Supreme Court of Georgia. June 18, 1894.)

DEED—DELIVERY—ACCEPTANCE—ACTION TO SET ASIDE DECREE—WANT OF NOTICE—JURY TRIAL—EXECUTION—LEVY—DESCRIPTION—INSTRUCTIONS.

1. Where, under the evidence, the real issue as to the alleged delivery of a deed was whether the party to whom it was sent by the maker, and who shortly afterwards returned it, declaring it unsatisfactory, had ever accepted it, a charge in the following words was erroneous and misleading: "A deed is 'delivered,' in the sense of the law, when the person who makes it puts it in the possession of the person to whom it is made, with the intention that it shall pass the title to such person. After such a delivery, the mere return of the deed by the holder thereof to the maker would in no

wise affect the condition of the title. The title, after such return, would stand just where it did before the return." And it was also error to refuse to charge as follows: "If the plaintiff never accepted delivery of this deed, but it was brought to her by a person other than the grantor, and she immediately repudiated the deed, and brought it back to the grantor, saying she would not have it, there would be, in law, no delivery of the deed, and it would not be effectual to pass the title to the plaintiff. Delivery, to be effectual, must be accepted as such."

2. Under section 2014a of the Code, a defendant in an equity case who was duly served with a copy of the bill, or acknowledged service of it, will, after the lapse of three years from the rendition of a decree in such case, be barred from instituting proceedings to set it aside. Such defendant was bound to know when the decree was rendered, and to take, within the time prescribed by law, the proper steps to set it aside, if cause for so doing existed. A defendant not served, or who did not acknowledge service, or appear and defend, is in no way affected by the decree. In the present case the evidence was not sufficient to support a finding that the plaintiff did not acknowledge service of the bill in question. It required clear and explicit proof to show that she had not been served.

3. The decree showing on its face that the counsel for the plaintiff in the case in which the decree was rendered claimed to have the consent of a defendant in that case to the terms of the decree, this was sufficient to put that defendant on notice that such consent was asserted of record, and require her to move within three years to set the decree aside.

4. A decree purporting to be rendered by consent of parties is not void upon its face because it declares the title to the premises in controversy to be in a person other than one of the parties to the record, it appearing from the record, taken in connection with extrinsic evidence, that this person was a purchaser pendente lite from one of these parties. Because of his purchase pendente lite, such person is bound by the decree, and, consequently, entitled to take the benefit of it; and his vendee of the premises, being his privy in estate, is likewise bound and protected by the decree.

5. Where, prior to the adoption of the constitution of 1868, an appeal in an action upon a promissory note was entered by consent from the county court to the superior court, a judgment rendered by the superior court without the intervention of a jury, after the adoption of that constitution, was not void; no issuable defense having been filed, and, consequently, there being nothing presented for a jury to try, and the judgment being for principal, interest, and costs only. In *Walker v. Bevins*, 57 Ga. 323, and *Birdsong v. Woodward*, Id. 354, the rights of securities on appeal were involved. In *Seibels v. Hodges*, 65 Ga. 245, it does not appear from the report that the appeal was entered by consent, and therefore without giving security, as was done in the present case.

6. The property levied upon being described in these words: "A lot and the improvements on the same (as said lot is now inclosed) on Houston street, in the 4th ward of the city of Atlanta, containing a half acre, more or less, adjoining the property of Francis, Haslett, and Jones, it being part of land lot No. 51 in the 14th district of originally Henry, now Fulton, county, Georgia, levied on as the property of Robert Yancey,"—the description was prima facie sufficient, although the premises adjoined only one of the persons named, and did not adjoin the other two; and the extrinsic evidence did not raise such a latent ambiguity, or disclose such want of accuracy, as would render the description too uncertain to uphold a sale made by the sheriff under the levy. As there was no mistake in the levy in setting forth the

number of the land lot of which the premises were a part, it was error for the court, in its charge to the jury, to refer to any mistake in that regard.

(Syllabus by the Court.)

Error from superior court, Fulton county; M. J. Clarke, Judge.

Action by Naomi Hilson against Charles P. Beardsley and others to set aside a decree against her, and in favor of defendants, in which there was a judgment for plaintiff. Defendants bring error, and plaintiff brings cross error. Reversed on main bill of exceptions, and affirmed on cross bill.

R. R. Arnold, for plaintiff in error. Hall & Hammond, for defendants in error.

**SIMMONS, J.** A deed by Arnold conveying to the plaintiff the premises in dispute was attacked by the defendants, on the ground that the plaintiff had refused to accept the deed; Arnold testifying that, a day or two after it was executed and handed to the plaintiff's husband, to be delivered to her, she returned it to him (Arnold), saying it was "no account," and left it in his office; and it had remained in his possession ever since, until produced at the trial in response to notice. On this subject the defendants requested the court to charge the jury as follows: "If the plaintiff never accepted delivery of this deed, but it was brought to her by a person other than the grantor, and she immediately repudiated the deed, and brought it back to the grantor, saying she would not have it, there would be, in law, no delivery of the deed, and it would not be effectual to pass title to the plaintiff. Delivery, to be effectual, must be accepted as such." The court refused to charge as requested, but charged that "a deed is 'delivered,' in the sense of the law, when the person who makes it puts it in the possession of the person to whom it is made, with the intention that it shall pass the title to such person. After such a delivery, the mere return of the deed by the holder thereof to the maker would in no wise affect the condition of the title. The title, after such return, would stand just where it did before the return." We think the court erred in refusing to charge as requested, and in charging as he did, on this subject. Delivery of a deed consists of more than the mere handing of the deed to the grantee. In order to constitute a complete delivery, there must be acceptance by the grantee. Where a grantee retains a deed without objection, acceptance will be inferred. It is a presumption of law that a party accepts whatever is for his benefit; but this presumption may be rebutted. Certainly, it cannot be the law that the mere handing to a person of a deed, which he forthwith returns and declines to accept, invests him, nevertheless, with the title which the maker of the deed seeks thereby to convey. If a deed conveying merely a life estate should be sent to the vendee of a

fee-simple title, and he should return it, and decline to accept anything less than the title bargained for, it certainly could not be contended that the mere placing of the deed in his possession would invest him with a life estate, notwithstanding his refusal to accept; yet this would be so if the rule laid down by the court below in this case is correct. It is true the learned judge who delivered the opinion in the case of *Ross v. Campbell*, 73 Ga. 309, said that "our law does not make acceptance, as well as delivery, an essential requisite of a deed to pass title to land," and cited section 2690 of the Code, which declares: "A deed to lands in this state must be in writing, signed by the maker, attested by at least two witnesses, and delivered to the purchaser, or some one for him, and be made on a valuable or good consideration." In that case, however, it was not necessary to say this in order to sustain the decision, inasmuch as it was held that the facts and circumstances showed that the grantee did accept the deed in question. Besides, although the section cited does not say in so many words that the deed must be accepted, we think this is to be implied from the requirement that the deed shall be delivered; for, without acceptance, as we have already said, there cannot be a complete delivery, so as to pass title. To this effect, see 1 *Devl. Deeds*, § 285 et seq.; 5 *Am. & Eng. Enc. Law*, "Deeds," pp. 445, 446, 449.

2. This suit was brought August 15, 1887, to set aside a decree rendered April 1, 1884. On the bill against the plaintiff upon which the decree was rendered, there was an acknowledgment of service purporting to be signed by her; and in the present suit she seeks to avoid the decree, on the ground that she did not sign the acknowledgment of service, nor authorize any one else to do so for her. On this subject the testimony was conflicting. The Code (section 2914a) declares that "all proceedings of every kind in any court of this state to set aside judgments or decrees of the courts must be made within three years from the rendering of said judgments or decrees." If this plaintiff was served with a copy of the bill or acknowledged service, she was bound to know when the decree was rendered, and, under this section of the Code, would be barred from instituting proceedings to set the decree aside, more than three years having elapsed from the rendition of the decree to the filing of her suit to set it aside. Of course, if she was not served or did not acknowledge service, or appear and defend, the decree is not binding upon her. Where, however, an acknowledgment of service purporting to have been made by the defendant appears on the record, and several years have elapsed from the rendition of the decree, and other persons have acted upon the faith of it, and acquired property rights under it, we think the testimony to set aside the decree

on the ground that there was no service or acknowledgment of service should be clear and positive. Although the plaintiff in this case stated positively in the beginning of her testimony that she did not acknowledge service on the bill, she admitted on cross-examination that she was not certain and did not remember about signing the acknowledgment; that her memory was not very good; that she "did not know;" and that she was "cripple-minded and thick-headed." It would be a dangerous precedent to set aside the solemn judgment of a court, after a long lapse of time, upon testimony so vague and uncertain as this. We all know that human memory is frail and uncertain, and my own experience convinces me of this more and more every day. Judgments and decrees are solemn adjudications upon the rights of parties interested therein; and if courts were to set them aside, years after they have been pronounced, upon such testimony as that of the plaintiff in this case, the public could no longer rely upon them as binding, and no investments upon the faith of them could be regarded as safe. We do not think the evidence in this case was sufficient to support a finding of the jury that the plaintiff did not acknowledge service of the bill in question; and we do not hesitate to say this, although another jury upon a former trial may have found the same way.

3. The decree sought to be set aside purported to have been made pursuant to the consent of counsel for the plaintiff and defendants in the case, the consent referred to being in writing, and attached to the decree. The counsel who filed the bill on which the decree was founded signed this consent, as follows: "J. B. Redwine, for complainants and Naomi Webster, for whom I was attorney in final settlement, and who consents to the settlement." This was sufficient, if Naomi Webster acknowledged service on the bill, to put her on notice that such consent was asserted of record, and require her to move within three years to set the decree aside.

4. It appears from the record that a settlement was agreed upon by the parties some time prior to the taking of the decree, and, E. P. Black having, under this settlement, become a purchaser of the property in question, the parties consented that the decree should vest the title to the property in Black. This being so, the decree is not void because it declares the title to be in a person other than one of the parties to the record. Having purchased pending the litigation, he was bound by the decree, and consequently was entitled to take the benefit of it; and, when he sold the premises to other persons, they were his privies in estate and were likewise bound and protected by the decree.

5. The defendants relied upon a sheriff's deed as a part of their title. This deed was made by virtue of a sale under an execution founded upon a judgment against Webster. The judgment was rendered in a suit brought

in the county court of Fulton county in 1867, and appealed by consent of parties to the superior court. Before the trial of the case in the latter court, the constitution of 1868 was adopted and ratified. That constitution provided that "the court shall render judgment without the verdict of a jury in all civil cases founded on contract, where an issuable defense is not filed on oath." The suit being upon an unconditional contract, in writing, and there being no issuable defense filed on oath, the judge entered up judgment, under this provision of the constitution. When the sheriff's deed and the judgment and execution above referred to were offered in evidence in the present case, counsel for the plaintiff objected, on the ground that the judgment under which the sheriff sold was void, because the case, being appealed from the county court to the superior court before the ratification of the constitution of 1868, should have been tried by a jury, and judgment entered on the verdict of a jury. In support of this contention, counsel for the plaintiff relied upon the cases of *Walker v. Bevins*, 57 Ga. 323, and *Birdsong v. Woodward*, Id. 354. In those cases, however, it will be seen that the rights of sureties were involved. The defendants therein appealed, and gave bond and security for the eventual condemnation money; and it was held by this court that the sureties had a right to trial by a jury to ascertain what the condemnation money was, and that the judge had no power or authority in such a case to render judgment without the verdict of a jury. Those cases are commented upon in the case of *Redd v. Davis*, 59 Ga. 825. In the case of *Selbels v. Hodges*, 65 Ga. 245, the report of the case, as published in the book, is silent as to whether sureties were involved or not; but, after a careful reading of the record in the clerk's office, I am inclined to think the appeal was made in the same way in which it was made in the other cases above referred to. At any rate, the record does not show that the appeal was made by consent. In the present case, as before remarked, the appeal was made by consent. No appeal bond was given, and no rights of sureties were involved, and the judgment was merely for principal, interest, and costs. This case, therefore, is not controlled by the cases relied upon by counsel for the plaintiff in error. In the case of *Redd v. Davis*, supra, it was held that where the constitution of 1868 abolished the county court, and transferred the cases pending therein to the superior court, it was competent for the latter court to render judgment without a jury, where there was no issuable defense. If this could be done where the cases were transferred by law, we see no reason why it could not be done where they were transferred, by the consent of the parties, from the same court before it was abolished. We think the court below, in this case, was right in holding that the judgment was not void.

6. We deem it unnecessary to add anything to what is said in the sixth headnote as to the sufficiency of the levy, as the headnote seems to be full enough on that point.

Judgment on the main bill of exceptions reversed; on the cross bill, affirmed.

(95 Ga. 516)

### LOTT v. PETERSON.

(Supreme Court of Georgia. Oct. 22, 1894.)

FORCIBLE ENTRY AND DETAINER—WHAT CONSTITUTES—INCLOSURE OF PREMISES.

Neither forcible entry nor forcible detainer was constituted by merely refusing peaceably, and without any threat or display of force, to desist from inclosing under claim of right a church edifice, on request of one of the trustees of the church, who visited the premises while the work was in progress, nor by afterwards locking the gate of the inclosure, and posting thereon a warning in these terms: "All persons are positively forbidden to trespass upon these grounds by or under any deed or other instrument of writing not given by the undersigned. The worship of God is not prohibited when the above is fully complied with." *Curry v. Hendry*, 46 Ga. 631; *Stuckey v. Carleton*, 66 Ga. 215; *Blackwell v. State*, 74 Ga. 816.

(Syllabus by the Court.)

Error from superior court, Coffee county; J. L. Sweat, Judge.

Action by B. Peterson, trustee, against John M. Lott, Sr., for forcible entry and unlawful detainer. A petition for a writ of certiorari was presented by Lott. The writ was refused, and Lott excepts, and brings error. Reversed.

The following is the official report:

The petition for certiorari stated that there was tried before a magistrate a case of forcible entry and detainer, in which petitioner was defendant, and B. Peterson, trustee, was plaintiff. It appears from the affidavit of Peterson, attached to the petition for certiorari, that it was alleged in said affidavit that on May 26, 1894, the trustees of the Methodist Church in Douglass, Ga., were in the peaceable, etc., possession of a house and lot therein, known as the Methodist Church, and part of lot 192, sixth district of Coffee county, generally known as part of the Tom Harper lands, the lot containing one acre, it being the lot on which the church stands; and that, on said day, Lott, with force and arms, etc., took possession of the house and lot, etc. The evidence as stated in the petition was, for plaintiff: The possession by the church of the land known as the Tom Harper land had been peaceable and undisturbed up to Monday before June 6, 1894, at which time the pastor and others started to the church, and found it inclosed by a fence with a gate in front, which had a lock and chain on it, but whether it was locked or not the witness did not know. Upon the gate was a notice that all persons were forbidden to trespass upon the grounds by or under any deed or other instrument of writing not given by Lott, and "the worship of God is not

prohibited when the above is fully complied with." This notice was signed by Lott. There was an agreement between Peterson and Lott by which, under the conditions therein stated, Lott was to make title to one acre of land for the church, and Peterson was to make Lott title to one-fourth of an acre adjoining Lott's land, and Lott said on several occasions he was ready to comply with the contract. One of the trustees of the church, at the request of Peterson, went to see Lott to try to get him not to fence up the church ground. He found Lott building a plank fence on the church ground. He asked Lott not to build the fence, saying they did not want it built there; and Lott said, if that was what he came for, he could go back; that he (Lott) was ready to comply with the contract, and for this trustee to go back and see if Peterson would comply with his contract, and, if he would, then Lott would stop fencing. Lott used no angry words to this trustee. His manner was peaceable, and he displayed no weapons. By agreement, the contract between Lott and Peterson, individually, was introduced. It was dated August 25, 1892, and was to the following effect: There being a dispute over the title to three acres of land known as the Tom Harper land, it was agreed that, if the lands were recovered by Lott, he would make Peterson a deed to one acre thereof, being the land whereon the Methodist Church was to be built by Peterson, in consideration of a certain parcel of land described; that, in case Lott should fail to recover the land, Peterson would deed to Lott said last-mentioned parcel, and Lott would pay Peterson \$50; that each guarantied to the other that he would fully comply with this agreement without any trouble with the other; and that Peterson proceed to build the church without being molested by Lott, or any person claiming under him. The jury found a forcible entry and detainer, and the premises for plaintiff. The petition for certiorari alleged that this verdict was contrary to law, and that it was contrary to the evidence; the evidence showing that there was no force used, and that defendant took possession of the grounds peaceably, claiming the same as his own.

G. J. Holton & Son and E. D. Graham, for plaintiff in error. C. A. Ward, Jr., and Quincey & McDonald, for defendant in error.

PER CURIAM. Judgment reversed.

(95 Ga. 472)

### LOYD v. STATE.

(Supreme Court of Georgia. Oct. 22, 1894.)

CRIMINAL PROSECUTION—ERRONEOUS STATEMENT BY COUNSEL—CORRECTION BY COURT.

1. Counsel for the state having conceded that, because of a former conviction, no offense committed previous to a certain date was involved in the case on trial, and having after-

wards, in his argument to the jury, suggested a construction of the former conviction inconsistent with this concession, it was enough for the presiding judge, when his attention was called to the matter by opposing counsel, to say in the hearing of the jury that the conceded date would govern, and afterwards so instruct the jury in his general charge. Thus treating the impropriety was all that was necessary to render it harmless.

2. The evidence warranted the verdict, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from criminal court of Atlanta; T. P. Westmoreland, Judge.

John Loyd was convicted of gaming, and brings error. Affirmed.

The following is the official report:

On August 6, 1894, an accusation was sworn out in the criminal court of Atlanta, charging the defendant with the offense of gaming, as having been committed on June 16, 1894. He pleaded not guilty, and also entered a special plea of former conviction. By this special plea he showed that on January 25, 1894, he had been indicted in Fulton superior court for the offense of gaming, the day charged in the indictment being October 16, 1893, and that on February 5, 1894, he entered a plea of guilty on this indictment. The state's solicitor conceded that the matters thus set up by the special plea were true, and that the plea of guilty covered all offenses of gaming prior to January 25, 1894, and stated that the evidence would be confined to periods since that date. The testimony for the state showed that the defendant played and bet for money at the game of poker on the 26th and 27th days of March, 1894, with Hawes and four others. The testimony for the defendant was to the effect that said playing was in the early part of January. Defendant stated to the jury that on February 5th, knowing he had gamed on two occasions within two years, he pleaded guilty to the indictment of January 25th; that "one of the occasions referred to, which he had in his mind, and for which he supposed he was indicted, was the game of poker with Hawes and others, which is the only game he has played with Hawes;" that "the games with Hawes, and about which Hawes testified, occurred prior to the date of the indictment; that when he heard of the indictment he supposed it referred to these games, and, knowing that he was guilty, pleaded guilty." In the concluding argument the state's solicitor said: "Now, gentlemen of the jury, that is the charge he pleaded guilty to,—of gaming at the time fixed in this indictment." Defendant's counsel objected to this as incorrect and improper argument, and requested the court to stop the solicitor, and to instruct the jury "that the defendant, in pleading guilty on February 5, 1894, pleaded guilty to all offenses within two years prior to January 25, 1894." The court thereupon remarked, in the hearing of the jury, that the effect of the plea of guilty was to bar all prosecutions for gaming prior to that time, and that the jury

could not consider any evidence of gaming before January 25, 1894, and the jury would be so instructed in the charge. The court did instruct the jury in the charge, thus: "In considering this case, you cannot go back of January 25, 1894, the time the grand jury found a true bill against this defendant for gaming, he having entered a plea of guilty on February 5, 1894. This plea of guilty is a bar to all prosecution for the violation of the law against gaming, to January 25, 1894; and, if you convict the defendant at all, it must be on evidence that proves a violation of the law since January 25, 1894." It is contended that the court erred in refusing to stop the solicitor and correct his statement in the manner requested by defendant's counsel, and a new trial is asked on this ground, and on the further ground that the verdict is contrary to law and evidence.

W. T. Moyers and L. P. Skeen, for plaintiff in error. L. W. Thomas, for the State.

PER CURIAM. Judgment affirmed.

(115 N. C. 195)

#### ISLEY v. BOONE.

(Supreme Court of North Carolina. Oct. 30, 1894.)

Appeal from superior court, Alamance county; Hoke, Judge.

J. W. Hinsdale and John Gatling, for appellant. L. M. Scott, C. E. McLean, and J. E. Boyd, for appellee.

PER CURIAM. Parol evidence of the contents of the lost record was admissible (see this case reported in 109 N. C. 555, 13 S. E. 795), and upon due consideration we think that Mr. Parker's testimony, under the peculiar circumstances, was properly received. We are also of the opinion that the defendant was not prejudiced by the introduction of the proceedings for dower. Upon the whole record, we see nothing that warrants a new trial. Affirmed.

(114 N. C. 580)

#### CANNON et al. v. McCAPE et al.

(Supreme Court of North Carolina. May 21, 1894.)

For majority opinion, see 19 S. E. 703.

CLARK, J. (dissenting). I concur with the court that the fair and reasonable construction is that the commission is to be allowed on the sum "realized by the sale," though not on any amount beyond the debt. But here there was no sale, and hence no sum on which commission could be allowed. When property was levied on and advertised for sale under execution, but payment was made before sale, the sheriff was allowed no commission on the sale. *Dawson v. Graffin*, 84 N. C. 100. It took a statute to change this. Code, § 3752. But there has been no



statute as yet extending this rule to trustees or mortgagees when the debtor pays before sale. It is to be feared that such practice, if adopted, will result in oppression in very many instances.

(115 N. C. 138)

# **BUNN v. TODD.**

(Supreme Court of North Carolina. Oct. 30, 1894.)

## **SALE OF LAND BY HEIR — TRUST IN FAVOR OF CREDITORS.**

Where an heir, who was also administrator, having exhausted decedent's personal estate, sold devised lands to an innocent purchaser more than two years after the granting of letters, the proceeds of the sale are a trust fund in his hands for the payment of decedent's debts.

Appeal from superior court, Wake county; Hoke, Judge.

Action by Elvador Bunn against M. G. Todd, administrator, to subject the proceeds of a sale of land to the payment of the debts of the estate. Judgment for defendant, and plaintiff appeals. Reversed.

W. N. Jones and Strong & Strong, for appellant. J. B. Batchelor and J. O. L. Harris, for appellee.

**SHEPHERD, C. J.** The sale of the land by M. G. Todd, one of the heirs at law of James Todd, having been made more than two years after the grant of letters of administration, for value and without notice, was valid as to the purchaser; and it is now sought to subject the proceeds of such sale, in the hands of the said heir, to the payment of the outstanding indebtedness of the estate. It is insisted by counsel that the proceeds in such cases cannot be so subjected, and that the liability of the heir is personal only. Although this question was not the distinct ground of decision in *Winfield v. Burton*, 79 N. C. 388 (the proceeds being in the hands of an assignee of the heir), it cannot be denied that the contention of counsel is sustained by what is said in the course of the opinion. But it is not a little remarkable that in the same volume (in *Badger v. Daniel*, Id. 372) a contrary view is declared by the court, through the same justice who delivered the opinion in the former case. The court said: "Whitfield held the land as Henry Joyner did, and sales by Whitfield, after the two years, passed unincumbered estates to his vendees, Whitfield holding the price paid him in lieu of the land, and subject to its liabilities." This view is fully adopted by the court in *Davis v. Perry*, 96 N. C. 260, 1 S. E. 610, where the foregoing language is quoted with approval. The opinion sustains the principle, succinctly stated in the headnote as follows: "Where a devisee or heir at law sells land derived from the devisor or ancestor more than two years after the issuing of letters testamentary, etc., to a bona fide purchaser, for value and without notice, such

purchaser gets a good title against the creditors of the devisor or ancestor, but the devisee or heir holds the price received for the land in lieu thereof, and subject to the claims of such creditors just as the land would have been." And, again, in *Arrington v. Arrington*, 114 N. C. 168, 19 S. E. 351, after declaring that one who purchased of the heir after two years, and gave his note for the purchase money, was a purchaser for value, the court distinctly stated that the creditor could subject "the purchase money or its securities in the hands of the vendor." This principle being determined, its application to the facts of the case before us is quite easy. Here the heir was also the administrator, and had notice of the claim of the plaintiff against his ancestor. It is his duty, the personal assets being exhausted, to apply the proceeds of the sale to the outstanding indebtedness of the estate; but, instead of doing this, he attempts to apply them to the settlement of a debt due by him to his wards, the Norvell children. Procuring the note for the purchase money to be made payable to himself, as the guardian of these children, did not constitute them assignees for value, so as to preclude the rights of the plaintiff, as it is expressly found as a fact that the note due by him to the said children has never been credited or surrendered, and that he has never settled with them. The said note is now in the hands of the clerk, and the bond of the guardian is solvent. These children have parted with nothing, and their claim is still subsisting, and can be collected. *Holderby v. Blum*, 2 Dev. & B. Eq. 51. To take the proceeds of the sale of the land, which the administrator holds in trust by virtue of his office, and apply them to the payment of his own debt, instead of the indebtedness of the intestate, would, under the circumstances of this case, be contrary to the plainest principles of equity. We think the plaintiff was entitled to judgment. Reversed.

(115 N. C. 100)

# **STAINBACK v. HARRIS et al.**

(Supreme Court of North Carolina. Oct. 24, 1894.)

## **SALE OF DECEDENT'S LAND — PAYMENT OF DEBTS — ACTION BY ADMINISTRATOR — DEFENSES — PLEADING—INSTRUCTIONS.**

1. In an action by an administrator to subject lands in possession of the heirs to the payment of a judgment on a claim against decedent, the fact that the administrator made no defense to the action on the claim is no defense.

2. In an action to subject lands held by the heirs to the payment of decedent's debts, it was error to refuse to submit to the jury the question of the sufficiency of the personal assets to pay the debts, this issue having been raised by the answer.

3. The heirs cannot, by a mere general denial of title in the ancestor, and without alleging independent title in themselves, put the administrator to the proof of the ancestor's title.

Appeal from superior court, Vance county; Bynum, Judge.

**Action by W. T. Stainback, administrator, against G. I. Harris and others, for the sale of land to pay debts of the estate. Judgment for plaintiff, and defendants appeal. Reversed.**

J. B. Batchelor, for appellants. T. T. Hicks and T. M. Pittman, for appellee.

**SHEPHERD, C. J.** We do not think that, under the particular circumstances of this case, the counsel was precluded from insisting that the issues raised upon the pleadings should be submitted to the jury. The questions to be determined, therefore, are whether the issues certified by the clerk were material.

1. As to the first issue, we agree with his honor that it should not have been submitted. There is not the slightest suggestion that the debt upon which the judgment was taken against the administrator was not due by his intestate, and the mere fact that the administrator made no defense to such a claim cannot invalidate the judgment.

2. In refusing to submit the second issue, or to order the taking of an account, we think there was error. Before descended lands can be subjected to the payment of the indebtedness of the ancestor, it must be shown that the personal assets are insufficient, or have been exhausted in due course of administration (*Womack's Dig. par. 4835*); and, as the answer denied this, an issue was raised which should have been tried before making a decree of sale.

3. As to the third issue, we very much doubt whether, in a proceeding of this kind, the heirs, without alleging any independent title in themselves, can, by a mere general denial, put the administrator upon proof of the ancestor's title. To permit this would result in much unnecessary expense, inconvenience, and delay in the settlement of estates. In this case no prejudice can possibly be done the heirs, as the decree purports to operate only upon "the interest and estate" of their ancestor. If he has any interest or estate, they are, of course, bound by the decree. If he has none, or if the heirs have any interest or estate independent of their ancestor, they are clearly not estopped by the form of this decree. When the decree is to be so framed, we are inclined to the opinion that such a general denial by the heirs should not be considered. The case of *Egerton v. Jones*, 107 N. C. 284, 12 S. E. 434, and other decisions, do not present this point. The objection there is taken by parties claiming the land, or some interest therein; and, when it is shown that the decedent had parted with his title, the jurisdiction is defeated. In the cases like the present, it would seem that the heir should not be permitted to show by mere general denial that his ancestor had no title, and the jurisdictional question in such an instance would therefore not arise. New trial.

(42 S. C. 427)

**HENTZE v. MARJENHOFF.**

(Supreme Court of South Carolina. Oct. 30, 1894.)

**LIABILITY FOR WIFE'S SUPPORT—EVIDENCE.**

In an action against a husband for supplies furnished his wife and children, it is error to take from the jury the consideration of the question whether an order appointing a receiver of the husband's property on the application of the wife, the receiver being directed to pay her one-half of the income, did not provide a proper sum for her support.

Appeal from common pleas circuit court of Charleston county; James F. Izlar, Judge.

Action by A. W. Hentze against Johannes M. Marjenhoff for supplies furnished the wife and children of defendant. Judgment was rendered for plaintiff, and defendant appeals. Reversed.

W. Henry Thomas, for appellant. Trentholm & Rhett, for respondent.

**POPE, J.** This was an action brought by the plaintiff against the defendant in the court of common pleas for Charleston county, in this state, to recover from the defendant the sum of \$225.76 for supplies furnished by the plaintiff to the wife and infant children of defendant between the 26th day of September, 1892, and the 2d day of May, 1893. Such recovery was resisted by the defendant. The action came on for trial before his honor, Judge Izlar, and a jury, at the July term, 1893, of the court of common pleas for Charleston county. A verdict was rendered by the jury in favor of plaintiff, and after entry of judgment thereon the defendant appealed on various grounds. It will be unnecessary for us to consider all the exceptions of the appellant, as in our judgment there must be a new trial, and it is needless to examine all of the reasons of defendant why he is entitled to have the judgment below reversed.

The circuit judge was entirely correct in charging the jury that under the laws of this state it was the primary duty of the husband and father to provide for the support and maintenance of his wife and minor children. As recently as *Brown v. Thomson*, 27 S. C. 508, 4 S. E. 345, that doctrine of the common law was reaffirmed by this court, notwithstanding the changes wrought in our organic and statute law touching a wife's separate property. While, therefore, the circuit judge committed no error in the particular specified, his charge was calculated to prejudice the rights of the defendant very seriously when he stated to the jury that the "matters relating to several other suits which have been brought have nothing to do with this case." It seems from the testimony that the husband and wife were not living happily together; that, although living under the same roof, they occupied separate apartments; that the wife indulged in very abusive language, to others,

of her husband; that she had his property put in the hands of a receiver, and one-half of the rents of his property had been ordered to be paid to her by the receiver; that she had a bank account of \$800; that the husband had paid into the hands of a grocer \$75 in cash to be used in furnishing supplies to his family; that such grocer had informed the daughter that supplies could be had on the order of the husband and father. We cannot agree with the circuit judge that the fact that this wife had caused her husband's property to be put into the hands of a receiver, and that receiver ordered to pay to her one-half of the rents and profits, had nothing to do with this case, wherein the duty of the husband to maintain his wife and minor children was being investigated. It seems to us that if the rents and profits of the husband's property, to the extent of one-half thereof, was paid to this wife, such payment must necessarily enter into the solution of the performance by the husband of his duty in maintaining his wife and minor children. We cannot see, under ordinary circumstances, how the court could by its order take from the husband any of his property, to give to the wife, unless it was for her support and maintenance. No extraordinary circumstances were shown to exist in this case. Certainly, the wife, from her own testimony, was well supplied with money, she having testified that she had \$800 in cash in bank. It should always be borne in mind that under our theory of the married relation the husband is the head of his family, and as such is entitled to maintain his authority. It is only when he has abused his high prerogative by descending to a pitiless disregard of the solemn duties imposed upon him by nature and by law towards his wife that courts will interfere, and restrict the exercise by him of the management of his domestic expenses. As before remarked, the circuit judge took the question from the jury whether, in the payment of one-half of the rents and profits by the receiver to the wife, a proper sum was not provided for her support and maintenance by the husband, and we think this will necessitate a new trial. We prefer not to decide any other questions, but leave them all open for an investigation in the new trial. We can but hope that time may have already brought peace to this family, so that no further contention in the courts may be had. This is but the expression of a hope, and is not intended to indicate any disapproval of the exercise by an injured wife of her undoubted right to appeal to the law for that protection that the husband refuses her in a proper case. It is the judgment of this court that the judgment of the circuit court be reversed, and that the cause be remanded to the circuit court for a new trial.

McIVER, C. J., concurs.

(42 S. C. 421)

STATE ex rel. POORE v. NANCE, Sheriff.  
(Supreme Court of South Carolina. Oct. 29, 1894.)

FINDINGS BY COURT—MANDAMUS—SETTING APART HOMESTEAD.

1. The failure of the court to state the conclusions of law and fact separately in the findings is not reversible error.

2. Where the husband conveyed all his lands to his wife, and, under the execution on a judgment subsequently rendered on a cause of action against him alone, a homestead was admeasured to him, and the balance of the lands advertised for sale, mandamus does not lie to compel the sheriff to set apart to the wife the homestead so set apart to the husband.

Appeal from common pleas circuit court of Abbeville county; I. D. Witherspoon, Judge.

Mandamus, on the relation of Mary A. Poore, against F. W. R. Nance, sheriff, to compel the defendant to set apart a homestead. Judgment for defendant, and plaintiff appeals. Affirmed.

Frank B. Gary, for appellant. Parkee & McGowan, for respondent.

POPE, J. The petitioner (appellant) sought a writ of mandamus to compel the respondent to set aside to her a homestead in certain lands. The matter was fully heard by his honor, Judge Witherspoon, upon the petition, the return thereto, and certain affidavits, and he denied the writ prayed for. From his order dismissing the petition, the petitioner has appealed to this court, upon four grounds.

The fourth is too general, merely alleging that the order was erroneous, without pointing out in such exception wherein it was erroneous.

The third ground imputes error to the circuit judge because he failed to state his findings of fact and conclusions of law separately. By several decisions of this court, the course adopted by the circuit judge is not reversible error. *Stepp v. Association*, 37 S. C. 417, 16 S. E. 134, and cases there cited.

We will consider the first and second grounds together, as they involve the real controversy here, and here set out in full, to wit: "First. Because his honor erred in refusing to grant the writ of mandamus, when it appeared as an uncontradicted fact that A. J. Poore, at the time he conveyed the land in dispute to Mary A. Poore, was the head of a family residing in this state, and was entitled to a homestead in said lands, which had not been set off to him; that the judgment under which the sheriff has advertised the land for sale was recovered several years after the conveyance to Mrs. Mary A. Poore, and was on a cause of action arising subsequent to the ratification of the constitution of the state in 1868, and against which he had the right to claim a homestead; that the sale by the sheriff, as advertised by him, would damage the said Mary A. Poore, and cast a cloud on her title; and that she has demanded that the homestead of A. J. Poore in said lands be assigned to her, and that demand

was refused. Second. Because his honor erred in refusing to grant the writ of mandamus, when the allegations of the petition were not denied by the return, and which showed that she, as the grantee of A. J. Poore, was entitled to a homestead in said land." It seems that one A. J. Poore conveyed all the lands he owned to his wife, Mary A. Poore, by deeds made in 1880 and 1882, respectively, and continued to reside thereon with his said wife and children, and now so resides. On a cause of action which originated since the ratification of our constitution in April, 1868, Florence E. Sullivan, suing by her guardian ad litem, has obtained a judgment against said A. J. Poore, and in May, 1893, caused the respondent, as sheriff, to levy upon the lands as the property of A. J. Poore. He demanded a homestead in the lands levied upon. Under the usual mode, this homestead was admeasured, containing some 200 acres, whereon was located the family dwelling house. Exceptions were taken, but, upon these exceptions being heard by the circuit court, they were overruled. When the balance of the lands, not including the homestead set apart to A. J. Poore, was advertised for sale by the sheriff, Mrs. Poore, the petitioner, demanded that the homestead of her husband, A. J. Poore, be set apart by the sheriff to her. This the sheriff declined to do, whereupon this application for the writ of mandamus to compel him to do so was made.

It is contended here that the petitioner has the right to have the sheriff set off to her, not her homestead, but that he so set off to her the homestead of A. J. Poore. It is admitted that the petitioner is no party to the action of Florence E. Sullivan v. A. J. Poore. Her property could not be sold under that judgment. In fact, the property of no one but A. J. Poore could be legally sold under such judgment. It is difficult to see, therefore, how her right, under the deeds from her husband, A. J. Poore, to her, could be prejudiced by the sale advertised to be made. If the petitioner believes, as a proposition of law, that, A. J. Poore being entitled to a homestead as against the judgment, or rather the cause of action upon which it was based, and she having purchased his lands, which purchase, if from any cause should prove defective, yet the conveyance of the homestead of A. J. Poore would be upheld, because it was never subject to the judgment of Florence E. Sullivan, she would be clearly right; but it does not follow that therefore she is entitled to have such homestead set apart to her by the sheriff. The writ of mandamus was never designed for the enforcement of any such rights. An inspection of the return of respondent shows to us that the facts of the petition were sufficiently traversed by that pleading. It follows that there was no error here. It is the judgment of this court that the order of the circuit court appealed from be affirmed.

McIVER, C. J. I concur in the result, as I am not now prepared to express or intimate any opinion as to the ulterior rights, if any, of Mrs. Poore.

(42 S. C. 402)

**FROST v. BERKELEY PHOSPHATE CO.**  
(Supreme Court of South Carolina. Oct. 22, 1894.)

**NUISANCE—NOXIOUS GASES—ACTION FOR DAMAGES.**

1. In a suit to recover for damages to plaintiff's property caused by the escape of noxious gases from defendant's factory, a charge that defendant must have so used his property as not to unlawfully injure his neighbors, and that if he so used it as to injure his neighbors, "in an unlawful and unreasonable manner," he is liable, is objectionable as submitting to the jury a question of law.

2. Where one uses his land in the manufacture of fertilizers, and so, necessarily, in the manufacture of sulphuric acid, in the process of which noxious gases escape, by reason of which injury to his neighbors will either necessarily or probably ensue, he is liable, if such injury does result, even though he may have been reasonably careful.

3. Where plaintiff has sustained injury by the escape of noxious gases from defendant's factory and also injury from other causes, defendant is not relieved from liability for the injury which he has caused.

Appeal from common pleas circuit court of Berkeley county; James Aldrich, Judge.

Action by Thomas Frost to recover damages from the Berkeley Phosphate Company for injuries sustained by reason of noxious gases generated in defendant's mill. From a judgment for defendant, plaintiff appeals. Reversed.

The following are the charge of the judge, and the exceptions thereto:

"Mr. Foreman, and Gentlemen of the Jury: This is an action brought by Mr. Thomas Frost against the Berkeley Phosphate Company. You have heard the complaint read, which states the cause of action. You have heard the defendant's answer read, which is the answer to the allegations stated in the complaint. Those allegations and denials raise the issues which you are to pass upon. Among the issues that you will have to determine will be what damage, if any, has the plaintiff sustained by reason of the escape of gases, vapors, and those matters that are thrown off from the phosphate works, if they are thrown off; and in considering that you are to be guided by what we term the 'preponderance of the testimony.' The plaintiff comes in, and the burden of proof is upon him to sustain the case by the allegations that he has made. The defendant is not called upon to speak in his defense until the plaintiff has made out a case. When that is done, then the defendant introduces his testimony, and the jury then are controlled by what is termed the 'preponderance of the evidence.' You have heard counsel speak, in their arguments, of nuisances. In ordinary acceptance, we use the term 'nuisance' in referring to an offense that is indictable. To illustrate: Stopping the roads up,—digging

a ditch across the road,—is a nuisance. When that is considered the term, as applied here, is restricted. A nuisance that affects injuriously one or more or few individuals may be a private nuisance, and that is based upon this doctrine. A man has the right to engage in any lawful occupation, or to use his premises in any proper and lawful industry; but, in the exercise of his rights, he must so use his property as not to unlawfully and unreasonably injure his neighbor's property. If he does so use his property in an unlawful and unreasonable manner as to injure his neighbor, then, as to that neighbor, that would be a nuisance, and for that nuisance that neighbor would have the right to bring action in the civil court, and demand compensation in the way of damages. The Berkeley Phosphate Company, it is alleged, is a corporation under the laws of this state. That is admitted. There is no allegation that the Berkeley Phosphate Company is engaged in an unlawful business in itself; that is, in the sense that they are engaged in a business which is wrong. But the plaintiff alleges that, while they are engaged in that lawful business, they are not so conducting their business as they should, and there comes the gist of the case. Is the Berkeley Phosphate Company so operating and conducting its business as, by the escape of these gases and vapors as alleged in this complaint, to injure, in an unreasonable and unlawful manner, Mr. Frost's property? Well, you heard the testimony, and I don't know if I can state the rule any plainer than I have. If the Berkeley Phosphate Company is allowing these acids and gases to escape, and they are actually injuring Mr. Frost's property, well, then, Mr. Frost would be entitled to compensation. But, to enable the plaintiff to recover, the injury must be a positive, direct injury, and the damage must be actual and substantial. Further, it must be the result of the nuisance; that is, the act of the phosphate company, as charged, and not the result of other artificial causes. If the injury is in part the result of vapors, as charged in the complaint, and in part the result of other causes, the verdict must be for the defendant, unless the testimony establishes that the injury would not have resulted except for the vapor charged as causing the alleged injury. The law only deals with real and substantial injuries, and such as arise from the wrongful use of property, and will not lend its aid to check one engaged in a lawful pursuit simply because his neighbor is annoyed, unless the use complained of—that is, the conduct of his neighbor—is both in violation of the neighbor's rights, and unreasonable and unlawful, as I have explained to you. Now, gentlemen, this action, in my opinion, is not one sounding in punitive damages,—that is, what we call 'smart money.' It is for compensation,—that which will make the plaintiff whole, if you find that he has sustained any injuries. I think that

about covers all that I desire to say to the jury.

"With all due respect to the counsel who made that argument, I think that, when you come down to private nuisances or private damages, that numbers have nothing to do with it. When one man injures his neighbor in an unlawful and unreasonable manner, as I have endeavored to explain to you, he must make him answer by compensating him for damages. You can't find a verdict for more than five thousand dollars, because that is the amount claimed, and your damages cannot come down below the 5th November, 1890. Damage that he has sustained will lead up to, and prior to November 5, 1890. Whatever you think was the damage he sustained at that time from injuries, if you find any or not, in destroying his trees, grasses, vines, or injuries to the property itself, you state in your verdict. If you find that the plaintiff has failed to make out his case by the preponderance of the testimony, or that these gases that escape from the defendant's factory, if that escape was not the approximate cause of the damage alleged to have been sustained, your verdict would be, out and out, for the defendant. Now, whatever may be your verdict, write it out in letters, not in figures. Gentlemen, by consent, this copy of the complaint goes to the jury."

Exceptions: "(1) Because the presiding judge charged as follows: 'A man has the right to engage in any lawful occupation, or to use his premises in any proper and lawful industry, but, in the exercise of his rights, he must so use his property as not to unlawfully and unreasonably injure his neighbor's property. If he does so use his property, in an unlawful and unreasonable manner, as to injure his neighbor, then as to that neighbor that would be a nuisance, and for that nuisance that neighbor would have the right to bring action in the civil court, and demand compensation in the way of damages. \* \* \* The law \* \* \* will not lend its aid to check one engaged in a lawful pursuit, simply because his neighbor is annoyed, unless the use complained of—that is, the conduct of his neighbor—is both in violation of the neighbor's rights, and unreasonable and unlawful, as I have explained to you. \* \* \* When one man injures his neighbor in an unlawful and unreasonable manner, as I have endeavored to explain to you, he must make him answer by compensating him for damages.' In which his honor erred, it is submitted, by instructing the jury that a man would not have the right to bring such an action, and therefore could not recover damages, unless the defendant used his property in an unlawful and unreasonable manner, and so as to unlawfully and unreasonably injure his neighbor, whereas, it is submitted that it is the injury, by itself and in fact, not its unlawfulness and unreasonableness, nor the use of property in an unlawful

and unreasonable manner, which gives the right of action. (2) Because the presiding judge charged as follows: "There is no allegation that the Berkeley Phosphate Company is engaged in an unlawful business, in itself,—that is, in the sense that they are engaged in a business which is wrong,—but the plaintiff alleges that, while they are engaged in that lawful business, they are not so conducting their business as they should, and there comes the gist of the case. Is the Berkeley Phosphate Company so operating and conducting its business as, by the escape of these gases and vapors as alleged in this complaint, to injure, in an unreasonable and unlawful manner, Mr. Frost's property?"

\* \* \* The law \* \* \* will not lend its aid to check one engaged in a lawful pursuit, simply because his neighbor is annoyed, unless the use complained of—that is, the conduct of his neighbor—is both in violation of the neighbor's rights, and unreasonable and unlawful, as I have explained to you. \* \* \* When one man injures his neighbor in an unlawful and unreasonable manner, as I have endeavored to explain to you, he must make him answer by compensating him for damages.' In which his honor erred, it is submitted, (a) in stating to the jury that the plaintiff alleged that the defendants were engaged in a lawful business; (b) by instructing the jury that the gist of the case was whether the Berkeley Phosphate Company were so operating and conducting their business as, by the escape of the gases and vapors, to injure, in an unreasonable and an unlawful manner, Mr. Frost's property, whereas, it is submitted that it is the injury, by itself and in fact, not injury in an unreasonable and unlawful manner, which is the gist of such a case; (c) and in leaving it to the jury to decide what is unreasonable and unlawful. (3) Because the presiding judge charged as follows: "To enable the plaintiff to recover, the injury must be a positive, direct injury, and the damage must be actual and substantial. Further, it must be the result of the nuisance; that is, the act of the phosphate company, as charged, and not the result of other artificial causes. *If the injury is in part the result of vapors, as charged in the complaint, and in part the result of other causes, the verdict must be for the defendant, unless the testimony establishes that the injury would not have resulted except for the vapor charged as causing the alleged injury.*" In which his honor erred, it is submitted, by instructing the jury as he did in the said last sentence, italicized."

McCrady & Bacot, for appellant. Mitchell & Smith, for respondent.

McIVER, C. J. The plaintiff brought this action to recover damages from the defendant company for the injury done to plaintiff and his property by reason of the noxious gases generated in defendant's mill, located very near by, and at some points adjoining,

plaintiff's land, and erected for the purpose of manufacturing commercial fertilizers. It is alleged in the complaint that in the preparation and manufacture of these fertilizers "one of the elements in the preparation is the manufacture, in very large quantities, of sulphuric acid, in the manufacture of which acid are produced certain gases, fumes, or vapors, of very injurious results to vegetable life,—in some cases, destructive of it altogether,—and also highly deleterious to animal life;" and it is further alleged that these noxious gases, fumes, and vapors thus escaping from defendant's mill have greatly injured, and to some extent entirely destroyed, plaintiff's crops, and other vegetation growing on his land, and have proved so detrimental to health as to render plaintiff's premises unfit for habitation. The plaintiff offered testimony tending to prove these allegations, and, on the other hand, testimony was offered by the defendant tending to contradict the same. The case was submitted to the jury under the charge of his honor, Judge Aldrich, who found a verdict for the defendant, and plaintiff appeals upon the several grounds set out in the record, which practically impute two errors to the charge, which will hereinafter be stated; but we think it due to the circuit judge that his charge, as well as the exceptions thereto, should be incorporated in the report of the case.

The first error imputed to the circuit judge is in charging the jury as follows: "A man has the right to engage in any lawful occupation, or to use his premises in any proper and lawful industry, but in the exercise of his rights he must so use his property as not to *unlawfully and unreasonably* injure his neighbor's property. If he does so use his property, in an *unlawful and unreasonable* manner, as to injure his neighbor, then as to that neighbor that would be a nuisance; and for that nuisance that neighbor would have the right to bring action in the civil court, and demand compensation in the way of damages,"—and in stating to the jury, as the gist of this case: "Is the Berkeley Phosphate Company so operating and conducting its business as, by the escape of these gases and vapors as alleged in this complaint, to injure, in an *unreasonable and unlawful manner*, Mr. Frost's property?" We have italicized the objectionable words in these two extracts from the judge's charge simply for the purpose of indicating the point of the objection. It seems to us that this charge is open to two objections: First, that it left to the jury the decision of a question of law, for we do not find anywhere in the charge anything to indicate what would be an unreasonable or an unlawful use of the defendant's premises, or what would constitute an unreasonable or an unlawful injury to the plaintiff's property, and the jury were left without any rule or principle by which to determine whether Mr. Frost's property was

unreasonably or unlawfully injured by the defendant. If, therefore, the jury had been ever so well satisfied that the property of the plaintiff had been very seriously injured by the use to which defendant had put its own property, they could not, under this instruction, have found for the plaintiff, without further determining the question whether the defendant had so used its own property as to unreasonably and unlawfully injure the property of the plaintiff, for the determination of which they had been furnished with no rule or principle by the circuit judge. How the jury could determine whether the defendant had made a lawful use of its premises, without any instruction as to what would be a lawful use, it is difficult to understand.

The second objection to this charge is, as it seems to us, that it unwarrantably limits the operation of the maxim, "Sic utere tuo ut alienum non laedas," so as to allow the owner of a tract of land to so use his own land in the prosecution of any lawful business as would necessarily or probably injure his neighbor, provided he takes all reasonable care to prevent such injury. This we do not understand to be the law. On the contrary, we think, if one uses his own land for the prosecution of some business from which injury to his neighbor would either necessarily or probably ensue, he is liable if such injury does result, even though he may have used reasonable care in the prosecution of such business. This doctrine is supported, not only by reason, but by the weight of authority, as is shown by the cases cited by appellant's counsel. The rule is well stated in a note in 5 Am. & Eng. Enc. Law, at page 3, in these words: "In general, if a voluntary act, lawful in itself, may naturally result in the injury of another, or the violation of his legal rights, the actor must, at his peril, see to it that such injury or such violation does not follow, or he must expect to respond in damages therefor; and this is true, regardless of the motive or the degree of care with which the act is performed." In the case of *Fertilizer Co. v. Malone*, 73 Md. 268, 20 Atl. 900,—a case very much like the one under consideration,—it was held that: "No principle is better settled than that where a trade or business is carried on in such a manner as to interfere with the reasonable and comfortable enjoyment by another of his property, or which occasions material injury to the property itself, a wrong is done to the neighboring owner, for which an action will lie; and this, too, without regard to the locality where such business is carried on; and this, too, although the business may be a lawful business, and one useful to the public, and although the best and most approved appliances and methods may be used in the conduct and management of the business;" citing *Attorney General v. Colney Hatch Lunatic Asylum*, 4 Ch. App. 147; *Pinckney v. Ewens*, 4 L. T. (N. S.) 741; *Waterworks Co. v. Pot-*

*ter*, 7 Hurl. & N. 160; *Rylands v. Fletcher*, L. R. 3 H. L. 330. Again, in the same case, it is said: "We cannot agree with the appellant that the court ought to have directed the jury to find whether the place where the factory was located was a convenient and proper place for the carrying on of the appellant's business, and whether such a use of his property was a reasonable use, and if they should so find the verdict must be for the defendant. \* \* \* Nor can any use of one's own land be said to be a reasonable use which deprives an adjoining owner of the lawful use and enjoyment of his property." And the learned judge proceeds to show that the only case which gives countenance to the view contended for by appellant is *Hole v. Barlow*, 4 C. B. (N. S.) 334, which had been distinctly repudiated in the subsequent cases of *Bamford v. Turnley*, L. J. 81 Q. B. 286, and *Tipping v. Smelting Co.*, 4 Best. & S. 608. In *Wilson v. City of New Bedford*, 108 Mass. 261, the case of *Rylands v. Fletcher*, supra, afterwards carried to the house of lords, which respondent contends has been repudiated in this country, was cited with approval, and the following language of Lord Cranworth, used in that case (L. R. 3 H. L. 330), is quoted in the Massachusetts case: "If a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage." In *Bamford v. Turnley*, supra, the jury were instructed that if they thought the spot was convenient and proper, and that the use by the defendant of his property was, under the circumstances, a reasonable use of his own land, he would be entitled to a verdict; but upon appeal these instructions were held to be erroneous, and that it was no answer, in an action for a nuisance creating actual annoyance and discomfort in the enjoyment of neighboring property, that the injury resulted from a reasonable use of the property. In *Cahill v. Eastman*, 18 Minn. 324 (Gil. 292), it was held that a person who uses his property in such a manner as necessarily tends to injure the property of another is liable to that other for any injury which may result from such use, without regard to considerations of care and skill therein. In that case the court quotes the following passage from Bl. Comm. bk. 3, c. 13: "If one erects a smelting house for lead [or, for the same reason, a fertilizer factory, in which sulphuric acid is generated] so near the land of another that the vapor and smoke kills his corn and grass, and damages his cattle therein, this is held to be a nuisance. And, by consequence, it follows that if one does any other act in itself lawful, which yet, being done in that place, necessarily tends to the damage of another's property, it is a nuisance, for it is incumbent

upon him to find some other place to do that act, where it will be less offensive." In that case, also, *Rylands v. Fletcher* was recognized. In the case of *Losee v. Buchanan*, 51 N. Y. 476, relied on by respondent, the action was to recover damages for injury done to plaintiff's property by the explosion of a steam boiler used on defendant's premises; and it was held that the use of such a steam boiler, in such a manner that it is not a nuisance, would not render defendant liable, without proof of fault or negligence on his part. But that was a very different case from this, for there there was no evidence that the use of a steam boiler on defendant's premises would necessarily or probably cause any injury to a neighboring proprietor, while here there is evidence tending to show that a fertilizer factory, in which sulphuric acid is generated, will necessarily, or at least very probably, cause injury to the neighboring proprietors, by reason of the escape of noxious and poisonous gases. In that case it was stated—incorrectly, as we think—that the case of *Rylands v. Fletcher* "is in direct conflict with the law as settled in this country." But the same court, at the same term, held, in the case of *McKeon v. See*, 51 N. Y. 300, that the plaintiff was entitled to an injunction to restrain the defendant from using machinery propelled by steam power, where the evidence showed that the plaintiff's buildings on the adjacent lot were actually injured by the jarring and shaking caused by the use of such machinery. In the last-mentioned case the case of *Tipping v. Smelting Co.*, supra, is cited with approval. In *Appeal of Pennsylvania Lead Co.*, 96 Pa. St. 116, it was held that the plaintiff was entitled to an injunction to restrain the company from carrying on lead-smelting works on its own premises, where the evidence tended to show that such works emitted offensive, poisonous, and noxious fumes and vapors, producing danger to animal and vegetable life on adjoining premises. In a note to that case the case of *Pennoyer v. Allen* (decided by the supreme court of Wisconsin in January, 1883) 14 N. W. 609, is cited, in which the action was to recover damages for the maintenance of a tannery on the defendant's premises, adjoining those of the plaintiff; and the question was distinctly presented whether the fact that the tannery was conducted and operated in a reasonable and proper manner, so that no odors of a disagreeable character were sent forth, except such as are incident to a tannery properly conducted, would be a defense to the action. The court held that this would be no defense, saying: "The ownership of land carries with it the rightful use of the atmosphere while passing over it. Title to land gives to the owner the right to impregnate the air upon and over the same with such smoke, vapor, and smells as he desires, provided he does not contaminate the atmosphere to such an extent as to substan-

tially interfere with the comfort or enjoyment of others, or injure the use of their property. \* \* \* When such comfort and enjoyment are so impaired, and compensation is demanded, it is no defense to show that such business was conducted in a reasonable and proper manner, and with more than ordinary cleanliness, and that the odors sent over and upon such adjacent premises were only such as were incident to the business when properly conducted." See, also, *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, in which the action was to recover damages for injuries sustained by the plaintiff below, arising from the noise, smoke, and odors emanating from the engine house and workshops of the railroad company, constructed and maintained on a lot adjoining the church building in the city of Washington, where the court, in response to a defense set up by the railroad company that their charter permitted them to enter the city of Washington, and to construct such works as were necessary and expedient for the completion and maintenance of its road, used this language: "The grant of powers and privileges to do certain things does not carry with it any immunity for private injuries which may result directly from the exercise of those powers and privileges." And again the court said: "If, as asserted by the defendant, the noise, smoke, and odors which are the cause of the discomfort and annoyance to the plaintiff are no more than must necessarily arise from the nature of the business carried on, with an engine house and workshop as ordinarily constructed, then the engine house and workshop should be so remodeled and changed in their structure as to prevent, if that be possible, the nuisance complained of; and, if that be not possible, they should be removed to some other place, where by their use the plaintiff would not be thus annoyed and disturbed in the enjoyment of its property." See, also, *McAndrews v. Colliery*, 42 N. J. Law, 189; *Heeg v. Licht*, 80 N. Y. 579; *Powder Co. v. Tearney*, 131 Ill. 322, 23 N. E. 389; *City of Tiffin v. McCormack*, 34 Ohio St. 638; *Euler v. Sullivan*, 75 Md. 616, 23 Atl. 845, affirming *Fertilizer Co. v. Malone*, supra. We think, therefore, that plaintiff's first exception should be sustained.

The second error imputed to the circuit judge is in instructing the jury that "if the injury is in part the result of vapors, as charged in the complaint, and in part the result of other causes, the verdict must be for the defendant, unless the testimony establishes that the injury would not have resulted, except for the vapor charged as causing the alleged injury." This instruction was erroneous, or, to say the very least of it, was misleading. Under this instruction the jury might very well suppose that, even if they came to the conclusion that the vapors emanating from the defendant's mill did injure the plaintiff's property, yet, if they at the



same time believed that a part of the injury sustained by the plaintiff was due to other causes,—for example, the work of the worm referred to in the testimony as the “borer,”—they could not find for the plaintiff. This we do not understand to be the law. The fact that, where one has sustained injury at the hands of another, it appears that he has also sustained injury from causes other than the act of the wrongdoer, will not, in our judgment, relieve the wrongdoer from liability to respond in damages for the injury which he has caused.

Another objection to this portion of the charge is that it imposed upon the plaintiff the burden of proving a negative. The charge necessarily implied that it was not sufficient for the plaintiff to show that his property had been injured by the noxious gases escaping from the defendant's mill, but it was necessary for him to go further, and show that the injury of which he complained was not due to any other cause. If, as matter of fact, the injury complained of by the plaintiff did proceed from other causes, that was a matter of defense, to be shown by the defendant. The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial.

POPE, J., concurs.

(42 S. C. 447)

ROSS v. CHARLESTON, M. & S. TRANSP. CO.

(Supreme Court of South Carolina. Nov. 2, 1894.)

**INJURIES CAUSED BY STEAMBOAT — LIABILITY OF OWNER — EFFECT OF CHARTER — SUFFICIENCY OF COMPLAINT.**

1. A complaint which alleges that through the careless, negligent, and unlawful operation of a certain steamboat by defendant, plaintiff's sailboat was run into and sunk, to his damage, states a cause of action.

2. An allegation in a complaint that a railroad company chartered a steamboat of the defendant owner for the purpose of towing to Charleston vegetable boats from the neighboring country, and that, while said company was operating such boat, plaintiff's sailboat was run into and sunk through the negligent management of said steamboat, does not show that the charterer of said steamboat, and not the owner, was liable for the injury; the charterer, in the absence of evidence to that effect, not being presumed to be the temporary owner of the chartered boat, so as to make him liable for such mismanagement.

Appeal from common pleas circuit court of Charleston county; D. A. Townsend, Judge.

Action by Marion Ross against Charleston, McClellanville & Santee Transportation Company. From a judgment for defendant, plaintiff appeals. Reversed.

The grounds of appeal were as follows: “Marion Ross, the plaintiff in this case, excepts to the order of Judge D. A. Townsend, made and filed March 14, 1894, on the fol-

lowing grounds: (1) Because the said judge erred in sustaining the demurrer to the complaint, and dismissing the same, with costs, ‘on the ground that it does not state facts sufficient to constitute a cause of action’ against the defendant, inasmuch as it alleges that the said steamer Louise was chartered by the Northeastern Railroad Company for certain purposes, and in the discharge of the said purposes inflicted the injury, if any, on plaintiff, thereby, by the use of the word ‘chartered,’ unlimited and unqualified, relieving the defendant of all liability, whereas he should have held that the said word ‘chartered’ is explained, limited, and qualified when the paragraphs in which the said word occurs are read and construed in connection with the allegations of the other paragraphs of said complaint. (2) Because the said judge erred in holding that it was necessary to limit or qualify in any way the said word ‘chartered’ (other than as limited and qualified in the complaint) to constitute a cause of action against the defendant. (3) Because the said judge erred in not holding that, although the said complaint alleges in effect that the said steamer Louise was chartered by the Northeastern Railroad Company for a specific purpose, and in the discharge of that purpose inflicted the injury complained of, it nevertheless also alleges that the said steamer at said time was owned, operated, and navigated by the defendant, its agents and servants, and that the said injury was caused by the carelessness, negligence, improper and unlawful conduct of the said defendant, its agents and servants, while so owning, operating, and navigating the said steamer, and therefore states facts sufficient to constitute a cause of action. (4) Because the said judge erred in not holding that the said complaint, irrespective of the paragraphs in which the word ‘chartered’ is used, states facts sufficient to constitute a cause of action.”

Bulst & Bulst and M. Rutledge Rivers, for appellant. Henry E. Young, for respondent.

McIVER, C. J. The sole question in this case being whether the circuit judge erred in sustaining a demurrer to the complaint upon the ground that the facts stated therein are not sufficient to constitute a cause of action, it will be necessary first to ascertain what are the allegations contained in the complaint. These allegations may be stated substantially as follows: (1) That the defendant is now, and was at the times hereinafter mentioned, a corporation, and as such owned and operated a certain steamboat, known as the “Louise”; (2) that on or about the 15th of May, 1893, the said steamboat Louise was chartered by the Northeastern Railroad Company “for the purpose of towing to the city of Charleston boats containing vegetables from the neighboring country, and intended for shipment over said railroads”; (3) that on the said 15th of

May, 1893, plaintiff owned and operated a certain sailboat, known as the "David John," used by plaintiff for carrying vegetables to the city of Charleston, "and that said boat, at the time of the collision hereinafter mentioned, was tight, staunch, strong, and in every way suited for the purpose for which she was used"; (4) that on said 15th of May, 1893, while plaintiff's boat was on her way to Charleston, loaded with vegetables for shipment, the defendant caused its said boat Louise "to approach plaintiff's said boat, to stop, and then and there offered, in accordance with the purposes for which said steamboat was chartered, to tow plaintiff's said boat to Charleston, having at said time the sloop Gipsy in tow"; (5) that plaintiff accepted the offer made, and "in obedience to the directions of defendant attempted to place his said boat to the stern of the said sloop Gipsy, for the purpose of being towed as aforesaid, but in consequence of the careless, negligent, improper, and unskillful management of the defendant and its agents in running the said steamboat Louise plaintiff was prevented from carrying out the directions given, and his said boat was sunk, and, with the vegetables aforesaid, entirely lost"; (6) that said loss to plaintiff "was caused by the careless, negligent, improper, unskillful, wrongful, and unlawful conduct of the defendant and its agents and servants navigating the said steamboat Louise, for the reason that, contrary to proper care, skill, and caution, the said defendant, its agents and servants, caused the said steamboat to start off without having allowed plaintiff sufficient time for carrying out the directions given by the said defendant, its agents and servants, and without having seen, as the said defendant, its agents and servants, should have, that the said boat of plaintiff was properly in position, and prepared for the said steamboat to start off"; (7) "that the said defendant, its agents and servants, by reason of their neglect, inattention, and improper conduct in prematurely and unexpectedly starting the said steamboat Louise, caused the said sloop Gipsy, towed as aforesaid, to run into and strike with great force and violence the said boat of plaintiff, thereby capsizing and sinking her, loaded with vegetables, as aforesaid, the property of plaintiff, to his loss and damage, three hundred and fifty dollars." Upon the reading of this complaint the defendant demurred orally, on the ground that it did not state facts sufficient to constitute a cause of action, "inasmuch as it alleges that the steamer Louise was chartered by the Northeastern Railroad Company for certain purposes, and in the discharge of the said purposes inflicted the injury, if any, to the plaintiff." The circuit judge, in a short order, without stating any reasons, sustained the demurrer, and rendered judgment dismissing the complaint with costs. From this judgment plaintiff appeals upon the several

grounds set out in the record, which, it is due to respondent, should be set out in the report of the case, as it is insisted by its counsel that these grounds are objectionable in point of form, as being too general in their nature, and also in violation of rule 5, forbidding a reference back to the exceptions taken to the report of a master or referee, or to the decree of the judge of probate.

We will first dispose of these preliminary objections, neither of which are, in our judgment, tenable. As to the objection that the grounds of appeal are too general, we must say that they are much more specific than those which we have seen in any case that we can now recall where the appeal has been from a short order, like this, sustaining a demurrer upon the ground that the complaint does not state facts sufficient to constitute a cause of action. Inasmuch as there are no grounds stated in the order upon which the demurrer was sustained, and no specific ruling made as to any legal proposition, except the general proposition that the demurrer was well taken, we do not see how the grounds of appeal could have been any more specific than they are. As to the violation of rule 5, called in the argument of respondent's counsel, the "reference back" rule, it seems to us, from the express terms used in that rule, very obvious that such rule has no application to this case. We do not think it necessary to consider the grounds of appeal *seriatim*, for it seems to us very obvious that a good cause of action is stated in the complaint. If the allegations found in the complaint are to be taken as true (and they must be so taken, under the demurrer), then it is plain that the plaintiff, in his complaint, has stated facts showing that he sustained an injury to his property by the careless, negligent, and unlawful act of the defendant, through its agents and servants, and, if so, then a cause of action has certainly been stated. But it is contended by the counsel for respondent that the allegation in the complaint that the steamer Louise was chartered by the Northeastern Railroad Company, and in the service of that company at the time the disaster occurred, is inconsistent with and contradictory of the other allegations in the complaint to the effect that the injury was caused by the act of the defendant, its agents and servants, and hence, to use a common phrase, the plaintiff has "stated himself out of court"; that, if he has any cause of action at all, it is against that railroad company, and not against the defendant company. This position is founded upon the unwarranted assumption that whenever a vessel is chartered by any person or corporation the charterer becomes the owner, for the time being at least, of such vessel, and as such liable for any injury done to a third person by the mismanagement or misconduct of those in charge of the vessel, and that the real

owner is relieved from any such liability. This we do not understand to be the law. On the contrary, the rights and liabilities of the charterer and the real owner, respectively, depend upon the terms of the charter party, and of these terms the complaint does not purport to speak. In *Leary v. U. S.*, 14 Wall. 607, the plaintiff, being the owner of a certain steamer, "chartered her to the United States for the purpose of plying in the harbor of Port Royal, South Carolina, or for any other service the government might designate." The steamer having been injured while in the service of the government, one of the questions which arose in the case was whether the charterer—the government—was the owner of the steamer at the time under the terms of the charter party. The court, in determining that question, used the following language: "There is no doubt that under some forms of a charter party the charterer becomes the owner of the vessel chartered for the voyage or service stipulated, and consequently becomes subject to the duties and responsibilities of ownership. Whether in any particular case such result follows must depend upon the terms of the charter party, considered in connection with the nature of the service rendered. The question as to the character in which the charterer is to be treated is in all cases one of construction. If the charter party let the entire vessel to the charterer, with a transfer to him of its command and possession, and consequent control over its navigation, he will generally be considered as owner for the voyage or service stipulated. But, on the other hand, if the charter party let only the use of the vessel, the owner at the same time retaining its command and possession and control over the navigation, the charterer is regarded as a mere contractor for a designated service, and the duties and the responsibilities of the owner are not changed. \* \* \* All the cases agree that entire command and possession of the vessel, and consequent control over its navigation, must be surrendered to the charterer before he can be held as special owner for the voyage or other service mentioned. The retention by the general owner of such command, possession, and control is incompatible with the existence at the same time of such special ownership in the charterer"; citing a number of cases. The court, after laying down these principles, proceeded to examine the terms of the charter party, and reached the conclusion that by those terms the charterer did not become the owner of the steamer. It follows, therefore, that the simple allegation in the complaint that the *Louise* was chartered by the Northeastern Railroad Company for the purpose of towing to the city of Charleston boats containing vegetables, does not necessarily show that the railroad company became the owner of the *Louise*. Indeed, the other allegations in the complaint to the effect that the defendant company operated the steamer *Louise*, which

was navigated by its agents and servants, are quite sufficient to show the contrary. If the United States government, when it chartered *Leary's* steamer for the purpose of plying in the harbor of Port Royal, or for any other service the government might designate, which of course involved the right of the government to send the steamer to any point it might designate, did not thereby become the owner of the steamer, certainly the Northeastern Railroad Company, when it chartered the *Louise* to tow boats laden with vegetables to the city of Charleston, did not thereby necessarily become the owner of the *Louise*. If the terms of the charter party, when offered in evidence, shall prove sufficient to invest the railroad company with the character of owner, that may avail the defendant as a matter of defense; but the mere fact that the *Louise* was chartered by the railroad company cannot avail the defendant under this demurrer. But, even if the allegation that the steamer *Louise* was chartered by the Northeastern Railroad Company could be regarded as inconsistent with or contradictory of other allegations of the complaint, that would not seem to justify the demurrer in this case. *Childers v. Verner*, 12 S. C. 1. The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to that court, with instruction to overrule the demurrer, and proceed with the trial of the case on its merits.

POPE, J., concurs.

(42 S. C. 415)

WEYMAN et al. v. PERRY et al.

(Supreme Court of South Carolina. Oct. 29, 1894.)

NONNEGOTIABLE NOTE—RIGHTS OF CO-OBLIGORS—AGENCY—DELIVERY.

1. Where several obligors on a nonnegotiable note place it in the hands of one of their number, he becomes the agent of all, and, where the terms of his agency are expressed in the instrument, every one into whose hands it comes is bound thereby.

2. Until it is shown that the co-obligors on a nonnegotiable note, expressing on its face the use to which it shall be put by that obligor in whose possession it is, have given such holder other powers of agency than those in the note expressed, the latter must be held to govern.

3. The discounting of a nonnegotiable note by one of the makers, with a party other than the payee named therein, and payment of the money thus obtained to the payee, is not delivery of the note to the payee, so as to bind the other makers; nor can such fault in its delivery be mended by a subsequent indorsement by the payee, without consideration, to such other party.

Appeal from common pleas circuit court of Greenville county; J. F. Izlar, Judge.

Action by Samuel T. Weyman and George W. Connors, as copartners under the firm name of Weyman & Connors, against B. F. Perry, W. T. Crews, J. P. Latimer, T. O.

Gower, and J. Walter Gray, as co-obligors on a promissory note under seal. From a judgment for defendants, plaintiffs appeal. Affirmed.

Haynesworth & Parker, for appellants. Cothran, Wells, Ansel & Cothran, for respondent, T. C. Gower. J. Walter Gray, in pro. per. Geo. W. Dillard, for respondent J. P. Latimer.

POPE, J. The plaintiffs brought their action against the defendants in the court of common pleas for Greenville county, in this state, to recover from them the sum of \$700, and interest thereon at 8 per cent. per annum from the 3d day of February, 1892, and \$2.10, fees for protest of a sealed note. The defendants B. F. Perry and W. T. Crews did not answer, but the defendants J. P. Latimer, T. C. Gower, and J. W. Gray did answer, denying any liability to pay the plaintiffs the sums sued for, or any part thereof. The action came on for trial before his honor, Judge Izlar, and a jury, at the spring term, 1892, of the court of common pleas for Greenville county, in this state. Judgment by default was taken against defendants B. F. Perry and W. T. Crews. After the plaintiffs had closed their testimony, the defendants who had answered moved for a nonsuit upon the ground that plaintiffs had failed to prove a delivery of the note, and also that the consideration of the note had been changed. In an order therefor, the circuit judge granted the nonsuit, dismissing the complaint, with costs.

The plaintiffs now appeal upon the following grounds, to wit: "(1) That his honor erred in refusing to permit the witness W. C. Dodson to testify as to his intention in suggesting to B. F. Perry to discount the note in suit, and of his intention as to assignment thereof; (2) that his honor erred in refusing to permit the witness W. C. Dodson to testify of his intention and understanding in accepting from B. F. Perry the proceeds arising from his so discounting the note; (3) that his honor erred in holding that the said note had not been delivered, and was not, therefore, a binding obligation of the defendants Latimer, Gower, and Gray; (4) that his honor erred in holding that said note had been diverted from the purpose for which it was intended, and was therefore not binding upon such defendants; (5) that his honor erred in not holding that the said note had been delivered, and that, at least to the extent of \$500, it had been practically used for the purpose intended, and was therefore to that extent binding upon such defendants; (6) that his honor erred in granting a nonsuit, it being submitted that there was sufficient evidence to cause the case to go to the jury; (7) that his honor erred in refusing to admit the statements, it being submitted that these statements were made in the course of his agency."

It seems to us that this case can be decid-

ed very readily in the light of our adjudicated cases. What is the contract here? It is a sealed note in these words and figures: "\$700.00. Ninety days after date, we, or either of us, promise to pay W. C. Dodson, of Atlanta, Ga., seven hundred dollars, with interest from date at 8 per cent. per annum, value received in printing supplies, including type, etc. Witness our hands and seals this February 3d, 1892. B. F. Perry. (L. S.) W. T. Crews. (L. S.) J. P. Latimer. (L. S.) T. C. Gower. (L. S.) J. W. Gray. (L. S.)" The following is a brief summary of the facts of the case, whose mention may be advisable to understand the present controversy: B. F. Perry and W. T. Crews, of Greenville, S. C., desired to embark in the printing business. In order to do so, they needed some printing supplies, including type, etc. They applied to their neighbors J. P. Latimer, T. C. Gower, and J. W. Gray to assist them. It seems that Perry had, previous to that time, been in correspondence with Mr. W. C. Dodson, of the city of Atlanta, in the state of Georgia, as to these supplies. The result of it was that a sealed note for \$700, due at 90 days, payable to said Dodson for such supplies, was written and signed by all the parties. With this sealed note, B. F. Perry visited Mr. Dodson in Atlanta, Ga., and after some discussion as to, and selection of, printing supplies, Perry tendered the note in payment, but Dodson assured him that he had quoted his printing supplies at spot cash figures, and that no note, however good, would be taken in payment for such supplies. Mr. Dodson suggested that some one else might discount the note, and thereby enable Perry to pay cash for what he should buy of him. Perry then sought out the plaintiffs, and they, after seeing a Mr. Johnson, the head man of the credit department of W. C. Dodson's business, discounted the note, paying Perry in cash \$670. Perry then returned to W. C. Dodson, and bought a bill of \$580 worth of printing supplies from him, and paid \$500 in cash, leaving \$80 still due, which he secured by leaving title in such supplies in Dodson. Some days after,—it may be, a month,—Dodson, conceiving that the plaintiffs were prima facie owners of the sealed note, indorsed it, but without recourse. The note was not paid at maturity, was duly protested at a cost of \$2.10, and plaintiffs sued thereon.

The parties to the record make this admission: "It is admitted that, under the laws of Georgia, this is not a negotiable note." It is certainly not a negotiable note in this state. Hence it falls under the laws regulating unnegotiable paper. The obligee is fixed as W. C. Dodson, of Atlanta, Ga. The consideration is also fixed as printing supplies, including type, etc. It is a familiar principle of law that when several obligors place an unnegotiable paper, by them duly signed, in the hands of one or more of several obligors, the act of such obligor or ob-

ligors, within the scope of his or their agency for the other obligors, is the act of all such obligors, and that any misrepresentation or wrongdoing while within the scope of his or their agency is visited upon the heads of the obligors, and not upon that of the obligee.

This leads us to inquire, what was the scope of the agency of B. F. Perry for the other obligors to this obligation? It was expressed in the bond itself to be the procuring of printing supplies, including type, etc., from W. C. Dodson, of Atlanta, Ga. The bond itself, therefore, carried notice to every one who dealt with such paper of the terms of this agency. They were bound, at their peril, to regard such terms, and not go beyond them. One of these terms was that the bond was not to be operative until delivered to W. C. Dodson, of Atlanta, Ga. Another of these terms was that the bond was not to be operative until delivered to W. C. Dodson, of Atlanta, Ga., for printing supplies, including type, etc. So, therefore, when plaintiffs' proofs established that the bond was never delivered to W. C. Dodson for printing supplies, including type, etc., but, on the contrary, was negotiated by Perry with the plaintiffs for money, and no ratification of such diversion of power was in proof by the other obligors, it was fatal to plaintiffs' case. *Mills v. Williams*, 16 S. C. 600; *Gourdin v. Commander*, 6 Rich. Law, 497.

It was not error for the circuit judge to refuse to allow W. C. Dodson to testify as to what his intention was in suggesting to Perry to discount the note in suit, and of his intention in assigning the same afterwards to the plaintiffs, for the reason that until it was proved that these co-obligors, Latimer, Gower, and Gray, had given Perry other powers of agency at variance with those expressed in the bond or sealed note, such power of agency so expressed in the note itself must govern, and proof of any conduct of any persons, at variance with the terms of the sealed note, other than Latimer, Gower, and Gray, was incompetent. So the first exception is overruled.

Nor could the plaintiffs, at the trial, prove what the intention and understanding of W. C. Dodson was in accepting the proceeds of Perry's discounting such note to the plaintiffs. The defendants Latimer, Gower, and Gray had the right to restrict the plaintiffs to the terms of the agency as set out in the note itself, which evidenced their contract, unless the plaintiffs first showed that additional powers had been given to Perry by these parties defendant. Testimony should be restricted by the circuit judge, on the trial had before him, to the matters within the proper scope of the issues before him. It is true, sometimes the trial judge allows parties to anticipate other proof, but it is always, in such cases, with the understanding that such missing links are to be sup-

plied later on in the trial. So the second exception is overruled.

His honor did not err in holding that, under the proofs tendered by the plaintiffs, there had been no delivery; for the witness W. C. Dodson testified emphatically that the sealed note was never delivered to him, and that he only assigned it to plaintiffs, some time after it had been discounted by plaintiffs, for \$670 in cash for Perry. It was the plaintiffs' misfortune that the facts were as testified to by Dodson, and, as we have seen, the defendants at bar had the right to stand upon a delivery to W. C. Dodson, of Atlanta, Ga.; and, these proofs showing that no such delivery had been made, the circuit judge did not err in this matter.

The diversion of the note from the purpose expressed upon its face was established by the testimony, and therefore the circuit judge did not err as is charged in the fourth ground of appeal.

The fifth ground of appeal imputes error to the circuit judge, in that he did not hold that, to the extent of \$500, the plaintiffs were entitled to recover. The testimony showed that when Perry tendered the note now sued on to W. C. Dodson in payment of printing supplies, including type, etc., Dodson refused to accept the delivery of such note, and that, under that condition of things, Dodson suggested to Perry to go elsewhere, and have the note discounted, so that he could pay cash for such printing supplies. This Perry did by obtaining a discount of such note by the plaintiffs for \$670, and of this sum (\$670) Perry paid Dodson \$500 in part payment of \$580 worth of printing supplies. But see the effect of this action of Perry and Dodson. Perry, on February 3, 1892,—on the day the note was signed by the defendants,—gave them a mortgage on the printing supplies, including type, etc., he was to purchase from Dodson. (All these facts were recited in the mortgage, which mortgage was introduced by the plaintiffs themselves.) Now, this security to the obligors defendant was defeated by Dodson retaining to himself the ownership of all the printing supplies sold to Perry until the \$80 was paid, thus defeating the mortgage given the defendants here. Why should these defendants be required to split up their contract, or rather their liability under their contract as expressed in the sealed note, to prevent a loss to the plaintiffs to the extent of \$500? In law, these defendants have a right to stand upon their contract as they made it. Certainly, the position contended for by plaintiff would alter that contract. We agree with the circuit judge, and therefore overrule the fifth exception.

We fail to see how it can be considered that there was any testimony to go before the jury. We have examined the record carefully, and fail to note its existence in this case. The sixth exception is overruled.

Lastly, it is contended that his honor ought to have admitted the testimony of Mr. John-

son, the credit man of W. C. Dodson, on the ground that such remarks were made in the course of his agency for said Dodson. If Dodson, as obligor of the bond, had accepted the same, then possibly these declarations of his agent might have been introduced by the plaintiffs; but, when Dodson refused to accept the bond or sealed note, Dodson could no longer, as to these defendants, do anything to bind them. If he could not, certainly his agent could not. The exception is overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

McIVER, C. J., concurs.

(42 S. C. 424)

**PEOPLE'S BLDG. & LOAN ASS'N OF  
SPARTANBURG COUNTY v.  
MAYFIELD et al.**

(Supreme Court of South Carolina. Oct. 30, 1894.)

**JUDGMENT — EFFECT ON PERSONS NOT PARTIES —  
RES JUDICATA — SERVICE OF SUMMONS — EFFECT.**

1. A judgment establishing a homestead for the debtor in part of his property, obtained by him in a contest with his judgment creditors, does not, in an action to foreclose a prior mortgage on the whole property, to which the creditors are parties, bar an effort to compel the mortgagor to satisfy his debt, if possible, from the sale of the homestead, so that the balance may be applied to satisfy the claims of the judgment creditors.

2. Jurisdiction of a living party, acquired by service of summons, attaches always, though he may be beyond the court's jurisdiction.

Appeal from common pleas circuit court of Spartanburg county; W. H. Wallace, Judge.

Action by the People's Building & Loan Association of Spartanburg County against J. G. Mayfield to foreclose a mortgage. P. A. Gardner, a purchaser of the mortgaged properties, and certain judgment creditors of his, were made parties defendant. Gardner appeals from an order requiring the plaintiff to satisfy its claim out of his homestead rights in the property, and establishing a lien on the remainder for his creditors. Affirmed.

Stanyarne Wilson, for appellant, P. A. Gardner. Duncan & Sanders, Bomar & Simpson, R. K. Carson, and Carlisle & Hydrick, for respondent judgment creditors.

POPE, J. It seems that on the 14th day of October, 1890, the defendant J. G. Mayfield borrowed of the plaintiff \$700, and executed a bond to evidence and secure such loan. As security, he pledged to the plaintiff seven shares of the capital stock of the building and loan association, named as plaintiff, and also executed to it a mortgage on a certain lot of land in the city of Spartanburg, in this state. That thereafter the said defendant J. G. Mayfield sold and assigned said seven shares of the capital stock in said building and loan association, and

also conveyed unto the defendant P. A. Gardner, in fee simple, by deed, the said lot of land. P. A. Gardner failed in business, and was sued to judgment by the other defendants to this action. They sought to make their money by levy and sale of this lot of land herein referred to, but he resisted such sale until his homestead had been assigned to him. In this contest with his judgment creditors, P. A. Gardner prevailed; but inasmuch as the commissioners in homestead found the house and lot of land were worth \$1,500, and could not be so divided as to lay off \$1,000 thereof as his homestead, they recommended a sale of the whole, and that the sum of \$1,000 from the proceeds of sale be paid to him as his homestead, and the balance of such proceeds be applied to the partial payment of his judgment creditors. This return was confirmed by the circuit court, and no appeal was taken. After these proceedings, the present plaintiff instituted an action for the sale of the seven shares of stock pledged to it, and a foreclosure of the mortgage of the house and lot, and to this action the said J. G. Mayfield, P. A. Gardner, and his judgment creditors were all made parties defendant. In this action no contest is made with the plaintiff. All parties to the action concede that the plaintiff is entitled to the sale of the stock, and the foreclosure of the mortgage by a sale, etc. But the judgment creditors of the defendant P. A. Gardner say that, while all this is true, still they have an equity to require the plaintiff to have applied to the satisfaction of its debt the seven shares of stock, and then to require the balance of the plaintiff's debt paid out of the \$1,000 homestead of defendant Gardner. The defendant Gardner lustily denies this equity. When the cause came on to be heard by his honor, Judge Wallace, at the fall term, 1893, of the court of common pleas for Spartanburg, he decided that the judgment creditors of P. A. Gardner did have the equity they contended for, and he decreed accordingly. From this decree the defendant P. A. Gardner now appeals, and his grounds of appeal substantially raise these questions: First, that it was error to carve out a portion of defendant Gardner's homestead after it had been ascertained; second, that the judgment creditors of P. A. Gardner had no equity to have their debts paid out of a portion of his homestead; third, that such judgment creditors are estopped from contesting defendant Gardner's right to the homestead exemption; fourth, that there was a jurisdictional defect arising from the absence of J. G. Mayfield beyond court's jurisdiction.

The first three grounds of appeal may be considered together. Is it true that the judgment in favor of Gardner in his contest with his judgment creditors over his homestead can be interposed in this action, where the parties and equities are quite distinct? We do not think so. It would

have been impossible in the contest between the judgment creditors of Gardner and Gardner to have considered any equities that might flow from the mortgage of the plaintiff here, for such instrument was not, and could not have been, before the court in that contest. This being true, the judgment establishing a homestead need not be again considered in the light of a barrier to the inquiry here made. To test the accuracy of the circuit judge, let us see what, exactly, was before him. It is admitted that the mortgage of plaintiff covered the entire house and lot. The judgment defendants here have liens that cover all of the house and lot, except the \$1,000 homestead. Such being the case, why does not the two-fund doctrine of equity apply, and force the plaintiff, having a lien on both the homestead and all outside of the homestead in the house and lot, upon the homestead, if sufficient for the payment of his debt, so that all the balance may be applied to the judgments of defendants, who only have a lien on one part of the house and lot?

As to the last ground of appeal, it appears that J. G. Mayfield accepted service of process in this case, and there is no proof of any facts going to negative the full force and effect of such service. It is by such service of the summons the court acquired jurisdiction of him. Jurisdiction once acquired as to a living party is enough. We see no merit here, and we are all the more ready to say so because counsel for appellant handled it so gingerly in his argument, thereby indicating either a want of confidence in it, or an unwillingness to persist in having it considered.

It is the judgment of this court that the judgment of the circuit court be affirmed; and it is ordered that the cause be remanded to the circuit court for such other proceedings as may be necessary.

McIVER, C. J., concurs.

(95 Ga. 472)

#### SMITH v. STATE.

(Supreme Court of Georgia. Oct. 15, 1894.)

#### CRIMINAL LAW — INSTRUCTIONS — ARGUMENTS OF COUNSEL—BURGLARY.

1. Counsel for the accused having, in strong and emphatic language, stated in argument to the jury that the prisoner impressed him in his statement there, and before, that he was innocent of the charge, and that he (the counsel) conscientiously did not believe the prisoner was guilty, there was no error in charging that "what counsel said in their argument, and what they believe," was to have no influence with the jury whatever; it clearly appearing from the context that the presiding judge used the words above quoted with reference solely to the statement made by counsel as to his belief in the prisoner's innocence.

2. The evidence warranted the verdict, and the newly-discovered evidence was not such as to authorize the grant of a new trial.

(Syllabus by the Court.)

Error from superior court, Fulton county; R. H. Clark, Judge.

Ed Smith was convicted of burglary, and brings error. Affirmed.

The following is the official report:

The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also, because the court erred in charging (counsel for defendant having stated in argument that the prisoner impressed him in his statement here, and before, that he was innocent of the charge, and that he believed the prisoner was not guilty) that what counsel said in their argument, and what they believed, was to have no influence with the jury whatever. As to this ground the court states that the ground does not fully state what counsel said to the jury as to his belief of the prisoner's innocence; but he put it, as strong as language could make it, that he conscientiously did not believe the defendant guilty, which involved his belief as a man as well as a lawyer. Also, that exceptions to the charge should be considered in the light of the whole charge. Because of newly-discovered evidence. In support of this ground, movant produced the affidavit of Fanny Young. She saw Mr. Reeder immediately after the trial, and asked why he swore so hard against Ed, and so different from what he swore on the commitment trial. Reeder said that Ed got too "upity." "He got his head up. You ought to have heard how Ed went for me, and I determined to send him up." Also, the affidavit of John Young: Reeder told him that he did not go from the stable with Ed to Mr. Dodds' to get the pistol, but, after Ed left the stable to go after the pistol, he followed him. Affiant knows he did not come to Dodds' with Ed, for affiant met Ed at Dodds' gate, and Reeder was nowhere in sight. Affiant saw Ed as he came up Fair street to Mr. Dodds', and, if Reeder had been with or anywhere near Ed, affiant would have seen him. Also, the affidavit of Josephus Fields: On the day Ed Smith came to the house of Mr. Dodds, he saw him as he came up the street to the house, and no one was with him or near him. Ed came into the house, and got the pistol, and went out with it the same day he was arrested. Also, the affidavit of Henry Dorvan: On the day of defendant's arrest he saw a man have defendant down and tying him, who, after he got defendant tied, and made defendant get up, pulled a pistol out of his hip pocket, and made him go before him. Also, the affidavits of defendant and his counsel as to their ignorance of the facts set out in the above affidavits, and their diligence in preparing for trial. It appears from the record that Reeder was one of the main witnesses for the state. The room alleged to have been burglariously entered was over a livery stable, and was occupied by Reeder and one Hughes. The pistol belonging to Hughes was stolen. Defendant worked at the livery stable. Reeder testified, among

other things, that he asked defendant if defendant had the pistol, and defendant denied it; that he told defendant he had better give it up, and then there would be nothing of it; that, after a while, defendant said he had it, and would have it up there by 12 o'clock, and witness went with him, and he went to Dodds' house, corner of Washington and Fair streets, and said he had it in the basement, and went into the basement, and came out, and handed witness the pistol, and started to run, and witness caught him, and had him, tying him, and had the pistol sticking up in witness' pocket, and defendant tried to get it out to shoot witness; that defendant confessed to him having gotten the pistol, and said he took it to shoot a colored girl who had had him arrested; that witness tied defendant on the corner of Fair and Pulliam, but did not hit him. In defendant's statement he claimed that a boy named "Will" pawned the pistol to him for the loan of a quarter, and he deposited it in the room of an aunt who stayed at Mr. Dodds'; that the next morning Reeder asked him about the pistol, and he told Reeder he had one the boy had pawned him, and told Reeder where it was, and went to get it, and, when he got out of the house, Reeder was outside, and he handed the pistol to Reeder, who had a pistol, and who put one pistol in his pocket, and took the other in his hand, and they walked down Fair street to Loyd, and, when they were on Loyd, Reeder accused him of stealing the pistol, which he denied; that Reeder told him he was going to tie him, and take him to the stable, and grabbed and hit him; that he never scuffled against Reeder, but Reeder hit him with his fist twice, put both his knees on his breast, jerked out a pistol, etc.

A. C. Perry, for plaintiff in error. O. D. Hill, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(95 Ga. 565)

#### MICHELSON v. LAVIN.

(Supreme Court of Georgia. Oct. 15, 1894.)

##### ACTION FOR SLANDER.

There is no merit whatever in any of the grounds of the motion for a new trial, the damages do not appear to be excessive, and no cause for reversing the judgment appears.

(Syllabus by the Court.)

Error from superior court, Glynn county; J. L. Sweat, Judge.

Action by Mary Lavin against H. Lavin for slander. Judgment was rendered for plaintiff, and defendant brought error. While the case was pending in the supreme court, defendant died, and Morris Michelson, his administrator, was substituted as plaintiff in error. Affirmed.

The following is the official report:

The motion contained the grounds that the verdict was contrary to law and evidence,

and was excessive. Also, because the court erred in charging: "In this case Mary Lavin brings her action for slander against H. Lavin, the defendant, for the recovery of damages from the defendant under the allegations made in the declaration, which has been read to you. The defendant, in his plea or answer, sets up a general denial. He says that he did not use the words or language charged against him by the plaintiff, and that he is in no wise guilty of having slandered the plaintiff, or liable to her in any manner whatever for damages. Ordinarily, the purpose of the law is that when one person slanders another—that in certain cases of slander, where damages may be inferred by the jury trying the case—that the party slandered may recover an amount in money from the defendant as damages resulting generally to one's character, by way of punishing and deterring a person from the use of slanderous language to another. In this case on trial before you, the plaintiff brings her action for slander, charging that the defendant used certain language which, as the law terms it, is 'actionable per se,' and from the use of which damages might be inferred. The court would state, also, that ordinarily this action may be defended either by admitting that the slanderous words were used, setting up, by way of justification, the truth of the words, and undertaking to prove and establish the truth of the words used, or that the words used did not impute a crime; that they were not so intended, but were simply abusive words, used under such circumstances as that bystanders would understand them to be words of abuse, and not of slander. In this case the plea or answer of the defendant is, as the court has stated to you, a general denial that the defendant is guilty at all of having used the words attributed to him, and of any liability upon his part to the plaintiff in this case. The issue which you are to determine in this case, from the testimony which has been submitted to you, and the law as given you in charge by the court, is as to whether or not the defendant used the language charged against him in the plaintiff's declaration. Were the words, the language, which he used, which, in their general significance and meaning, impute a crime, in their ordinary meaning calculated to convey that meaning to bystanders, —those who may have heard them spoken? If so, under the rule which the court will give you, and which has already been suggested, where you are permitted to infer damages without any proof of special damages, what amount you will find in favor of the plaintiff against the defendant. Of course, if you find in favor of the contentions upon the part of the defendant, that he is not guilty of the using of the language charged by the plaintiff, your findings would be in favor of the defendant. Slander or oral defamation consists, first, in imputing



to another a crime punishable by law, and in such cases damage is inferred. Now, the court charges you that to charge another, or to say to another, as is claimed by the plaintiff in this case, that the defendant did, by calling her a 'whore,' or that she 'had been a whore,' or 'was a whore,' that the use of such words or language as that would be slanderous as a matter of law in imputing to another, or the plaintiff in this case, a crime punishable by law; that is, the offense of having committed adultery or fornication, or adultery and fornication, as the case may be. If you shall find from the evidence in this case that the defendant, H. Lavin, as charged in the declaration in this case, used the language set out in the declaration to her, in the presence of others who heard it, saying to her (the plaintiff) that she 'had been a whore in Savannah,' or 'was a whore,' and thereby imputed to her the crime of adultery,—one punishable by law,—the court charges you that if you find that to be true, that then the plaintiff, as a matter of law, would be entitled to a verdict in this case. If you shall not be satisfied that this defendant used the language charged against him,—if you shall find, under the plea or answer in this case, that he did not use any such words or language to the plaintiff, and in the presence and hearing of others,—why, then you could not find in favor of the plaintiff, but it would be your duty to return a verdict for the defendant. If your finding is in favor of the plaintiff, from the testimony, and under the rules of law as given you by the court, then it is a matter entirely with you, looking to all the facts and the circumstances, and to the parties themselves, as to what amount of damages you find in favor of the plaintiff against the defendant, H. Lavin. There is no fixed rule of law as to any definite or precise amount which the plaintiff may be entitled to recover, if entitled to recover at all, that being a matter left entirely to the jury trying the case, and, as the court has remarked, looking to all the facts and circumstances under which the words or language may have been used, and to the parties themselves; having in view, however, the finding of such amount as in your judgment would reasonably compensate the plaintiff for the damage resulting to her character from the imputation of a crime against her, and having in view, also, the fact that the amount which you may find in favor of the plaintiff should not be excessive or oppressive. The plaintiff in her declaration claims, I believe, the sum of one thousand dollars. While the plaintiff sues for that amount, and claims that amount, that is simply pleading, and is not to be taken by you as fixing any amount which you may find. You cannot find an amount in excess of that. You may find that amount, or you may find so much less, as according to your judgment, in view of all the facts and circumstances in the case, you believe would be

just and right and proper. In the event your findings should be in favor of the plaintiff in this case, the form of your verdict in that event would be: 'We, the jury, find for the plaintiff so many dollars and cents,'—stating the amount. If your findings should be in favor of the defendant, the form of your verdict in that event would be: 'We, the jury, find for the defendant.' Let your verdict be entered on this declaration and date, and sign it by one of your members as foreman,'—which was the entire charge. Alleged to be error because it did not sufficiently cover the issues presented by the pleadings; did not sufficiently cover the contentions made by the testimony under the pleadings; did not sufficiently cover the issues and contentions as made by the pleadings and evidence; tended to illegally confine the issues made in the case; did not present the law of the case; tended to cloud the investigation and confuse the jury; failed to state the entire issues clearly, and to instruct the jury sufficiently on them; did not clearly and fully state any issue in the case, and direct the jury as to it; and illegally limited the jury in their deliberations.

Symmes & Bennet and Harrison & Peeples, for plaintiff in error. Harris & Sparks and F. H. Harris, for defendant in error.

PER CURIAM. Judgment affirmed.

(115 N. C. 54)

TRUITT v. GRANDY et al.

(Supreme Court of North Carolina. Oct. 30, 1894.)

EJECTMENT—POSSESSION—CONSTRUCTIVE NOTICE—QUESTION FOR JURY.

Plaintiff claimed title under a trust deed duly registered, and defendants claimed under a trust deed by the same grantor, but of an earlier date and not registered, of which deed plaintiff had neither actual notice nor notice by registration. There was testimony that no one was in possession of the land under the earlier deed when the later deed was given, but that a tenant of the grantor of said land was then in possession. *Held*, that a ruling that plaintiff was not entitled to recover was erroneous, and that the questions as to who was in possession of the land when the second deed was given, and the effect of such possession as notice, were for the jury.

Appeal from superior court, Hertford county; Armfield, Judge.

Action by G. W. Truitt against O. W. Grandy and others for the recovery of real estate. Judgment for defendants, and plaintiff appeals. Reversed.

L. L. Smith, for appellant. Pruden & Vann, for appellees.

SHEPHERD, C. J. The plaintiff claims under a deed executed to him by R. B. Prentiss, trustee in a deed of trust executed to said Prentiss by J. D. Brett and wife on January 16, 1886, and duly registered on February 26, 1887. The defendants, the Grandys, claim under a deed executed to

them by T. R. Jernigan, trustee in a deed executed to said Jernigan by Harrell & Sharpe dated January 1, 1878, and duly registered on October 17, 1878. The defendants also introduced a deed to the said Harrell & Sharpe, executed by J. D. Brett and wife on January 1, 1878, which deed was not registered until October 11, 1889.

As there is no contention that Prentiss had actual notice at the time of the execution of the deed to him, the question upon which the case is to be determined is whether he had constructive notice of the conveyances above mentioned. It is plain that he did not have constructive notice by registration, as there is nothing in the record to show that the trustor, Brett, had conveyed the property to Harrell & Sharpe. All that Prentiss was required to do was to "follow up the chain of title as it appeared of record," and if it was unbroken, and he found no registration of a deed from Brett or those under whom he claimed, he was not compelled to look over the whole record for the deed of trust from Harrell & Sharpe to Jernigan, when the registry would not have disclosed any connection of the said parties with the line of Brett's title. *Maddox v. Arp*, 114 N. C. 585, 19 S. E. 665.

Having no notice by registration, the next point to be examined is whether Prentiss, under the proviso of section 1, c. 147, Acts 1885 (the act relating to the registration of deeds), had constructive notice of the said unregistered conveyance by reason of the possession of Harrell & Sharpe, or of those claiming under them, at the time of its execution, on January 16, 1886. There was testimony tending to show that Harrell & Sharpe were not then in possession, but that the land had been leased by an agent of Brett to one Mebane Norvell. If the jury should find that Norvell was the tenant of Brett, it must be assumed that, if Prentiss had made inquiry of him, he would have been so informed. The information thus obtained would have been entirely consistent with the record title of Brett, and, in the absence of other circumstances, there would have been no duty on the part of Prentiss to make further inquiry. Such possession alone would not, therefore, be constructive notice of the deeds under which the defendants claim. This view of the case was not submitted to the jury, but upon the whole evidence the court held that the plaintiff was not entitled to recover. This ruling, in our opinion, was erroneous, and there must be a new trial.

(115 N. C. 200)

**NICHOLSON v. NICHOLS.**

(Supreme Court of North Carolina. Oct. 30, 1894.)

**MECHANIC'S LIEN — CONTRACT WITH OWNER OF LAND.**

Where no contract is made with the owner of the land, a builder has no lien against the property for erecting a building thereon.

Appeal from superior court, Alamance county; Hoke, Judge.

Action by George A. Nicholson against William E. Nichols to enforce a mechanic's lien. Plaintiff made a contract with defendant's mother to build an ell to defendant's house. In so contracting, defendant's mother was acting solely in her own behalf, and not as the agent of the defendant. After the ell was completed, the plaintiff brought this action against the defendant to recover for work done and materials furnished, and to enforce a mechanic's lien therefor, against the defendant's property. Judgment for defendant. Plaintiff appeals. Affirmed.

J. E. Boyd and W. H. Carroll, for appellant. C. E. McLean and L. M. Scott, for appellee.

**PER CURIAM.** It is well settled that there can be no lien in cases of this character unless the work was done or materials furnished under a contract, either express or implied. *Weir v. Page*, 109 N. C. 220, 13 S. E. 773; *Thompson v. Taylor*, 110 N. C. 70, 14 S. E. 513. There is no evidence of any such contract in this case. Affirmed.

(115 N. C. 152)

**HINSDALE v. JERMAN.**

(Supreme Court of North Carolina. Oct. 30, 1894.)

**ACTION ON NOTE — PLEDGE OF COLLATERALS — RIGHTS OF PAYEE.**

Where defendant gives his note pledging shares of stock to secure its payment, and makes a collateral agreement whereby all assessments on said stock shall be shared equally by the parties thereto and the stock sold to pay said note, the surplus up to a certain amount to go to defendant, and all beyond that amount to payee, on the stock proving worthless defendant is liable for the face value of the note.

Appeal from superior court, Wake county; Hoke, Judge.

Action by John W. Hinsdale against B. S. Jerman on promissory note. Judgment for plaintiff. Defendant appeals. Affirmed.

The note, agreement, and charge of the court are as follows:

"\$790. Raleigh, N. C., November 12, 1890. One day after date, for value received in borrowed money, I promise to pay to John W. Hinsdale or order the sum of \$790, with interest at eight per cent. from date. This note is secured by the pledge of ten shares of Rockbridge stock, Certificate No. 192. B. S. Jerman."

"Raleigh, N. C., November 12, 1890. In consideration of the sum of one dollar, paid by John W. Hinsdale to B. S. Jerman, it is agreed between them that the ten shares of stock of the Rockbridge Company, Certificate No. 192, which is pledged to John W. Hinsdale to secure the payment of note of B. S. Jerman for \$790, shall be sold first to pay the said note, and that all between that sum and interest thereon that the said stock shall

sell for up to \$900 shall be paid to B. S. Jerman, and that all over the sum of \$900 that the said stock shall bring shall be divided equally between the said Jerman and Hinsdale. It is further agreed that all future assessments upon the said stock shall be paid by the said Jerman and Hinsdale equally, each paying one-half the same, to be refunded to each of them out of the proceeds of the sale of the said stock next after the payment of the said note to the said Hinsdale, and before the payment of any amount to the said Jerman. Witness our hands and seals the day and year first above written. J. W. Hinsdale. [Seal.] B. S. Jerman. [Seal.]"

Gentlemen of the Jury: In this case there is a note signed by the defendant to the plaintiff for \$790. There is also an agreement that certain stock in the Rockbridge Company shall be appropriated to its payment, and there is a further agreement that these gentlemen should share equally the assessments on it. It is contended on the part of the defendant that there was an agreement between them that the note should only be paid out of this stock, but, after hearing this statement, I charge that there was no evidence that there was any such agreement. On the contrary, the evidence is that this note should be paid according to its tenor; and on the evidence, if you believe it, I charge you to answer this first issue, 'No.' That is, in other words, was the note given here given on condition that the same should be paid only from the profits of the stock? There is no such an agreement that should restrict the payment in that way, and it is your duty on this evidence, if you believe it, to answer this first issue, 'No.' The second issue is, 'Did B. S. Jerman, on November 12th, execute a note for \$790 for borrowed money?' The note is presented here. It is not denied by the defendant, and it is your duty to answer the second issue, 'Yes.' Third. 'What are the ten shares of stock worth?' By the terms of the agreement the ten shares of stock are to be sold, and whatever it is worth to be credited on this note. You have here the evidence about that. Col. Hinsdale, the plaintiff, swears that he has been up there, and given it a thorough examination, and the stock is absolutely worthless. The property of the corporation is in the hands of a receiver, and it is mortgaged much beyond what it is worth. The evidence of the defendant was that the stock was not absolutely worthless, but he did not know what it was worth. He had ceased giving it any attention. You shall consider this in answering the issue, and as you believe the evidence you shall say what you consider this stock worth, and so write your answer. Fourth. 'Has any part of the note been paid?' The answer to the fourth issue is, '\$50.' These men agreed to pay these assessments equally. It turns out from the evidence that this defendant has paid

\$100 more than the plaintiff, and that should be divided. It would make \$50 the plaintiff owes the defendant by reason of these assessments, and that should go as a payment on this note. Fifth. The answer to the fifth issue will be the face value of the note at interest, less the credit of fifty dollars."

Haywood & Haywood and Thos. M. Argo, for appellant. R. O. Burton and Armistead Jones, for appellee.

**PER CURIAM.** The note set out in the complaint, with the contemporaneous agreement between the plaintiff and defendant, which the latter put in evidence, constituted the contract between the parties to this action. We think the construction put by his honor on this written contract was correct, and that the transaction was merely a loan of money, secured by collaterals which have become worthless, thus leaving no course open to the plaintiff to recover the money he loaned to the defendant except to enforce the secondary liability of the maker of the note. It seems to us very evident that he has the right so to do. Affirmed.

MacRAE, J., did not sit on the hearing of this case.

(115 N. C. 570)

# WHITESIDES et al. v. COOPER.

(Supreme Court of North Carolina. Oct. 24, 1894.)

**CONSTRUCTION OF DEVISE—ESTATE IN REMAINDER—CONTINGENCY WITH DOUBLE ASPECT—PARTITION SALE—EFFECT ON PERSONS NOT PARTIES.**

1. Under a devise in a will, after a limitation to the wife for life, "to our seven sons [naming them], or such of them as may be living at their mother's death, and to their heirs, share and share alike; and if any one or more of our said sons should be dead, leaving lawful issue, said issue shall take the deceased father's share,"—the limitation to each of the sons is a remainder upon a contingency with a double aspect, vesting on the mother's death, or, upon his death before that of his mother, never vesting, but having substituted for it another remainder to his issue.

2. Where a contingent remainderman under an executory devise, supposing himself to be possessed of a vested remainder, conveys his interest, with the general covenants of warranty, and the contingency fail, those in whom the estate then vests are not bound, even though they would have been his heirs, for they take by purchase, and not by descent.

3. Persons to whom a remainder is devised subject to the death of their father before the life tenant, are not bound by proceedings for partition to which the life tenant and the other remaindermen, with the exception of their father, are parties, the limitation being purely legal, and not in trust.

Appeal from superior court, Buncombe county; Armfield, Judge.

Action by John B. Whitesides, as guardian, and others, against C. S. Cooper, to recover an undivided one-sixth interest in certain lands, claimed to have been devised to them by the will of their grandfather, John B.

Whitesides, deceased. From a decision for plaintiffs, defendant appeals. Affirmed.

F. A. Sondley and W. R. Whitson, for appellant. M. E. Carter, for appellees.

SHEPHERD, C. J. The numerous authorities cited in the elaborate brief of the defendant's counsel fail to convince us that we are warranted in so far departing from the plain and natural import of the language used in the limitation before us as to hold that the seven sons named in the will of their father took a vested remainder in the land therein devised. Fully appreciating, as we do, the public policy which induces the courts to favor the early vesting of estates, we are nevertheless of the opinion that it would be doing violence to the most liberal rules of construction were we to say that it was the intention of the deviser that the estates limited to his said sons should vest before the death of his widow, the life tenant. On the contrary, it was his evident purpose that the entire remainder in fee should be disposed of absolutely at a definite time, and that he did not intend that the remainder as to any part of the property should become vested while the remainder in the residue was dependent upon a contingency. After a limitation to the wife for life, the will proceeds as follows: "At the death of my said wife, the said plantation, with all its rights and interests, I bequeath and devise to our seven sons, namely, Henry Clay, James Hardy, Charles Lincoln, Frank Patton, Simpson Jarrett, William Ratliff, and John Bowman, *or such of them as may be living at their mother's death*, and to their heirs, share and share alike; and if any one or more of our said sons should be dead, leaving lawful issue, said issue shall take the deceased father's share in each and every such case." The words we have italicized very clearly do not divest by way of condition or otherwise any estate previously limited, but are manifestly used as a part of the description of the persons who are to take; and these persons are plainly such only of the sons as may survive the life tenant. In other words, the limitation, with a very slight transposition of the words, reads, "To such of my sons, Henry Clay, James Hardy," etc., "as may be living at their mother's death, and to their heirs." If the language indicating survivorship were at all doubtful, the construction we have adopted would be well sustained by the fact that the words of inheritance do not immediately follow the names of the seven sons, but they follow the qualifying language, "*such of them as may be living at their mother's death*." Under the construction we have put upon the will there can be no question that the limitations to the sons were contingent remainders, the contingency being that they should survive their mother, and, failing in this as to any one or more of them, the remainder to vest

in his or their issue as purchasers. This, as we have said in *Watson v. Smith*, 110 N. C. 6, 14 S. E. 640, is a limitation of several concurrent fees by way of substitutes or alternatives, one for the other, "the latter to take effect in case the prior one should fail to vest in interest, and is known as a remainder on a contingency with a double aspect." If one of the sons die before the mother, his remainder is at an end, and can never vest, and another remainder to the issue is substituted, who take nothing from their father, but directly from the deviser. That the limitation, under the construction we have adopted, is a contingent remainder, is apparent from the decisions of this court, and these decisions, it is believed, are in harmony with the principles of the common law as enunciated by the most approved authorities in other jurisdictions. In *Starnes v. Hill*, 112 N. C. 1, 16 S. E. 1011, and *Clark v. Cox* (at this term) 20 S. E. 176, we quoted with approval the language of Mr. Gray in his excellent work on Perpetuities: "That the true test in limitations of this character is that, if the conditional element is incorporated into the description of the gift to the remainder-man [as it is in the case under consideration], then the remainder is contingent; but if, after the words giving a vested interest, a clause is added divesting it, the remainder is vested. Thus, on a devise to A. for life, remainder to his children, but if any child die in the lifetime of A. his share to go to those who survive, the share of each child is said to be vested, subject to be divested by its death. But, on a devise [as in the present case] to A. for life, remainder to such of his children as survive him, the remainder is contingent." In *Watson v. Watson*, 3 Jones, Eq. 400, the devise was to A. for life, and at his death to such of his children as might then be living, and the issue of such as might have died leaving issue. It was held that A. was tenant for life, "with a contingent remainder in fee to his children who may be living at his death, and to the issue of such children as may have died in his lifetime, leaving children." See also, *Watson v. Smith*, 10 N. C. 6, 14 S. E. 640. In *Williams v. Hassell*, 74 N. C. 434, the court said that, "inasmuch as the lands are devised to the first takers for life only, with remainders to such of their children as should be living at their death, it cannot be ascertained now who are to take the remainder." In *Young v. Young*, 97 N. C. 132, 2 S. E. 78, the court said: "The contingent remainders limited on the termination of the life estate are to such of her children as are then living, and to the then living issue of such as have died leaving issue; so it is impossible to tell who will be entitled when the life tenant dies." In *Ex parte Miller*, 90 N. C. 625, there was a devise of land to A. for life, with remainder to such children as she may leave her surviving, and it was held that the children

took contingent remainders. Without resorting to the text-books, these authorities abundantly show that the element of survivorship in our case fully characterizes the limitation as a contingent remainder.

In view of the construction we have placed upon the language of the will and of the decisions of our own court, we do not deem it necessary to review the many English and other cases cited by counsel. None of them are directly in point, and, even if they were, we would not be inclined to depart from our own decisions, which, as we have already remarked, are, in our opinion, well supported by principle as well as authority. If the will should read as we have construed it (and of this we think there can be but little doubt), it is clear that these remainders are contingent. The case most strongly pressed upon us on the argument is *Ex parte Dodd*, Phil. Eq. 97. The decision turned upon the construction placed upon the language of the will, under which it seems that the limitation was general; that is, to all of the children of the life tenant or the issue of such children. The element of survivorship as a condition to the vesting of the remainder was considered as absent, and it was held that the remainder was vested as to the children living, subject, of course, to open and let in after-born children, or the issue of such as should die before the life tenant. That this is the ratio decidendi of the case is apparent from the opinion of the court in *Irvin v. Clark*, 98 N. C. 437, 4 S. E. 30. The limitation there was "to Margaret Irvin and her husband, during their natural lives, and to descend to the children of said Margaret equally." This was treated as a vested remainder, but the court was careful to say that: "If the devise had been to those children living at the death of their mother, there would have been a contingent, and not a vested, interest in either; for, until that event occurred, it would not be known who would take, and in such case the contingent interest could not be sold by a court of equity. But where the gift is general, not being confined to survivors when to take effect, it is otherwise, and, by representation, those who may afterwards come into being are controlled by the action of the court upon those whose interests are vested, but whose possession is in the future. The distinction is pointed out by Battle, J., delivering the opinion in *Ex parte Dodd*." As we have seen, the remainders to the sons being limited only to such of them as survived their mother, and Simpson Jarrett Whitesides, one of the said sons, having died in 1874, before the death of the life tenant in 1887, it must follow that his children, the plaintiffs, acquired the interest in controversy as purchasers; and the only question which remains to be determined is whether they are precluded from asserting their title by the conveyance of their father, and the proceedings for partition under which the land was sold, and purchased by

one Davis, under whom the defendant claims.

2. If the view we have taken of this limitation is correct, it is hardly necessary to cite authority in support of his honor's ruling that the plaintiffs are not rebutted by the conveyance and warranty of their father in 1867. The case of *Flynn v. Williams*, 1 Ired. 509, is not in point. It was there held that where one having an estate of inheritance in possession sells the same with general warranty, his heirs are bound, whether the warranty be lineal or collateral, and whether they have assets or not. In the present case no estate whatever vested in the ancestor, and his children who take as purchasers under the will are therefore not bound by his warranty. Even had a life estate vested in him, his warranty would likewise have been ineffectual by way of rebutter. Code, § 1334; *Starnes v. Hill*, supra.

3. Were the plaintiffs bound by the sale for partition? It appears that in 1870 John Kimberly (who had purchased the interest of Simpson Jarrett Whitesides), together with the life tenant, Catherine, and the other contingent remainder-men, united in a petition for the sale of the land in partition. Under a decree rendered in this proceeding the land was sold, and T. K. Davis became the purchaser. The defendant claims under the said Davis, and denies the claim of the plaintiffs that they are tenants in common with him to the extent of one-sixth interest in the said land. The life tenant, Catherine, having died in 1887, the plaintiffs' contention must be sustained, unless they are bound by the decree of sale. Neither these plaintiffs (if, indeed, they were in existence at that time) nor their father were parties to the proceeding, but it is insisted that they were represented by others of the same class, or at least by the life tenant. It is plain that the other parties could not represent these plaintiffs as a part of the same class, and upon this point it is only necessary to refer to *Irvin v. Clark*, supra, and the authorities therein cited. Equally untenable is the position that these contingent remainder-men were represented by the life tenant. This would be a very radical departure from well-settled principles, and has received no countenance from this court. In *Overman v. Tate*, 114 N. C. 571, 19 S. E. 706, we quoted with approval the language of Lord Hardwicke in *Hopkins v. Hopkins*, 1 Atk. 690, that "if there are ever so many contingent limitations of a trust, it is an established rule that it is sufficient to bring the trustees before the court, together with him in whom the first remainder of inheritance is vested; and all that may come after will be bound by the decree, though not in esse, unless there be fraud and collusion between the trustees and the first person in whom the remainder of inheritance is vested." In referring to the application of this principle in one or two jurisdictions where the first remainder was only for life, we stated that we were not prepared to adopt such

a view, and, a fortiori, would it be rejected in a case like the present, where the limitations are not in trust, but purely legal. Under the peculiar circumstances of the case referred to we applied the principle declared by Lord Hardwicke, the fact that the limitations were in trust not having been adverted to in a previous ruling. The decision was not based upon the idea that the child of Annie was of the same class as the issue of Caswell, but this was mentioned as a circumstance tending to show that but little prejudice would probably result by the application of the principle above stated, under the particular limitations then before us.

4. Neither is there any force in the contention that our case falls within the principle of *England v. Garner*, 90 N. C. 197, and other decisions in which the court has gone very far in sustaining judicial sales. It is not pretended that these plaintiffs, even if in esse, were represented by guardian, or any one claiming to be their attorney. Indeed, they are not mentioned as parties in any stage of the proceeding, nor is there anything in the decree which purports to bind their contingent interests.

5. As to the statute of limitations, it is only necessary to say that it did not begin to run against these plaintiffs until the death of the life tenant in 1887. Their rights accrued only upon that event, and it is therefore clear that they are not barred. After a careful consideration of the elaborate brief of counsel, we have been unable to discover any error in the rulings of his honor. Affirmed.

(42 S. C. 436)

**MARSHALL et al. v. MARSHALL et al.**  
(Supreme Court of South Carolina. Nov. 2, 1894.)

**CONSTRUCTION OF WILL—LIMITATION OVER—DEVISEE'S DEATH WITHOUT CHILDREN—LOST WILL—PROOF OF CONTENTS.**

1. A will gave land to testator's wife for life, to be divided at her death between his sons W. and J., to be held by "them and their heirs, forever," and provided, further, that, "should my son J. die leaving no children to inherit the land left him by me at his death," the parcel of land so left him should be sold, and the proceeds be equally divided, etc. Held, that the right to sell the land devised to J., and to distribute the proceeds, was not dependent on the death of J. without children during the life of his mother, but the land should be sold if J. died at any time without children.

2. Where evidence of the contents of a lost will is taken before the clerk of the circuit court, the order of proof is not material.

3. Where it is shown that a will admitted to probate before the war of the Rebellion was destroyed during the war, formal evidence of its execution need not be given before proof of its contents is admissible.

4. The question of the right to a trial by jury cannot be raised in the first instance in the appellate court.

Appeal from common pleas circuit court of Lancaster county; Ernest Gary, Judge.

Action in partition by Mary Marshall and others against J. Thomas Marshall, William

A. Marshall, and others. Judgment for the sale of the land was rendered, and defendants appeal. Affirmed.

Jones & Williams, for appellants. R. E. & R. B. Allison and Wylie & Wylie, for respondents.

McIVER, O. J. This was an action for the sale of a certain tract of land, situate in Lancaster county, and for a division of the proceeds of such sale among the several parties entitled thereto, under an alleged will of one John Marshall, in certain proportions mentioned in the complaint; and also for an account of the rents and profits of the said land from such of the parties as have used and occupied the same since the interests of the plaintiffs have become vested, as alleged. The appellants answered, denying all the allegations of the complaint, and claiming that they are exclusively entitled to the land in question under the will of one John W. Marshall. The testimony was taken (the most of it) by the clerk, under the provisions of section 2210, Gen. St. 1882, and the same was heard upon this, with some additional taken at the hearing, by his honor, Judge Gary, who rendered his decree, holding that while much of the testimony taken by the clerk is inadmissible, under section 400 of the Code, there was abundant evidence, which is free from objection, that John Marshall made his will during the year 1849, and died in April of the same year; that soon thereafter his will was duly admitted to probate in the proper office; that the original will was either lost or destroyed during the recent war; that its contents have been properly proved; and he therefore found "that John Marshall left a last will and testament, and that the same was properly admitted to probate, and that Exhibit A of the plaintiffs' complaint contains a correct copy of the provisions of the same." Proceeding, then, to consider what was the proper construction of the will, he held that the land in question was devised to the testator's widow for life, with remainder to his son John W. Marshall in fee defeasible, if he should die without children; and that, the widow having died in 1864, and the said John W. Marshall having died in 1888, without children, under the limitation in the eleventh clause of the will, the land should be sold and divided as directed in the said clause. He therefore rendered judgment that the land be sold, and the proceeds be paid over "to the plaintiff or their attorneys, in accordance with their interests as set out in the complaint," and reserved the question as to the rents and profits until a further order of the court, as there was not sufficient evidence before him to adjudicate that issue. From this judgment the appellants have taken this appeal, based upon numerous exceptions set out in the record. It is proper here to note that a manifest inadvertence in the decree,

whereby the proceeds of the sale were directed to be paid over to the plaintiffs only, has been corrected by a notice, served on appellants' attorney, and incorporated in the record, to the effect "that the plaintiffs conceded the right of all the defendants to take such share of the proceeds of the land according to their interests therein as set forth in the complaint, and their willingness that an order be taken on the part of the defendants directing the clerk of the court to pay over to them the share of the proceeds in conformity to the allegations and prayer of the complaint." The exceptions raise two general questions: (1) As to the competency and sufficiency of the evidence offered to establish the will of John Marshall; (2) as to the construction of that will. We will consider the second question first, as that question is raised by one of the exceptions in the nature of a demurrer, upon the ground that the complaint does not state facts sufficient to constitute a cause of action; for, if the construction of the will contended for by appellants is sound, then it is obvious that the plaintiffs have no rights, so far as the land in question is concerned, under the will as set forth in the exhibit to the complaint.

To determine the question as to the proper construction of the will, it is only necessary to set forth three clauses of the will, which read as follows: "(3) I leave to my beloved wife, her lifetime, the plantation whereon I now reside," besides certain personal property therein mentioned. "(6) I give to my beloved sons, Wm. K. and John W. Marshall, at the death of my wife, the residue of my land, being the plantation whereon I now live, commencing at the Helckry corner, mentioned in Robert's tract, to extent of my land boundary west of the Potter road, the same to be equally divided between them, giving John the side next to W. W. Bell's, with these considerations: that each one pay to me or my executor the sum of sixteen dollars yearly, commencing on the first of Jan., 1849, for the support of myself and wife during my lifetime and the lifetime of my wife should she outlive me; they, refusing to comply with said terms, forfeit so much out of the said lands so given them, and by their compliance I give said parcels of land to them and their heirs, forever." "(11) Should my son John W. Marshall die leaving no children to inherit the land left him by me, at his death, it is my desire, and I leave it as my will, that the parcel of land so left him by me be sold, and the proceeds be equally divided between my son Samuel and my three daughters, Mary, Susan, and Sarah, or their heirs." The practical inquiry is whether the testator intended by the words which he has used in the eleventh clause of his will that the fee previously given to John W. Marshall by the sixth clause of the will should be defeated by his death without children during the lifetime of the widow, or by his death without children at

any time when that event should occur; for both parties concede, and the circuit judge so holds, that John took a fee defeasible upon the happening of one or the other of said contingencies. Now, which of these contingencies did the testator contemplate? Looking at the language he used, especially in the light of the surrounding circumstances, as it is permissible to do, we think there can be no doubt that the testator intended that, if John W. Marshall should die at any time without children, then the land given him should be sold, and the proceeds be equally divided between the persons named in that clause. We see nothing in the clause which warrants the idea that the testator intended that the contingency upon which the estate previously given to John W. Marshall was limited to his death during the lifetime of the widow; and, to put such a construction upon the will, it would be necessary to interpolate words into the will, which no court has the power to do. Indeed, it seems to us that the express language of the clause forbids such a construction, for the direction is that the land is to be sold at the death of John W. Marshall, which clearly indicates that the testator did not contemplate the death of John W. Marshall without children during the life of the widow, for that would have defeated the life interest of the widow, which, certainly, the testator did not intend. The undisputed testimony shows that when the will was made, though John W. was a married man, he had no children; and there was a probability, at least, that he never would have any, as he had married a widow verging upon 40 years of age, who had never had a child by either of her husbands; and therefore it was quite natural that the testator should contemplate the possibility of his son's death without children, in which event the testator would very naturally desire that the property should go to his other children.

It is earnestly contended, however, that the construction which we have adopted is in conflict with the decisions in this state, and two cases—*Vidal v. Verdier*, Speer, Eq. 402, and *Blum v. Evans*, 10 S. C. 56—are mainly relied upon by counsel for appellants. The case of *Presley v. Davis*, 7 Rich. Eq. 106, was also cited; but, as the provisions of the will there construed are so very different from those of the will upon which we are to pass, it will only be necessary to point out such difference. There the testator, by his will, directed that his estate be equally divided among his six children, followed by these words: "If any of the aforesaid children should die, or make their exit without lawful issue, then their portions are to be equally divided among the remainder of the aforesaid children." And it was held that the testator meant, if any of the children should die in the lifetime of the testator, without lawful issue, then, etc. As was said by Wardlaw, Ch., in delivering the opinion

of the court, any other view would meet with two insurmountable obstacles: First. "It is the established doctrine that, wherever the gift takes effect in possession immediately on testator's death, words of survivorship refer to the date of testator's death, and are intended to provide for the contingency of the death of the objects of his bounty in his lifetime, unless some other point of time be indicated by the will. If the enjoyment be postponed by the interposition of a particular interest, such as a life estate, or by fixing a future period for division, such as the attainment of the legatee to full age, then the words of survivorship more naturally relate to the period of division and enjoyment." There the gift took effect in possession immediately on testator's death, without the interposition of any life estate; while here the gift to John W. Marshall did not take effect in possession immediately upon the death of the testator, and the life estate of the widow was interposed. The second obstacle which the appellants encountered was that, if the construction contended for by them should prevail, the limitation over, "dying without lawful issue," would be void for remoteness; while here no such consequence would follow, as the limitation here is "die leaving no children." It is very manifest, therefore, that the case of *Presley v. Davis* is not applicable.

Recurring, then, to the case of *Vidal v. Verdier*, supra, we find there, too, a striking difference in the phraseology of the will. There the testator, after giving a life estate to his wife, proceeds as follows: "After the death of my wife, I leave to my nephew James Felix Vidal the whole of my estate, both real and personal; but, in the case of the death of my nephew James Felix Vidal without his leaving a lawfully begotten child or children, then and in that case the whole, both real and personal, shall be divided among the rest of my nephews and nieces, share and share alike." The nephew James Felix Vidal survived the life tenant, and the question was whether his estate thereby became absolute; and this depended upon the question whether the testator intended that the limitation over to the rest of the nephews and nieces should take effect only in the event of the death of James Felix during the lifetime of the life tenant, or in the event of his death at any time, without a child or children. The court held, "thought not without some degree of doubt and hesitation," as said by Harper, Ch., in delivering the opinion of the court, that, James Felix having survived the life tenant, his estate thereby became absolute. It seems to us that the words "but, in case of" the death of James Felix without children, following immediately after the words "and after the death of my beloved wife, Sarah Bennett, I leave to my nephew James Felix Vidal the whole of my estate, both real and personal,"—terms importing an absolute estate,—and

followed by the words "then and in that case" the whole estate be divided among the rest of his nephews and nieces, indicate that the testator's intention was to give his whole estate in remainder absolutely to James Felix; but, his mind being at the moment directed to the point of time when the widow should die, it very naturally occurred to him that his favorite nephew might then be dead, and, if so, he must make some other disposition of his property, and hence he used the appropriate phrase to meet such a contingency, "but, in case of" the death of such nephew without children, then the rest of his nephews and nieces should be substituted in his place. In other words, the testator, after giving his whole estate to his wife for life, reached the point when he was to dispose of the remainder at her death, and this he gives to James Felix absolutely if he should then be alive, or, if dead, had left children who would inherit such absolute estate; but, contemplating the possibility that James Felix might then be dead without children, he substitutes the rest of his nephews and nieces. The language of the will of John Marshall, however, admits of no such construction. Here the testator, after giving, by the third clause of his will, the land in question to his wife for life, by the sixth clause gives the remainder therein, in fee, to his two sons, John W. and William K. Marshall; but contemplating not only the possibility, but the probability, that John W. might die leaving no children, to whom his share of the land would naturally descend, he proceeds, in the eleventh clause, to provide for such a contingency by declaring as follows: "Should my son John W. Marshall die leaving no children to inherit the land left him by me, at his death it is my desire, and I leave it as my will, that the parcel of land so left him by me be sold, and the proceeds be equally divided between my son Samuel and my three daughters, Mary, Susan, and Sarah, or their heirs." There is not a word here to indicate that the testator intended that the son Samuel and the three daughters should take as substitutes for John W. in case he died during the lifetime of the widow. Indeed, the provision that the land be sold at the death of John W. utterly refutes such an idea. In fact, we are unable to discover anything in the terms of the will which countenances the idea that the son Samuel and the three daughters were to take only in the event that John W. should die without children during the lifetime of the widow. On the contrary, the expression is general, "should my son John W. Marshall die leaving no children"; and, in the absence of any words limiting that event within a specified period, it must be construed as meaning his death at any time leaving no children.

In *Yates v. Mitchell*, 1 Rich. Eq. 265, the testator gave one moiety of the income of his estate to his wife for life, and the other



moiety to his children during the life of his wife, and then provided that, after the death of his wife, his estate should go to his children in fee; "and, should any of my said children die without leaving lawfully begotten issue living at the time of his, her, or their death, then the share or shares of such child or children in my estate, so dying as aforesaid, \* \* \* shall go to the survivor or survivors of my said children, and to the issue of such of my said children as may have previously died." It was contended that, upon the death of the widow, the estate of a child who survived her became absolute, and the case of *Vidal v. Verdier*, supra, was relied upon to support that view; but the court held that that case did not apply, and upon the death of any of the children, at any time, without issue, the share of the child so dying would go over to the survivors. It seems to us that *Yates v. Mitchell* is much more like the present case than *Vidal v. Verdier*. Harper, Ch., in delivering the opinion of the court in *Yates v. Mitchell*, said that the case of *Vidal v. Verdier*, in which he had likewise delivered the opinion of the court, "was decided on this principle: that when a testator, giving in remainder after an estate for life, uses one set of expressions denoting that the remainder-man is to take an absolute estate, and another set of expressions limiting him to an estate for life, with remainder to his issue, this apparent repugnancy may be reconciled by restricting the dying without issue to the lifetime of the tenant for life, thus permitting every part of the will to have its proper effect. If he dies during the lifetime of the tenant for life, leaving issue, the issue will take as purchasers under the will; if without issue, the limitation over will have effect; but, if he survives the tenant for life, the estate is absolute. Such is in every case a reasonable and probable intention; and in that case there were circumstances to satisfy me very fully that such was the actual intention." It is very obvious that the case of *Vidal v. Verdier*, thus explained, cannot control the present case; for here there are not two sets of expressions,—one denoting that John W. Marshall was to take an absolute estate, and the other limiting him to an estate for life, with remainder to his issue, and a limitation over upon failure of issue. On the contrary, it is clear that John W. Marshall, by the sixth clause, took an estate in fee simple, after which there could be no remainder to his issue; but, by the operation of the eleventh clause, such fee became defeasible upon his death without children, whenever that event might happen. *Carson v. Kennerly*, 8 Rich. Eq. 259; *Thomson v. Peake*, 38 S. C. 440, 17 S. E. 45, 725. The case of *Blum v. Evans*, 10 S. C. 56, resting mainly, if not entirely, upon *Vidal v. Verdier*, need not be considered.

We agree, therefore, with the circuit judge in the construction which he has placed up-

on the will of John Marshall; and the twenty-first ground of appeal, which is in the nature of a demurrer, cannot be sustained.

It is necessary, therefore, to consider next whether that will has been properly established. As has been stated, much the greater portion of the testimony was taken before the clerk, and very numerous objections to the testimony were taken and noted; but these objections were of the most general character, and therefore it is not surprising that the circuit judge took a general view of the objections, for it does not appear that he was called upon to rule upon any specific objection, based upon any particular ground. It is somewhat difficult, therefore, for us to perceive how any specific error can be imputed to the circuit judge in admitting or rejecting any testimony. There can be no doubt that much of the testimony taken by the clerk was, as the circuit judge says, inadmissible, under section 400 of the Code; but we agree with him that there was quite sufficient testimony, open to no valid objection, to establish the will. We shall not undertake to consider all the various objections serially presented by the numerous exceptions, but propose rather to classify them. It seems to us that these exceptions may be reduced to the following classes: (1) Those which are inadmissible under section 400 of the Code; (2) those which are objected to as mere hearsay evidence; (3) objections raised to the order in which the testimony was taken. As to the first class, we think that wherever any party to the cause was permitted to testify as to any transaction or communication had with a person then deceased, under whom the appellants claim as devisees, such testimony should be, and has been, rejected as incompetent. For example, whenever any party to the cause was permitted to testify as to any transaction or communication with John W. Marshall, such testimony should be rejected. Second, all mere hearsay testimony, as, for instance, that of Croxton, should be, and has been, rejected as incompetent. But this does not include the declarations or admissions of the appellants, or the declarations or admissions of John W. Marshall, when proved by persons not parties to the cause, and not having any legal interest therein. Third, while it is quite true that, when it is proposed to set up a lost will or other paper, the proper course is first to prove the existence and loss of such paper before offering any evidence as to its contents, yet where, as in this case, the testimony was taken before the clerk, and not before a jury, a departure from this order will not constitute reversible error, provided proper testimony is introduced showing existence and loss of the paper. In this connection it will be well to note that it is earnestly contended that there was no legal evidence of the execution of this will.

But when it is remembered that this will was alleged to have been executed upward of 40 years ago, and that one of the subscribing witnesses was dead, and that the other two had left this country, and had not been heard of in more than 20 years, and therefore, in the eye of the law, could be regarded as dead, it could not be expected that very strict and ample proof could have been made as to the formal execution of the will. But as it has been held in *Prater v. Whittle*, 16 S. C. 40, and *Rumph v. Elliott*, 35 S. C. 444, 15 S. E. 235, that the admission of a will to probate supersedes the necessity for formal proof of its execution, especially after such a lapse of time; and as we think there was quite sufficient evidence that this will had been admitted to probate, and that the same, as well as the record thereof, had been destroyed during the recent war, it seems to us that the way was open to adduce evidence as to the contents of the will, which we think was fully established.

It was contended in the argument here that the appellants had a right to have the question of their exclusive title to the land passed upon by a jury; but as no question of this kind seems to have been raised in the court below, and as the circuit judge was not called upon to make, and did not make, any ruling upon that point, and as there is no exception raising any such point, the question is not properly before us, and we have no power to determine or consider it in this case.

The point raised by the twentieth exception, as to the inadvertent error in the circuit decree in directing the proceeds of the sale to be paid over to the plaintiffs, has already been disposed of by the consent of the plaintiffs to the rectification of such error, entered upon the record, as hereinbefore stated.

The judgment of this court is that the judgment of the circuit court, as modified by the consent of the plaintiffs, entered upon the record, be affirmed.

POPE, J., concurs.

(42 S. C. 421)

AULL et al. v. COLUMBIA, N. & L. R. CO.  
(Supreme Court of South Carolina. Oct. 31, 1894.)

EMINENT DOMAIN—DAMAGES FOR RAILROAD RIGHT OF WAY—PETITION FOR ASSESSMENT—JURISDICTIONAL AVERMENTS.

1. The question whether a petition by a landowner, after the construction of a railroad, for the assessment of damages for the taking of a right of way over his land, was sufficient to confer jurisdiction, is not properly raised by an appeal from an order refusing to set aside an order complying with a prayer of the petition for the impaneling of a jury to assess damages.

2. Gen. St. § 1558, authorizing an owner of land, who "shall permit the person or corporation acquiring the right of way over the

same" to construct the highway without previous compensation, to demand compensation after such construction, and to petition for an assessment thereof, applies to a case in which a railroad company, without instituting condemnation proceedings, constructed its road without objection from the landowner or by his implied permission, provided he did not actually consent thereto; and a petition for assessment, alleging that the right of way was taken "without the consent" of the owner, is sufficient.

Appeal from court of common pleas, Newberry county; W. H. Wallace, Judge.

Petition by Jacob L. Aull and El. H. Aull against the Columbia, Newberry & Laurens Railroad Company. An order was made granting the petition, and defendant moved to have it set aside. Said motion was refused, and defendant appeals. Affirmed.

Lyles & Muller, for appellant. Johnstone & Cromer, for respondents.

McIVER, C. J. On the 5th of June, 1891, the respondents filed their petition, stating, among other things, that the appellant had constructed its railway across a lot of land in the town of Newberry belonging to petitioners, "and that the said right of way was taken and occupied without the consent of the said owners, and not in the manner provided by law;" and after alleging that the railway had been completed over said land within the period of a year prior to the filing of the petition, and that petitioners had never received any compensation for the land so occupied by the railway of appellant, although repeated demand had been made for such compensation, prayed for an order directing the clerk to impanel a jury to ascertain the compensation to which petitioners are entitled, in the manner provided by law. On hearing the petition, his honor, Judge Wallace, who was then the judge of the seventh circuit in which the town of Newberry is situated, granted an order bearing date 8th of June, 1891, directing that the petition be filed in the office of the clerk of court for Newberry county, and that said clerk impanel a jury of 12, as provided by law, to ascertain the compensation to which petitioners are entitled for the use of their land occupied by the respondent as a right of way. In pursuance of this order the said clerk served a notice on appellant that he would proceed to impanel a jury, as directed, on Tuesday, the 30th of June, 1891. No further steps seem to have been taken in the matter, for the reason, as alleged by the petitioners, that negotiations for a settlement without resort to legal proceedings were pending. On the 2d of November, 1893, appellant, upon an affidavit made by the president of the defendant company, in which, among other things, it was stated that he was advised that the petition did not set forth the necessary jurisdictional facts, "in that it alleges that the said right of way was taken and occupied without the consent of the said owner," whereas the law only provides for

a proceeding of this kind where the owner of the land permits the company to enter upon the construction of its railway without previous compensation (another ground was also stated, but as it was abandoned at the hearing it need not be set forth here), applied for and obtained from Judge Wallace a rule requiring the petitioners to show cause before him why his order of the 8th of June, 1891, should not be vacated. To the rule the petitioners made a return, supported by an affidavit of one of their counsel, and upon these papers, together with an affidavit of the president of the defendant company, the motion was heard by Judge Wallace, who, without assigning any reasons, granted an order on the 3d of November, 1893, refusing the motion, and discharging the rule. From this order the appellant takes this appeal, upon the following grounds: (1) "Because his honor held that the allegation in petitioners' petition, 'that the said right of way was taken and occupied without the consent of the said owners,' does not necessarily mean that the petitioners did not permit the respondent to enter upon the construction of the highway," etc. (2) "Because his honor should have held that the petition does not contain the necessary allegations to give the court jurisdiction, and because he should have granted the motion, and set aside the order granted by him on 8th July [a misprint for "June," no doubt], 1891," etc.

Inasmuch as there is nothing in the record to show that the circuit judge held as is imputed to him in the first ground of appeal, that ground could not be sustained. But, as the same question is practically made by the second ground of appeal, this will make no real difference to the appellant.

Before proceeding to a discussion of the point intended to be raised by this appeal, it is necessary to dispose of a preliminary motion to dismiss the appeal upon the ground that the order from which the appeal is taken is not appealable. As the denial of the right to appeal is a serious matter, and this case, owing to circumstances which it is needless to state, cannot be determined by the full court, we will waive any decision of this question at this time, and proceed to consider the case as if no motion was made to dismiss the appeal. We must add, however, that we are inclined to think that there are two reasons why the appeal should be dismissed: (1) Because this is a special proceeding prescribed by statute for ascertaining the amount of compensation to which a landowner may be entitled when his land is taken for the right of way of a railroad or other similar structure, and the statute gives no right of appeal from any action of the court or judge thereof, except from the verdict rendered by the jury. Gen. St. § 1553. (2) Because the order in question really determines no question as to the merits, for the reason which will hereinafter be suggested. Proceeding, then, to consider the

case as if there was no motion to dismiss the appeal, we are of opinion that the appeal cannot be sustained.

In the case of *Railway Co. v. Riddlehuber*, 38 S. C. 308, 17 S. E. 24, it was held by this court that, the statute upon this subject having provided no mode by which the disputed right of a landowner to compensation for land taken as a right of way by a railroad company can be determined, it may resort to an action in the court of common pleas for an injunction, under which the question of right can be determined by a tribunal competent for the determination of such a question. If, therefore, the object of the appellant's motion to vacate the order of 8th June, 1891, was to determine the question of the right of petitioners to compensation, such a question could not be determined in that way, and the merits were not involved. If, however, the object of appellant was to question the jurisdiction of Judge Wallace to grant any order in the premises, upon the showing made by the petitioners, then, as it seems to us, some other mode of proceeding should have been resorted to,—either by writ of certiorari, as was done in *Ex parte Bennett*, 26 S. C. 317, 2 S. E. 389, or possibly by a writ of prohibition,—though we are not to be understood as deciding what would be the proper mode, for all that we do decide is that this appeal is not a proper mode of raising the question of jurisdiction in this case.

But, as the question of jurisdiction has been raised and argued, it may be well for us to express our views upon the subject, with a view to save the parties from unnecessary litigation. We do not think that the allegation in the petition "that the said right of way was taken and occupied without the consent of the said owners, and not in the manner provided by law," was sufficient to deprive Judge Wallace of jurisdiction to issue the order of 8th of June, 1891. Looking at sections 1550, 1561, Gen. St., as one act, as they in fact were originally, it seems to us that the scheme of the act, which was not an act to confer the right to take or condemn the property of the citizen for the construction of a railway or other like structure, but only to prescribe the manner in which this is to be done, and the mode by which the amount of compensation is to be ascertained (*Railway Co. v. Riddlehuber*, 38 S. C., at pages 312, 313, and 17 S. E., at page 24), speaking in general terms, without descending to details, was that, when a railway company desired to use the land of another as the right of way for its road, it should, before entering upon the land for the purpose of constructing its road, give notice in writing to the landowner that a portion of his land would be required for such purpose; and if the landowner did not, within a prescribed time, signify in writing his refusal of consent, such consent should be presumed, and the railway company might proceed with the construction

of its road, subject, however, to the right of the landowner to move for an assessment of compensation in the manner subsequently provided in the act. If, however, the landowner signified his refusal of consent, then it became the duty of the railway company, before entering upon the land for the purpose of constructing its road, to institute the proceedings prescribed for a condemnation of the land, and the ascertainment of the compensation to which the landowner may be entitled. The act then provides, in section 1558, "if in any case the owner of any lands shall permit the person or corporation requiring the right of way over the same to enter upon the construction of the highway without previous compensation, the said owner shall have the right, after the highway shall have been constructed, to demand compensation, and to petition for an assessment of the same in the manner hereinbefore directed," which manifestly refers to the mode of proceeding prescribed in section 1551, where the landowner has refused his consent in writing, to wit, by petition to the judge of the circuit for the impaneling of a jury to ascertain the amount of compensation to which the landowner shall be entitled, just as was done in this case. But the appellant contends that, inasmuch as the petition shows on its face that the land for the right of way was taken "without the consent" of the owners, it fails to show that the petitioners are entitled to institute this proceeding under section 1558. But it will be observed that the language used in that section is different from that used in sections 1550, 1551. In these two sections the word used is "consent," and it is manifest that the legislature was providing for cases in which the landowner signified his consent, either expressly or presumably, to the entry upon his land, and in cases which the landowner refuses his consent in the manner provided, to wit, in writing, while in section 1558 the word used is "permit," showing an intention to provide for cases, which oftentimes have occurred, where the railway company, without first obtaining the consent of the landowner, either expressly or by presumption, has been suffered or permitted to construct its road over the land of another. The word "consent" implies some positive action, while the word "permit" implies mere passivity; and this will account for the change in the phraseology in the sections referred to, as it must be considered that the legislature intended to provide for all cases that might arise. If, therefore, a railway company, without first obtaining the consent of a landowner, and without first resorting to the proper proceedings to condemn the land, and have the compensation to which the landowner is entitled ascertained, proceeds to construct its road over the land of another, without objection, or by the implied permission of the landowner, such landowner may, at any time within one year after the completion of the road, under the provisions of

section 1558, demand compensation in the manner therein provided. The judgment of this court is that the order appealed from be affirmed, without prejudice to the right of the appellant, if it shall be so advised, to institute some other proper proceeding to test the right of the petitioners to compensation.

POPE, J., concurs.

(95 Ga. 512)

#### HAWKINS v. DALE et al.

(Supreme Court of Georgia. Oct. 22, 1894.)

RECEIVER—ADVERSE CLAIM TO ASSETS—RULE TO SURRENDER POSSESSION—PARTIES.

Where, after the intervention of an adverse claimant to property which the court holds by its receiver pending the suit in which he was appointed, the receiver is ordered to turn over the property to the claimant, upon the latter's giving bond and approved security for the eventual condemnation money in the cause, and the bond and security are given, and the property is turned over accordingly, the judge cannot afterwards make a valid order, upon a rule brought against the receiver alone (even if the rule was brought prior to the time when the receiver, by virtue of the previous order, parted with possession of the property), requiring the claimant to surrender possession of some of the property to another claimant. Under such circumstances, the first claimant would be entitled to notice of the application to dispossess him. He, and not the original receiver, should be the party respondent in the application; or, if not the sole party, he should, at least, be a joint party with the receiver. In the present case the order to dispossess him was a nullity, and the subsequent order directing the sheriff to enforce it was erroneous.

(Syllabus by the Court.)

Error from superior court, Wayne county; J. L. Sweat, Judge.

Petition by Dale, Dixon & Co. against Hill, as receiver, for the delivery of iron rails. W. S. Hawkins, a claimant, intervened. From an order granting plaintiff's petition, the intervener brings error. Reversed.

The following is the official report:

Upon the petition of Wheelwright & Co. against Ellis, sheriff, et al., Hill was appointed temporary receiver of a certain sawmill and appurtenances referred to in the petition, as stated in the bill of exceptions; but the petition and order thereupon appointing the receiver, and granting injunction against defendants therein, does not appear in the record. Afterwards a further order was granted at chambers by the judge below, allowing Hawkins to intervene in the cause, and, among other things, ordering that upon Hawkins' making bond with security in a certain sum, conditioned for the payment of the eventual condemnation money, Hill should turn over all the property described in the original petition, and all that had come into his possession as temporary receiver to Hawkins, and that Hawkins should then be empowered to operate the same for his own profit, until further order and decree. The bond was made, and the property delivered to Hawkins, and included in this property

so delivered was a tramroad, laid with railroad iron 11 miles or more in length. Afterwards, Dale, Dixon & Co. presented their petition to the judge in chambers, alleging that among the property in the possession of the receiver were 165 tons of iron rails, weighing 35 pounds per yard, the greater portion, if not the whole, of which was laid upon the tramroad leading out into the forest from the mill; that this iron was the property of petitioners, and formed no part of the estate for which the receiver was appointed, and should be turned over to petitioners. Upon this petition, it was ordered that the receiver show cause why the prayer of petitioners that the rails be turned over to them should not be granted. Service of this petition and order was made upon the receiver, and he filed an answer to the petition, in which answer he alleged that he was advised and believed that the iron rails referred to in the petition were covered by a mortgage which had been executed by G. W. Haslam to Wheelwright & Co., shown in the amended petition of Wheelwright & Co.; that, said rails being in the possession of G. W. Haslam, and the court having appointed respondent receiver to take charge of all said property, he should not be required to deliver the rails to Dale, Dixon & Co.; that in the bill of sale made by G. W. Haslam to Hawkins, shown in the intervention of Hawkins, appeared the item of railroad iron connected with the sawmill, or theretofore used by Haslam, which item respondent was advised and believed covered all the rails referred to in the petition of Dale, Dixon & Co., and, the rails being in the possession of Haslam, who had sold them and yielded possession of them to Hawkins, and the bill of sale having been duly recorded, Dale, Dixon & Co. should not be heard to require respondent to deliver the rails to them; that the court had already ordered respondent to deliver all the property described in the said petition of Wheelwright & Co. to Hawkins upon the latter's giving bond, and Hawkins had given the bond, which had been approved and filed, and respondent could not deliver the rails to Dale, Dixon & Co. without violating the order, nor without great injustice to Hawkins; that respondent was advised and believed that Dale, Dixon & Co. sold the rails to Haslam, and took his notes therefor, thus parting absolutely with the title; and that it would be impossible for respondent to comply with an order from the court to deliver the rails to Dale, Dixon & Co., because there were many rails in use at the mill, much more than 165 tons, and all of the rails were laid upon the tramroad, and there were more than 165 tons so in use, of the weight of 35 pounds per yard, so he would have no way of identifying the 165 tons named in the petition. Upon the petition and answer, the judge at chambers ordered that the rails belonged to Dale, Dixon & Co.; that they were taken by the receiver as the property of

George W. Haslam, and, as such, were turned over to Hawkins, upon his intervention; that the receiver, and Hawkins deliver to Dale, Dixon & Co. within 30 days the 165 tons of rails; and that, upon said delivery, Dale, Dixon & Co. should execute a bond to stand in lieu of the iron. Hawkins did not deliver the iron in compliance with this order; and at the May term, 1894, of Wayne superior court, the judge granted a rule against him, requiring him to show cause why he should not be punished for contempt. Afterwards, at chambers, the matter came on to be heard. Hawkins answered, disclaiming any intention to be in contempt, and alleging that he declined to deliver the iron because he had no means of knowing which 165 tons he was directed to deliver, because, unless there was a particular mark of identity on the rail by which it can be pointed out so he would know it from any other, he ought not to deliver it; that the order furnished him with no mark of identity of the particular rails he was ordered to deliver, and there was no such mark upon the rails known to him as would justify him in making a delivery; that, when the sawmill and appurtenances were placed in the receiver's hands, the tramroad went into the hands of the receiver, and the court exercised control of the same, and directed removal of obstructions therefrom, and also ordered the receiver to turn over the property in his hands as such to this respondent upon his giving bond, which bond he had executed and filed, and the receiver had turned over to him the entire tramroad; that this respondent should at least be allowed the privilege of being heard, upon proper pleadings, before any final order was passed taking the property from him; that there has not been any proceeding instituted against him for the iron, but the proceedings of Dale, Dixon & Co. were against the receiver; the rule to show cause was against the receiver, who answered the rule, and upon whose answer the judge granted the order for delivering the rails to Dale, Dixon & Co. against this respondent, who at no time was a formal party to the proceedings, and who was denied the privilege of submitting the facts stated above; that the three miles of railroad iron claimed by Dale, Dixon & Co. had been bought by G. W. Haslam, who gave his notes therefor, several of which he paid to Dale, Dixon & Co., who hold the remainder of the notes, and no provision was made in the order last above mentioned for an accounting for the money they had received, or surrender of the notes they hold; that at the time of the execution of the mortgage of Wheelwright & Co., which covered four miles of railroad iron, G. W. Haslam only had in his own right a fraction over one mile of iron rails, except the three miles which he had at that time contracted for from Dale, Dixon & Co., and Haslam must have included said three miles in the mortgage, or else three miles belonging to some

one else, to which he had no pretended claim of title even; and that said three miles were included in the bill of sale made by G. W. Haslam to this respondent, and Dale, Dixon & Co. have no title to the same, and on this question respondent prays the right to be heard. He submitted that, under these facts, it would be most equitable and just to him, as well as to all others at interest, to have said last-mentioned order revoked, and a new hearing. He prayed that he be adjudged not in contempt; that he be granted a day in the court to be heard on the matters above mentioned; and for general relief. The judge ordered that the rule against Hawkins be discharged; that the case be not reopened; but that the order awarding the iron to Dale, Dixon & Co. stand; and that the sheriff put them in possession of the iron. To this order, by fast bill of exceptions, Hawkins excepted. The nature of his assignments of error is sufficiently indicated by the allegations of his answer above set forth, except that he alleged error because the order directed the sheriff to deliver the iron without specifying which 165 tons of 35-pound rails were to be delivered, but, in effect, allowed Dale, Dixon & Co. to take whatever they claimed, to the amount that they claimed, and that he was not allowed to be heard before the order to the sheriff was granted.

W. G. Brantley, for plaintiff in error. Charlton, Mackall & Anderson, for defendant in error.

PER CURIAM. Judgment reversed.

(93 Ga. 266)

#### CITY OF ATLANTA v. GABBETT.

(Supreme Court of Georgia. Nov. 6, 1893.)

##### CONSTRUCTION OF SEWER—NOTICE OF ORDINANCE—ASSESSMENTS.

1. The statute under which a local assessment was made upon adjacent property, on account of the construction of a sewer, requiring that the notice to be published prior to the final passage of the ordinance should contain a statement of the size of the contemplated sewer, a notice that the sewer would be "of various diameters," with nothing else to indicate its size, was no compliance with the statute, and the ordinance thereafter passed was illegal and void. All that was done under it was without authority of law, and no assessment upon adjacent property on account of the construction of the sewer is collectible.

2. The ordinance can derive no aid from a proper notice published prior to its introduction, the statute requiring that the notice should be published, not before, but after, the ordinance was introduced.

3. Where the scheme of the statute providing for the construction of sewers is to make or authorize local assessments upon adjacent property in consideration of benefit to the property in the matter of sewer connection, a mere strip of land lying between the sewer and the next proprietor's tract, too narrow for any use in which local sewerage would be needed or available, is not assessable, the statute not contemplating the assessment of any property other than that which could possibly be benefited in the manner indicated. That this intervening

strip would, since the construction of the sewer, be desirable property for the adjoining proprietor to own, and would, as his property, be much enhanced in value by reason of the construction of the sewer, is irrelevant.

(Syllabus by the Court.)

Error from superior court, Fulton county; Marshall J. Clarke, Judge.

Petition by Sarah E. Gabbett against the city of Atlanta to restrain the collection of executions issued to enforce the payment of assessments for sewer construction. From a judgment entered on a verdict for plaintiff, and from an order denying a new trial, defendant brings error. Affirmed.

The following is the official report:

Mrs. Gabbett, by her equitable petition, sought to enjoin the city of Atlanta from collecting two executions,—one issued to enforce an assessment against her property on account of the construction of what is known as the "Butler Street Branch Sewer" through her property in Atlanta, and the other issued to collect a similar assessment on account of the construction of what is known as the "Rice Street Sewer" through her property. The jury, under the direction of the court, made a verdict in favor of enjoining altogether the collection of the first execution mentioned, and of enjoining the collection of one-half the assessment remaining after the deduction of certain admitted overcharges on account of the construction of the Rice street sewer. The motion for new trial made by defendant was overruled, and it excepted. The motion contained the grounds that the verdict was contrary to law, evidence, etc. Also, because the court erred in admitting in evidence, over defendant's objection, the testimony of G. W. Adair, to the effect that only a small part of the area of the plaintiff's property was susceptible to direct drainage by the sewers constructed by defendant through plaintiff's property, and for the construction of which the executions in question were issued. Defendant's objection was that the rate and method of the assessments against the property of plaintiff for the building of the sewers were fixed by the act of November 8, 1889, amending the charter of Atlanta, and that it was not competent for plaintiff, under the pleadings, to have the question of the reasonableness or unreasonableness of these statutory assessments submitted to the jury on the testimony of witnesses. It appears from the petition of plaintiff that the question of the reasonableness of these assessments is raised by her petition, it being alleged by her, in the petition, that the sewers are not in any sense such as can be used by her for draining off the water that falls upon her property, or for the connection of private sewers from her property; that for the construction of one of the sewers an assessment has been made against her property for 429 feet, whereas a portion of it does not pass through her property at all, leaving her property entirely, and re-entering it again, but nevertheless all char-

ged to her from where it first enters, to where it last leaves, her property; and that there is as much incidental benefit, if any at all, to adjoining property, as to her property, the sewer being constructed just a little on her side of the line, etc. The testimony was also objected to on the ground that, if the reasonableness of the assessments could be inquired into by the jury at all, it was only competent for plaintiff to prove the facts as to the location and description of the property, the location and character of the sewers, the capacity of the property for subdivision and improvements and the like, and leave the jury to draw their own conclusions as to the feasibility of draining the area of plaintiff's lot by means of these sewers. Defendant alleges that the court erred in overruling these objections, and admitting the testimony of this witness and the witnesses Williams and Smith to the same effect, and also that of the witness Wilson as to the size and cost of lateral sewers which would be necessary, in the opinion of the witness, to drain certain parts of the plaintiff's property. Error in rejecting testimony offered by defendant, tending to show that the strip of ground belonging to plaintiff lying on the north side of Rice street sewer, while too narrow or shallow to be cut into building lots, had been greatly enhanced in value by reason of the construction of the sewer, on account of its lying immediately between other vacant property fronting on the south side of Pine street and the line of said sewer; defendant offering to prove that the strip of ground in question was worth more to the owners of this adjoining vacant property than before the construction of the sewer, and because of such sewer construction. Error in instructing the jury to return a verdict enjoining defendant from further prosecuting the execution for \$1,179 on account of the construction of the sewer known as the "Butler Street Branch Sewer." This instruction was based on an alleged insufficiency in the description of the size of the sewer in the notice published after the introduction of the ordinance under which the sewer was built, and before the passage of the ordinance. In this notice it was stated that the sewer was to be of "various diameters." It was agreed on the trial that both this notice and the other attached to defendant's answer, marked "Exhibit A," were regularly published as required by law, and this ruling of the court was based solely on the absence of a more specific statement of the size of the sewer in the notice first mentioned,—Exhibit B. It appears from defendant's answer that an ordinance for the construction of this sewer was introduced, and the notice Exhibit A was given, in which it was stated that the sewer was to be from seven feet nine inches to nine feet in diameter, of brick and stone, etc., but for want of accessible funds the construction of this sewer could not be provided for under said ordinance; but after-

wards another ordinance for the construction of the same was introduced, and the notice Exhibit B was given. Defendant alleges that the instruction was erroneous, for the following reasons: (1) So much of the act of 1889 as prescribes that notice shall be published after the introduction of the ordinance, and before its passage, is directory merely, so that the notice published before the introduction of the ordinance (that in Exhibit A) was sufficient. (2) The question of compensation for the right of way of the sewer not being in issue in this case, and the amount of the assessment being fixed by statute at 90 cents per front foot on each side of the sewer constructed through plaintiff's land, and the amount of said assessment being stated in the notice in question; and it being admitted by counsel for plaintiff that the sewer was of suitable size and character for the proper drainage of this property and the section of the city it was constructed to drain; and it being in evidence, plaintiff being a nonresident, that her resident agent never read either of the advertisements, but had actual notice of the facts that the sewer was to be constructed and was being constructed, and of its size and general character; and it being admitted that the sewer cost more than \$10 per lineal foot to build, and the evidence being uncontradicted that the construction of the sewer had enhanced the market value of plaintiff's property in a greater sum than the amount of the assessments against the property on account of the construction of the sewer; and it being also shown that the notice Exhibit A, which had contained a statement of the size of the sewer, was published in October, 1890; and the act of 1889 providing that a substantial compliance with the requirement as to notice should be sufficient,—the court should have held that the omission of the specific statement of the size of the sewer in the notice Exhibit B was immaterial, or should have submitted to the jury, as requested by defendant, the question of whether the notice given by both advertisements, in the light of all the facts and circumstances, amounted to substantial compliance with the act of 1889. Error in directing a verdict for plaintiff as to the execution for \$1,179, for the further reason that actual notice to plaintiff's agent, as shown by his testimony, dispensed with the necessity for constructive notice to plaintiff by publication, or at least such actual notice aided the published notice to such an extent as to make the omission of a specific statement of the size of the sewer in the last published notice harmless to plaintiff, and immaterial. The agent in question testified that he was only plaintiff's agent for paying tax on the property; that he was her agent when this sewer was built; that he knew it was going to be built, and when it was being built, and took no steps to try and stop it; that he corresponded very little with plaintiff about the property, except about

paying taxes, etc.; and that he saw neither of the notices, and made no objection to the construction of the sewer. Error in submitting to the jury the question of the reasonableness of the assessments against plaintiff's property on account of the construction of the Rice street sewer, there being no question of the sufficiency of the notice published as to that sewer. The effect of the instruction as to this assessment, defendant alleges, was to altogether disregard the rate and basis of assessments fixed by the act of 1889, under which the sewer was constructed, and leaves the jury free to adopt a different basis for allowing or disallowing the assessments made against plaintiff's property than that made by that statute. Defendant says the instruction was erroneous because the assessments were valid in law, and ought to have been upheld by the court, and not submitted to the jury at all, or, if at all, then only in so far as to ascertain from the evidence that they were made in conformity to the act and the city ordinance.

J. A. Anderson and Fulton Colville, for plaintiff in error. Hall & Hammond, for defendant in error.

**PER CURIAM.** Judgment affirmed.

(93 Ga. 274)

**LONGINO et al. v. LATHAM.**

(Supreme Court of Georgia. Nov. 6, 1893.)

**SALE OF LAND BY ADMINISTRATOR—DEDUCTION IN PRICE.**

A public sale of land by an administrator, under the description of "a certain tract or parcel of land situated in the 9th district of originally Fayette, now Campbell, county, Ga., being one hundred and sixty-five acres of lot of land No. 129, being all of said lot of land except thirty-seven acres in the northeast corner of said lot," is a sale by the tract, and not by the acre; and a deficiency in the number of acres specified, there being no fraud alleged, is no ground for making any deduction from the amount of the purchaser's bid, that amount being a gross sum for the whole tract or parcel sold.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action by I. W. Latham, as administrator, against T. D. & J. H. Longino, on a promissory note. From a judgment entered on a verdict for plaintiff, and from an order denying a new trial, defendants bring error. Affirmed.

The following is the official report:

Latham, as administrator of Fears, sued T. D. & J. H. Longino upon a promissory note for \$1,355 principal, dated November 4, 1890, and due November 4, 1891, on which \$1,140 were paid at the maturity of the note. The note, a copy of which was attached to the declaration, stated that it was given "for purchase money of lot 129 in 9th district of Fayette originally, now Campbell, county, Georgia, containing 165

acres." Defendants pleaded that plaintiff, as administrator of Fears, on November 4, 1890, contracted to sell them 165 acres of land, part of land lot 129, in the Red Oak district of Campbell county, for \$2,035, of which they were to pay one-third cash, and give their notes for the balance; that they paid him the \$680 cash, and gave their note for the balance of \$1,355, and he delivered them his written obligation, conditioned to make them title to 165 acres of land of said lot, and placed them in possession of a portion of the lot, representing it to contain 165 acres; that afterwards they discovered that said portion contained only 139 and a fraction acres, whereupon they informed plaintiff they would pay no more than the land was worth, or the price agreed on, and for which the note was given, abated by the value of the deficiency in land, to wit, 25 acres, at the price agreed upon, \$12.83½ per acre; and, when the note was due, they paid him \$1,140, and declined to pay more until he could comply with his contract to make them a deed to 165 acres, which he could not do, for his entire estate had possession of or title to but 140 acres, after deducting from the lot the 37 acres, as mentioned in the contract. They prayed a decree requiring plaintiff to deed to them the 140 acres, and deliver up their notes, canceled, upon the surrender of the bond for titles. There was a verdict for plaintiff for \$323.40, principal, with interest, attorney's fees and costs. Defendants' motion for a new trial was overruled.

Dorsey, Brewster & Howell, for plaintiffs in error. Glenn & Slaton and Thom. W. Latham, for defendant in error.

**PER CURIAM.** Judgment affirmed.

(93 Ga. 273)

**MUTUAL LIFE INS. CO. OF NEW YORK v. MOSS.**

(Supreme Court of Georgia. Nov. 6, 1893.)

**GARNISHMENT—FAILURE TO ANSWER—JUDGMENT BY DEFAULT.**

Where a summons of garnishment required the garnishee to answer at the December term, 1892, of the city court of Atlanta, and, after service of the summons, this term was abolished by the act of November 30, 1892, which established six terms annually of said court, beginning with the January term, 1893, and provided that all cases then pending in said court should be triable at that term, it was the duty of the garnishee to answer at that term, or, failing to do so, by the ensuing March term; and, having failed, there was no error in rendering judgment against the garnishee by default during the latter term, judgment having been previously obtained against the defendant in the suit.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Garnishment by H. B. Moss against the Mutual Life Insurance Company of New



York, garnishee. From a judgment rendered against it by default, garnishee brings error. Affirmed.

Jas. H. Gilbert, for plaintiff in error. R. J. Jordan, for defendant in error.

PER CURIAM. Judgment affirmed.

(93 Ga. 283)

THOMPSON v. COMMERCIAL GUANO CO.  
(Supreme Court of Georgia. Nov. 20, 1893.)

LANDLORD'S LIEN ON SUBTENANT'S CROP — SUBTENANT'S RECOURSE AGAINST TENANT—NOTE FOR RENT—DEFENSES AS AGAINST ASSIGNEE.

1. Where a tenant sublets to another without the consent of the original landlord, the crop produced by the subtenant is, when it matures, under a special lien in favor of the landlord for the rent owing to him by the principal tenant; and if the subtenant, in order to protect himself against the payment of double rent, where this step is rendered necessary by the default of the principal tenant, applies so much of his crop or its proceeds as amounts to the rent due from himself to the principal tenant to the payment of the rent due from the latter to the original landlord, the subtenant thus discharges his own rent obligation to the principal tenant.

2. After a subtenant has discharged himself, in the manner above indicated, from answering for rent to the principal tenant, the latter could not, by distress warrant or otherwise, compel him to pay rent, or any part of it, a second time. Nor can the assignee of a nonnegotiable promissory note given by the subtenant to the principal tenant do so, although such note was assigned before the crop matured, and before the note became due. The note not being negotiable, the assignee thereof stands in the shoes of the payee, and, while taking his rights, must abide by his obligations, one of which was to protect the subtenant (the maker of the note) against liability to the original landlord. The act of September 27, 1883, touching the assignment of rent contracts, does not enable the assignee to enforce a special lien for rent where the assignor himself could not have enforced it, by reason of the crop being bound by a superior lien.

(Syllabus by the Court.)

Error from superior court, Washington county; R. L. Gamble, Judge.

Action by the Commercial Guano Company against W. J. Thompson for rent, on a distress warrant based upon a nonnegotiable promissory note, of which plaintiff was assignee. A verdict was directed for plaintiff, and defendant brings error. Reversed.

The following is the official report:

The Commercial Guano Company, upon affidavit of T. J. Orr, as its agent, had issued a distress warrant for rent against W. J. Thompson, who interposed a counter affidavit. After the introduction of the evidence, the judge presiding directed a verdict for plaintiff, and to this ruling defendant excepted. Plaintiff introduced the note upon which the warrant was based. It was dated March 21, 1892, signed by W. J. Thompson, made payable to J. P. Thompson, Sr., payable October 15, 1892, and was for rent of land "on the Burch place." Up-

on this note there was an indorsement of transfer thereof, for value, to the Commercial Guano Company, March 21, 1892, signed by J. P. Thompson, Sr. The testimony for the defendant was to the effect: T. J. Orr, then and now agent for the Commercial Guano Company, took the note knowing that W. J. Thompson was a subtenant of his father, J. P. Thompson, Sr., who rented the place from Dr. Cheatham. In the fall, when the note fell due, W. J. Thompson carried the cotton to Orr (or told Orr he had the cotton to pay it), and told Orr he wanted his note. Orr refused to take the cotton and give up the note, because Dr. Cheatham was there ready to levy on it for his rent, and Orr knew he could not hold it against Cheatham. Defendant could not get his note, and so, according to his evidence, turned over the cotton to his father, in Orr's presence; and he sold it to Orr, and got the money, and paid it to Cheatham, or Orr paid it to Cheatham. Orr got the cotton, and knew all the time that it was defendant's rent cotton. According to Orr's testimony, defendant turned the cotton over to Cheatham in payment of his father's rent, and Orr bought the cotton from Cheatham, and paid him for it, as a cotton buyer, telling defendant he would hold defendant responsible on the note. Defendant further testified that Orr insisted on his giving the rent note to his (defendant's) father, who owed Orr, and Orr got the note from defendant's father.

Phillips & Phillips, for plaintiff in error. Harris & Rawlings, for defendant in error.

PER CURIAM. Judgment reversed.

(93 Ga. 275)

JAMES v. TAYLOR.

(Supreme Court of Georgia. Nov. 20, 1893.)

EXECUTION—CLAIM BY THIRD PARTY—COSTS—DECLARATIONS BY DEFENDANT AS TO TITLE.

1. Declarations by a defendant in *fi. fa.* against his title to property in his possession are not admissible in behalf of a claimant, if made after the judgment was obtained, or while the litigation was pending, and with reference thereto. Code, §§ 3776, 3784, subd. 4.

2. It not appearing from the record that the cost of trying the claim was rendered more or less by reason of the property found not subject being included in the levy (the whole of the evidence brought up relating to the property which was found subject), it does not affirmatively appear that there was any error in rendering judgment against the claimant for all the costs in the claim case, and in not charging the plaintiff with any part thereof.

3. The verdict was warranted by the evidence, and there was no error in overruling the certiorari.

(Syllabus by the Court.)

Error from superior court, Rockdale county; R. H. Clark, Judge.

Action by Josiah James against W. M. Taylor on the merits of a claim filed by plaintiff, and returnable in a magistrate's court,

against certain personalty levied upon by defendant as the property of Moses Curry, deceased. Plaintiff took the cause by certiorari to the superior court, on an entry of costs against him, and the writ was overruled. Plaintiff brings error. Affirmed.

A *fi. fa.* in favor of W. M. Taylor against Moses Curry was levied on a mare and other personalty, as the property of Curry, and James filed a claim, returnable to a magistrate's court. The case was tried on appeal before a jury in that court, and the jury found the mare subject, but the other property levied upon not subject, whereupon the magistrate entered up judgment for the full amount of costs against the claimant. Claimant took the cause by certiorari to the superior court, making various allegations of error, hereafter to be mentioned; and there the certiorari was overruled, to which he excepts. It appears that, upon the trial in the magistrate's court, claimant testified: That he bought a mule from Whittaker for defendant, and gave his note for it, defendant being also on the note. That Whittaker retained title until the mule was paid for. That defendant paid some of the money to Whittaker for the mule. That defendant lived on claimant's lands for a number of years, and used the mule on the place. That the mule always belonged to petitioner, after it was gotten of Whittaker, until defendant traded it for another mule, with one Wingate; claimant giving defendant leave to so trade it, provided he would pay the difference in value to Whittaker, which was done, or the most of it. That defendant, with claimant's consent, traded the last-mentioned mule to Fleming for a horse or mare, and swapped around, and then traded with Maddox for the mare levied on, getting some "boot," and paid some of the balance on the Whittaker note; leaving some \$27.50 still due on it, which claimant paid Whittaker in the fall of 1889, and took up the note. The animals so gotten in exchange were claimant's property, and so regarded by defendant; never belonged to defendant, but were to be his when fully paid for, and he never fully paid them, and made none of the trades referred to without the consent of plaintiff. That defendant swapped the mule gotten of Wingate to Sawyer for a horse, and brought it home, and claimant made him return it, and get the mule back. That Curry is dead. That claimant was misled in suing out an attachment, not knowing how to get at his rights, and being advised to sue it out, but was afterwards advised he was proceeding wrong, and then withdrew it, and filed the claim. There was evidence by one Sawyer that he did make the swap with defendant as testified by claimant, when claimant repudiated it, and he gave the mule back to defendant; that this was in 1887. Claimant proposed to prove by Sawyer that some time in 1890 he proposed to trade with defendant for the mare now levied upon, when defendant said

he could not trade it, because it belonged to claimant. This evidence was repelled on the ground that it appeared that this statement was made after plaintiff's judgment against defendant had been entered, and similar testimony of one Swords was repelled for the same reason. Plaintiff's *fi. fa.* was issued upon a judgment rendered in March, 1890. Error is assigned as to the rejection of this offered testimony. Claimant also offered interrogatories of his wife, to the effect that she heard defendant say many times that the mare belonged to claimant, one time being when plaintiff and defendant had a trial, defendant saying plaintiff could get nothing for the property belonging to claimant; that, when defendant made a mortgage to claimant, claimant telling him he was uneasy about the money defendant owed him, defendant said the property belonged to claimant anyway, and it was unnecessary to give any mortgage; and that it was not true that claimant only claimed by the mortgage, but he claimed by agreement between him and defendant. Error is assigned upon the rejection of this testimony. There was evidence for plaintiff, by various witnesses, that defendant was in possession of the mare levied upon, and said it was his property; that he offered to trade the mare to one Cawthorne, claiming it as his own, and that, when defendant left, claimant took out an attachment against defendant, and placed it in the hands of a witness, pointing out to him this mare to levy on as defendant's property; that Wingate, Fleming, and Maddox, when they traded with defendant, paid him "boot"; that Wingate spoke to claimant about trading for the mule, and claimant said it was all right; that Whittaker would not let defendant have the mule unless claimant would stand for him, and claimant and defendant signed the note, Whittaker retaining title; and that defendant traded the mule to Wingate before it was paid for, getting \$10 "to boot," which he paid Whittaker on the mule note, defendant and claimant paying Whittaker for the mule. It was alleged that the jury found contrary to the law, evidence, etc., and further that the magistrate erred in entering up all of the costs against claimant, part of the property levied upon having been found not subject.

J. N. Glenn, for plaintiff in error. J. R. Irwin, for defendant in error.

PER OURIAM. Judgment affirmed.

(38 Ga. 278)

WEBSTER v. DUNDEE MORTG. & TRUST CO.

(Supreme Court of Georgia. Nov. 20, 1893.)

RES JUDICATA—CONSENT—VERDICT WITHOUT JUDGMENT—HOMESTEAD RIGHT—WAIVER—POWERS OF ATTORNEY—CONSENT TO VERDICT.

1. Generally, it is requisite that a judgment be entered upon a verdict, in order that the

principle of *res judicata* may apply and operate as a bar to a future action from the same cause; but where, in the court below and in this court, counsel on both sides have treated the verdict as serving the office of judgment as well as of verdict, any objection on account of the failure to enter up judgment may be considered as waived. This is so more especially where the record shows that, by agreement at the time the verdict was rendered, indulgence upon it was to be granted, and that the indulgence stipulated for was in fact granted, and there is no suggestion that the verdict was ever set aside or modified, or that there was any order for an arrest of judgment.

2. Where husband and wife mortgaged premises, and after foreclosure, and after the mortgage *fi. fa.* was levied, the wife interposed a claim to the property based on an alleged homestead right in behalf of herself and minor children, the adjudication of this claim against her will bar a subsequent claim interposed by her husband in behalf of the same beneficiaries, and founded on the same homestead right; and, if the husband's claim be founded on a homestead right asserted and established after the mortgage was executed, this new right is unavailable as against the mortgage, the note secured by the mortgage waiving homestead on its face, and the mortgage itself waiving and renouncing the benefit of the exemptions provided for by law.

3. A verdict rendered by consent of parties, and which covers the whole scope of the litigation, is a verdict upon the merits, the consent acted upon by the jury being in the nature of an admission or concession by the losing party that the merits are in accordance with the verdict. The counsel representing a party litigant is competent to represent his client in agreeing to a consent verdict, although the client be a married woman, and the case be one in which a right of homestead is asserted, but not proved. (Syllabus by the Court.)

Error from superior court, Washington county; R. L. Gamble, Judge.

Action by the Dundee Mortgage & Trust Company against G. W. Webster and others to foreclose a mortgage. Defendant G. W. Webster, as next friend of his children, claimed part of the mortgaged land. The part so claimed was found subject to the mortgage, and he brings error. Affirmed.

The following is the official report:

A mortgage *fi. fa.* in favor of the Dundee Mortgage & Trust Company against T. C. Webster and Mrs. M. A. Webster was levied upon a tract of land of 560 acres as the property of defendants. The northwestern undivided half of the land was sold, and the southeastern undivided half, containing 283½ acres, was claimed by Mrs. M. A. Webster as the homestead property of herself and her five minor children. This claim was dismissed on motion of claimant's counsel. A claim was again interposed by Mrs. Webster for herself and minor children, alleging that the property was their homestead property, and there was a verdict finding the property subject. Afterwards, claim was interposed by G. W. Webster, husband of Mrs. M. A. Webster, as next friend for the same minor children, alleging that the property was homestead property set apart to Mrs. Webster and said minors. Upon the trial of this claim, the property was found subject, and, claimant's motion for new trial being

overruled, he excepts. The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also, because the court erred in ruling that the cause was *res adjudicata*. Also, because the court erred in admitting in evidence the *fi. fa.*, in the absence of the necessary affidavit to subject homestead property. It does not appear from the motion what objection was made to this evidence when offered. Upon the trial, plaintiff introduced the mortgage, which was dated February 15, 1882, and was given by T. C. Webster and his wife and Mrs. M. A. Webster and her husband to plaintiff, and covered the land in question; also, the *fi. fa.*, the first claim and order dismissing the same, and the second claim and verdict upon the same. Claimant testified that, when the levy was made, Mrs. Webster interposed her claim, which was afterwards withdrawn by consent; that afterwards, when the sheriff was proceeding to sell, she interposed another claim, and by consent of counsel a verdict was rendered against her, she not being present; that the consent whereby the verdict was obtained was not to enforce any judgment within four years; that afterwards he learned from counsel that claimant was only to have two years; that Mrs. Webster was in possession at the date of the mortgage; that the original homestead property has been sold for \$1,000, and \$800 of it was paid for the tract levied on and claimed, the balance of the money going to improve the place. Counsel for claimant in the second claim testified that when the verdict was given in that case, over two years before, the merits of the case were not entered into, but the verdict was by consent without testimony; and that plaintiff's counsel agreed to stay execution for some time, but for how long he did not remember. Other evidence was introduced by claimant, showing: Mrs. Webster, as the head of a family composed of herself and three minor children, applied for a homestead and exemption, attaching to her petition schedules of what she alleged to be the property she desired set apart, being certain land and personalty, and the homestead was granted in June, 1869. Afterwards, upon petition of herself and her husband to the judge of the superior court, appointment of guardian *ad litem* for the children, answer by him, etc., an order was passed by such judge in January, 1880, allowing sale by them of the homestead property, and reinvestment in the property levied upon. After this, in December, 1892, Mrs. Webster, by her petition to the ordinary, alleged that she previously obtained a homestead and exemption; that her application therefor was incorrect, as it stated that she was the head of a family, she being at the time a married woman; that her application was also defective because it failed to show that her husband had refused to apply for the homestead and exemption, and did not state that the property out of

which the homestead and exemption were sought was his property; that both of these omissions were the truth of the case, and should have been so stated; and that she now prayed that her original petition be so corrected and amended as to conform to law and the facts. She further prayed that her amended petition, when allowed, should be in the place of her original petition, and be taken and allowed as a part of the proceedings to obtain the homestead and exemption set apart to her by the ordinary in June, 1869; and that the usual notice might issue and be published as required by law. Upon this petition the ordinary ordered that citation issue and be published as required by law, which was done; the form of notice being that Mrs. Webster had applied to amend her original petition, and the ordinary would pass upon the same on a day named. Upon the petition was indorsed, "Approved and ordered to record January 28, 1893," signed by the ordinary. For the plaintiff, its attorney testified: He did not consent to the withdrawal of the first claim, and objected to the withdrawal of the second claim. Claimant was not present at the trial of the second claim, and witness was ready with proof to condemn the property. Claimant's counsel proposed to witness to take verdict condemning the property, provided witness would give two years to pay the debt. Witness consented, verdict was taken, and witness waited the two years before proceeding.

J. N. Gilmore and Jordan & Tyson, for plaintiff in error. Evans & Evans and Hines, Shubrick & Felder, for defendant in error.

PER CURIAM. Judgment affirmed.

(93 Ga. 284)

**CITY COUNCIL OF AUGUSTA v. LOMBARD.**

(Supreme Court of Georgia. Nov. 27, 1893.)

**OWNER OF WATER POWER—RIGHTS AND DUTIES—REMOVAL OF WATER GATES—CONSEQUENT INJURIES TO PROPERTY—EXTRAORDINARY FLOODS—EVIDENCE—OPINIONS.**

1. Where a broad scheme of manufacturing by the use of water power embraces the duty on the part of the owner of the water to furnish an adequate and continuous supply to numerous separate and distinct manufacturing establishments, and to keep the canal, its races, and the openings of such races, in proper condition for that purpose with reference to the ordinary stages of the water, anything in the way of removing obstructions to the free flow of the water, which is necessary or proper to be done in order to perform these duties, may be rightly done, although the doing of it will render the canal and one or more of its races more subject to overflow in times of high and extraordinary freshets, and one or more of the manufacturing establishments may thereby be exposed to serious damage on these extraordinary occasions.

2. No diligence on the part of the water owner to anticipate and provide against extraordinary floods is due to its patrons, except such

as is consistent with a right performance of the main, constant, and regular duties above referred to. If, in the present case, the removal of the structure at the head of the race was necessary or reasonably proper as a means of furnishing at ordinary stages of the water a continual and adequate supply to the establishments located along the race, the removal of the structure was not wrongful as against the plaintiff, and he could not recover; but if the removal was not necessary or reasonably proper for this purpose, and if the defendant, in the exercise of ordinary diligence, could and should have foreseen that it would expose the plaintiff's establishment to damage by any freshet not higher than some which were known to have previously occurred in the history of the same general manufacturing enterprise, then the removal would be wrongful, and the plaintiff, if injured thereby, might recover.

3. The court erred in charging the jury thus: "If, however, the gates were not originally put there for the purpose claimed in plaintiff's suit, but were afterwards used by the city for that purpose, and so known to the plaintiff, and defendant knew plaintiff relied upon the gates for the protection of his property, and they were really necessary to protect his property, and the removal of the same was the direct or proximate cause of the damages claimed, then the city would be liable for such damages as have been shown to flow from said causes."

4. All evidence as to freshets subsequent to that by which the damage complained of in the declaration was done was irrelevant and inadmissible.

5. The mere opinion of a witness that the damage would not have been done if the conditions had remained unchanged is not admissible; but his opinion, together with the facts on which it was founded, would be admissible. The same rule holds as to the opinion of a witness that the current by which the damage was done came down the race, and not from another direction.

6. That the plaintiff, if he had known the act complained of would thereafter be done by the defendant, would not have engaged in business where he did, and where the damage was sustained, was irrelevant, as there was no stipulation between the parties touching the matter, and nothing was said on the subject before the plaintiff did engage in business at that place.

7. The court erred in not granting a new trial.

(Syllabus by the Court.)

Error from superior court, Richmond county; H. C. Roney, Judge.

Action by Charles F. Lombard against the city council of Augusta to recover damages resulting from the removal of water gates in the Augusta canal. Verdict for plaintiff. From an order denying its motion for a new trial, defendant appeals. Reversed.

The following is the official report:

Lombard sued the city council of Augusta for damages resulting from the removal by the defendant of water gates which had been put in the second level of the Augusta canal, at the entrance of the headrace which conveyed the water to the plaintiff's foundry. A verdict in the plaintiff's favor was rendered, and the defendant excepted to the overruling of its motion for a new trial. The declaration was filed on March 26, 1888. It alleges that on July 31, 1887, and for a long time before, the plaintiff was, and still is, the lessee of property in Augusta on the east side of Kollock street, and immediately

on the south side of the third level of the Augusta canal, on which property he was carrying on a foundry business, the machinery of which foundry was run by water received from a headrace from the second level of the canal, for which water he pays the defendant a large rental; that, at the time of the building or cutting of the headrace, strong and substantial water gates, with solid brick abutments, were constructed at the point where the headrace leaves the second level of the canal, and the main object in constructing the water gates was to regulate and control the volume of water passing through the headrace during periods of very high water in the Savannah river, and consequent high water in the second level of the canal; that, early in the spring of 1887, the defendant had the water gates taken out, notwithstanding plaintiff's objections, who earnestly protested at the time, and notified the defendant's officers and agents superintending the removal of the gates that the effect thereof would be to seriously damage him at times of high water; that in consequence of said removal, on Sunday, July 31, 1887, when the Savannah river reached its highest stage, large and unusual quantities of water flowed from the headrace in such volume as to run over the banks or dams of the headrace, which dams of the headrace were lower by one or two feet than the dam of the second level of the canal, by which sixty feet or more of the bank or dam next to his foundry yard and buildings was washed away, and large quantities of water precipitated upon his premises; that the loss thereby resulting to him was caused by the negligent, reckless, and unnecessary removal of the water gates, which had been constructed for the purpose of guarding against the very character of injuries herein complained of, and but for their removal the damage would not have been done him; and that defendant is the owner, and has sole control, supervision, and management, of the canal and its branches. In addition to the plea of not guilty, the defendant sets up the following: The gates were not constructed to regulate and control the volume of water passing through the headrace during periods of very high water in the Savannah river and consequent high water in the second level of the canal, but as head gates of the race way for the Excelsior Mills; and the sole object of the construction of the gates was to cut off the water from the race way for the repair of the same, or for such work as might be necessary in connection with said mills. They were never constructed, fitted for, nor used for flood gates to control or regulate the volume of water in the second level of the canal during high water in the river. The alleged damages set out by the plaintiff were the result of the act of God, a freshet of extraordinary rise in the Savannah river, against which human foresight,

by the exercise of all reasonable care and diligence, could not have provided, and defendant exercised all ordinary care and diligence. At the date of the lease of the premises by plaintiff, the gates were at the opening of the race way from the second level of the canal. He had legal notice of defendant's right to increase the supply of water to Berry's Mill under its obligation to him; and the removal of the gates was a needful and proper alteration, and was consistent with sound principles, as applied to the nature of the enterprise and the business relations and circumstances of defendant with the different mills. The proximate cause of the damage to plaintiff was not the removal of the gates, but an extraordinary rainfall or freshet in the river, against which defendant could not provide by the exercise of ordinary care and caution. The gates were not, at the time of the building of the headrace, constructed at the point where the headrace leaves the second level of the canal. The canal was begun in 1845, and was completed through the city and first used in 1847. The second level in which the head gates were built was not constructed until 1847. From the date of the construction of the canal up to the date of the alleged damage, in 1887, there had been but three floods in the river. One occurred in 1852, before any part of the race way was dug; and the other two occurred in 1864 and 1865, many years after the head gates were put into the second level. Therefore, the head gates could not have been put therein to control and regulate the flow of water in the race way used by plaintiff, which had no existence at the time they were put in, nor to protect against any flow whatever. They could not have been used as a protection against a flood, because it is impossible for human foresight to guard against or anticipate the varying heights to which the waters of the river rise during a flood. Gates which might protect against a flood of 34 feet  $4\frac{1}{4}$  inches, as in 1864, would not protect against one of 34 feet and 1 inch at the bridge, as in 1887.

The motion for new trial contains thirty-four grounds. Four of these allege that the verdict is contrary to law and evidence. Fourteen others allege that the verdict is contrary to stated portions of the court's charge to the jury. Grounds 5 to 11, inclusive, assign error upon the overruling of the defendant's objections to testimony given by the plaintiff and by William Pendleton. These objections were, in brief, that the testimony was irrelevant, tended to confuse the issues before the jury, and to put upon the defendant the burden of showing that it was not responsible for the damage resulting from the freshets of 1888 and 1891, and showed merely expressions of opinion on the part of the witnesses, and was in the nature of hearsay. The plaintiff testified that, since the overflow in question, he had been in-

jured by high water, in 1888 and 1891; that the dam of his shop was washed away at these times; that in 1887 and in 1888 they refilled the banks, but since 1891 they have driven the piling, but the filling has not been done yet; also, that, if these gates had been there, the water would not have gotten in his yard, and done the damage it did; also, that he did not think he should have leased the property if he had known the gates were going to be removed; also, that in 1891 the defendant made an effort to dam the water, and keep it out of Kollock street, by hauling planks, and putting them on the west side, and hauling sand bags, and throwing them in to stop the water; that this would not have been necessary if the gates had been there, as they were before; that, in the freshet of 1888, he saw the water run over the banks of the canal, and it washed him out the same as before; that he did not think it would have been done if the gates had been in there, but thought the water would have backed in from Broad street, and would have been in there before it broke over the dam, and backed up in there, and would not produce the current; and that the water in the second level in 1888 was higher than in the third level, and in 1887 also. William Pendleton testified that he was acting as superintendent for the plaintiff at the foundry, and had been employed there ever since 1866. The portion of his testimony to which the defendant took similar objections to those already noted is this: "The city council attempted to dam this water up on Kollock street in 1891. I know as much about it as I did about the gates. I judged from the interest of everybody that they wanted to save that bank, and it was the opinion that the dam was put in to save the bank. No great damage was done to the plaintiff's shop in 1891, but the yard and foundry were washed out by the bank breaking. They broke in 1888, but I did not see them then. I was not there when the break occurred in 1887 that did the damage, and cannot tell if the water that did the damage came through the headrace of the canal, or was water that came from somewhere else. I was not there when the break occurred. I know that we have never feared any water that could come down Kollock street. I have stayed there until the water got to be a general freshet in the city and the water on Kollock street when it was the largest and most dangerous at our banks. Being absolutely familiar with the premises, working there, as I am, of course the current came through the race way. I never saw the water coming down Kollock street from the shop. It goes through the other way." The twelfth ground of the motion alleges that the court erred in charging thus: "If, however, the gates were not originally put there for the purpose claimed in plaintiff's suit, but were afterwards used by the city for that purpose, and so known to the plaintiff, and defendant

knew plaintiff relied upon the gates for the protection of his property, and they were really necessary to protect his property, and the removal of the same was the direct or proximate cause of the damages claimed, then the city would be liable for such damages as have been shown to flow from said causes." The remaining grounds of the motion (27-34) are that the court erred in refusing to give the following instructions: "If the gates were not necessary to prevent overflows in cases of ordinary stages of the water and high water less than a flood or freshet, but were only needed in cases of extraordinary freshets, to prevent damage, there was no duty upon the city to provide gates to prevent damage by extraordinary freshets, because it was not bound to anticipate that such a freshet would occur, nor were they bound to provide against extraordinary freshets, which are, in law, acts of God; and you may, in this connection, consider the freshet of July 31, 1887, an act of God in every sense, under the admission of the plaintiff." "If you believe from the evidence that the defendant did not own the gates, that it was not a part of its duty to keep them in repair, then I charge you that the defendant is not liable, and you should so find." "If you find from the evidence that Lombard would not have leased the property in 1882 if he had known that the gates would be removed in 1887, and yet did not communicate any such conclusion to the city, and made no contract with the city in reference to said removal, then I charge you that such determination upon the part of Lombard will not affect the liability of defendant." "Before the jury can find for the plaintiff, they must find that it was negligence on the part of the city to remove the gates; but this is not enough. Not only must you be satisfied that the removal of the gates was negligence, but you must also find that the removal of the gates was the proximate cause of the damage sued for. The city is not responsible if the proximate cause—the efficient cause—was the freshet, even though the removal of the gates was a condition necessary for the flood to do the damage sued for. If you find that the flood was the proximate cause of the injury, it is a principle of law that the defendant is not liable where his act is not the cause, but merely a condition, even though it may be true that the injury would not have happened had he not done the act complained of. It is admitted that the freshet of 1887 was an act of God. I charge you that the city was not responsible for failing to anticipate and provide against such a freshet." "I charge you that under the law the defendant was bound to furnish Mr. Berry with all the water his contract called for, to the extent of the limit of the canal; and, if you find that it was necessary for such supply for the defendant to remove said gates, then I charge you that plaintiff took his lease sub-

ject to such right, unless he shows you to the contrary, and your verdict should be for defendant." "If you find from the evidence that Mr. Lombard or his superintendent objected to taking out the gates, and you find that the person to whom he made this objection was simply a foreman of the gang of hands employed or engaged in the work, and that he had no connection with the work except to boss the hands, and that Mr. Bennett was the superintendent of the canal in charge of the same, then I charge you that Mr. King, the foreman of the gang, was not in this matter such an agent of the defendant as to make notice to him notice to the corporation." "If you believe from the evidence that, when plaintiff leased his property, the gates were at the second level of the canal at the head of the race way, and that their removal was a necessary and proper alteration of the plan adopted by defendant to supply water to the mill of Berry, which needed and demanded it, and that said change of plan was consistent with sound principle, as applied to the business in which defendant was engaged, then I charge you that plaintiff leased his property with legal notice of the right of defendant to make said alteration by moving said gates, and you should find for defendant." "If you believe from the evidence that, at the time plaintiff leased or rented or built the house in which the property alleged to have been lost was stored, the race way was there; that said house was built below said race way; that it was a point of unusual danger in connection with said race way,—then I charge you that plaintiff took all chances of damage attached to the location, except those resulting from the wanton or reckless negligence of the defendant; and if you find there was no such negligence of the defendant, then plaintiff cannot recover."

In overruling the motion, the court made the following statement: "After argument had, and after a very careful consideration of the grounds of motion for new trial, I have arrived at the conclusion that the verdict of the jury should stand, and a new trial refused. That the plaintiff sustained damage to the amount assessed by the jury there can be no question. The jury were instructed, if the damages sustained were occasioned by the act of God, to find for defendant, and, if caused by the negligence of the city, to find for plaintiff. The evidence, we think, warranted the finding that the direct and proximate cause of the damage was the negligence of the city in removing the gates, as charged in plaintiff's suit, and fails to disclose any necessity for such removal. Mr. Bennett, the superintendent of canal, does not contend that he removed the gates because of any benefit to flow to the system of water supply to the customers of the council, but simply because one of the customers of the canal so requested. The damages sustained by the plaintiff, we think, could

have been averted by the exercise of ordinary care and prudence on the part of the city in putting in another gate at the second level of canal, and for this reason, along with others not herein mentioned, refuse a new trial."

John S. Davidson and J. R. Lamar, for plaintiff in error. Twiggs & Verdery, for defendant in error.

PER CURIAM. Judgment reversed.

(93 Ga. 303)

#### DENNIS v. STATE.

(Supreme Court of Georgia. Nov. 27, 1893.)

##### VOLUNTARY MANSLAUGHTER—INSTRUCTIONS.

As the evidence in behalf of the accused, if true, showed that an actual assault was committed upon him by the deceased, and that the homicide took place while that assault was in progress, the law of voluntary manslaughter was involved in the case, and it was error not to give it in charge to the jury.

(Syllabus by the Court.)

Error from superior court, Putnam county; W. F. Jenkins, Judge.

Mike Dennis was convicted of a criminal offense, and brings error. Reversed.

Jos. S. Turner, S. T. Wingfield, and W. B. Wingfield, for plaintiff in error. H. G. Lewis, Sol. Gen., J. M. Terrell, Atty. Gen., H. A. Jenkins, and Hines, Shubrick & Felder, for the State.

PER CURIAM. Judgment reversed.

(93 Ga. 290)

#### McCATHERN v. BELL.

(Supreme Court of Georgia. Nov. 27, 1893.)

##### TRANSFER OF SECURITIES — PAROL EVIDENCE OF INTENTION—SECURING PARTICULAR DEBT — AUTHORITY OF AGENT—APPLICATION OF PAYMENTS — EFFECT OF AGREEMENT.

1. Where negotiable securities were transferred in general terms, "for value received," the writing not expressing the purpose of the transfer, parol evidence is admissible to show that the purpose was to secure the payment of a particular debt, and that the parties agreed that the proceeds, when collected, should be applied to that debt, and not to debts generally, at the election of the creditor.

2. The creditor's general manager was such an agent as would have power to stipulate for the application of the proceeds of particular collaterals received by him to the payment of a given debt, even though this might modify a previous executory contract made by his principal with the debtor.

3. A subsequent written agreement between debtor and creditor, touching further indebtedness and security therefor, in which it was provided that the creditor should have the right, at his own election, to place payments as credits on any demand he might have against the debtor at the time of the payment, would not abrogate the previous contract touching the collaterals and their proceeds, no express mention or reference thereto being made in the subsequent agreement.

(Syllabus by the Court.)

Error from superior court, Burke county; H. C. Roney, Judge.

Action by W. McCathern against J. W. Bell to recover possession of two mules. Judgment for defendant, and plaintiff brings error. Affirmed.

The following is the official report:

McCathern brought an action against J. W. Bell for the recovery of two mules. The plaintiff introduced a note given to him by the defendant for the two mules, dated May 16, 1890, payable on or before the 1st of the next November, with a reservation of title to the mules until the purchase price should be paid in full. The testimony for the plaintiff is that there were certain credits on the note, and, after calculating principal and interest, the balance due on November 9, 1891, was \$94.41, and that nothing has been paid on the note since then. The defendant introduced two rent notes, dated January 31, 1891, and payable to the defendant as landlord,—one for \$40, and the other for \$120. Each of them bears a written transfer of the same date, from the defendant to the plaintiff, together with all his rights thereunder as landlord. The testimony of the defendant and of his brother, Simeon Bell, who was manager for the plaintiff in January, 1891, shows that, on the day the notes were transferred, the plaintiff told his brother he was going to the bank and get the notes discounted, and pay up the balance then due on the mule note. Simeon Bell told him not to do that, but to transfer the notes to the plaintiff, and, when collected, the money arising from them would be first appropriated to the payment of the mule note, and the balance to the defendant's open account with the plaintiff. This testimony was admitted over objection that the transfer of the notes was in writing, and could not be added to by parol. Simeon Bell further testified: "My purpose in taking transfer of rent notes in that way was to get the overplus as security for his account. If he had gone off and traded them, he could have paid up the balance on the mule note, and kept the balance of the money. I wanted to get what security I could. I did not take any mortgage or other security on the mules; did not ask for any." The plaintiff introduced a mortgage to himself from the defendant, dated June 3, 1891, to secure a note for \$1,000, due on the 15th of the next September, covering the defendant's crop for that year, the note being for advances already made and to be made. The mortgage contained a stipulation that the plaintiff should have the right to place payments as credits on any demand he might have against the defendant at the time of the payment. Reynolds, who became bookkeeper for the plaintiff in the latter part of 1891, testified that the defendant came to him and directed him to apply the collections on the transferred rent notes to the payment of the mule note; that he positively declined to do so, for the reason that the plaintiff claimed the right

to appropriate credits; and that on the same day the defendant sent to the plaintiff a note directing him to apply a sufficient amount of the proceeds of the two rent notes to pay up the mule note, and to place the balance to the credit of the defendant's open account. Reynolds further testified that, when the rent notes were collected, he placed the proceeds to the credit of the open account, which was thus settled in full. The defendant testified that, when he directed Reynolds as above stated, Reynolds agreed to apply the collections from the rent notes to the payment of the mule note. The plaintiff testified: "I had been advancing defendant for years, and he got further and further behind. In January, 1890, I determined not to advance him further, and had him to turn over to me certain mules on which I then held a mortgage. He went to see another firm, and tried to get them to run him, then came back, and I finally agreed to run him for that year. In January, 1891, I told him I could not advance him any longer. He begged me to do so. Said he would transfer me all the notes, and give me a mortgage on his crops to secure his indebtedness, and try to pay me. Then I agreed to run him for 1891. He had transferred me the rent notes for previous years. I did not authorize Simeon Bell to receive the rent notes in 1891 in the way he claims to have done so, and never before heard that they had been so taken. He was managing my business for me, and took all papers and securities for me." Defendant testified: "I had been running with Mr. McCathern for several years. He sold me the mules sued for. I did not have any particular conversation with Mr. McCathern in January, 1891, about obtaining advances for that year. I was in debt to him. I had paid my account for 1890, and some on the old note. He did not make any objection to advancing me supplies for 1891. He had no security, except the reserve title note to the mules, for the balance then due on that note, and also a mortgage on land. The land was in homestead. He did not ask me for my security in January, 1891. Said nothing to me about security. He did not at first decline to advance me supplies for that year. He just said he would advance me as before." Simeon Bell testified: "I did not understand that plaintiff did not want to advance defendant for 1891. He had paid up his account for 1890 in full, and paid some on the old debt. I left plaintiff, and opened business for myself, in August, 1891. Since then defendant has traded with me. Plaintiff knew all along that the land of defendant was in homestead. I knew nothing of any previous arrangement or understanding between them. I could not have obtained the transfer of the rent notes to plaintiff without the understanding as to where the credit should be placed when col-



lected." The plaintiff introduced a judgment in his favor against the defendant, obtained in May, 1891, on two notes dated May, 18, 1890, and due October 1, 1890, one for \$433.35 and the other for \$1,000, the latter bearing credits which reduced it to \$176.72; also, a mortgage given to secure these notes, covering the defendant's land and crops. The jury found for the defendant, and the plaintiff's motion for a new trial was overruled. The motion contains the general grounds, and assigns error upon the allowance, over his objection, of the parol evidence as to the character and purpose of the transfer of the rent notes. Another ground is that the court refused a request to charge as follows: "If you believe that the defendant obtained consent of McCathern to furnish supplies for 1891 upon a promise to transfer the rent notes, I charge you that if, without McCathern's knowledge or consent, defendant went to the manager, and delivered the rent notes with a different purpose, and yet went on and obtained supplies under McCathern's consent, given as aforesaid, the transaction with the manager was a fraud on McCathern, and the rent notes, or collections on them, should be appropriated according to the contract made with McCathern." The other two grounds are that the court erred in the following instructions: "I charge you that if you find, at the time of the transfer of the rent notes by defendant to plaintiff, Mr. Simeon Bell was manager of the business of McCathern, and attending to such matters for McCathern in the conduct of the business; and if you should further find that the rent notes were transferred with the understanding and agreement between defendant, J. W. Bell, and Simeon Bell that collections on or the proceeds of said rent notes should be first appropriated to the payment of the balance then due to McCathern by J. W. Bell on the mule note, —then and in that event I charge you that the receiving of said rent notes under such agreement was equivalent to a settlement of the said balance due on the mule note, when said notes were collected, and could not be affected by a paper subsequently signed by J. W. Bell, authorizing McCathern to appropriate payments or credits at his election, unless the latter paper in some manner referred to the previous transfer of the rent notes, or from its contents was manifestly intended to change the previous contract." "If McCathern has been injured by the fraudulent conduct of his business manager in that transaction, that is a question between him and Mr. Simeon Bell, with which the defendant has nothing to do."

Johnston & Brinson, for plaintiff in error.  
Lawson, Callaway & Scales, for defendant in error.

PER CURIAM. Judgment affirmed.

(38 Ga. 205)

# CITY OF ATLANTA v. YOUNG.

(Supreme Court of Georgia. Oct. 30, 1893.)

## DEFECTIVE SIDEWALKS—INSTRUCTIONS—EVIDENCE.

1. Taking the charge as a whole, it did not assume the existence of the alleged defect in the sidewalk, of which the plaintiff complained as the cause of her injury, and the jury must have understood from the charge that it was incumbent on her to prove the existence of the defect before she would be entitled to recover.

2. The evidence, though conflicting, was sufficient to authorize the verdict, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by Caroline Young against the city of Atlanta. There was a judgment for plaintiff, and defendant brings error. Affirmed.

J. A. Anderson and Fulton Colville, for plaintiff in error. Glenn & Maddox, for defendant in error.

PER CURIAM. Judgment affirmed.

(38 Ga. 312)

# McGRATH et al. v. CITY & SUBURBAN RY. CO.

(Supreme Court of Georgia. Jan. 8, 1894.)

## STREET RAILWAYS—COLLISION WITH WAGON.

The evidence showing that, in approaching the point at which the injury occurred, the driver of the wagon was engaged in the violation of a city ordinance by driving at a prohibited speed, and the circumstances being such as that, if this violation had not occurred, the negligence of the defendant would not have produced the injury if ordinary diligence had been observed by the driver, there was no error in granting a nonsuit.

(Syllabus by the Court.)

Error from city court of Savannah; A. H. MacDonell, Judge.

Actions by Julian McGrath and by one Gardner against the City & Suburban Railway Company. The cases were consolidated, and from a judgment of nonsuit plaintiffs bring error. Affirmed.

The following is the official report:

Mrs. McGrath and Gardner sued the railway company, the action of Mrs. McGrath being for injuries to personalty, and that of Gardner for personal injuries; Gardner being a teamster in her employment, and the injury causing the damage being by a collision between a car of defendant and a team driven by Gardner. By consent, the two cases were tried together. After the introduction of the evidence for plaintiffs, there was a motion for a nonsuit, which was granted, and to this ruling plaintiffs except. Gardner testified: He was driving down Jefferson street in a trot, pretty fast, but slow enough to stop if he heard the bell. Was driving a team for plaintiff. Turned the corner in a trot, and, as soon as he did so, defendant's car struck the left front wheel of the wagon, throwing him off, and injuring him as described, and hurting the

mule so that plaintiff was obliged to kill him. The mule was worth about \$210. There was no way by which he could have avoided the collision, except that, if he had heard the bell, he could have stopped. Was driving at the ordinary speed, ordinary and usual trot. The car was moving from West Broad street east, and he was going from Liberty street from south to north, down Jefferson street, and across diagonally, when the car struck the wagon, and broke it all to pieces. Could not see the car until he got near the corner. The track is nearer the south side of Liberty street than the north side. The wagon was a sand wagon, unloaded. It rattled a good deal. There were no boards in it, no bottom in it. Jefferson street is paved, and a wagon on it makes considerable noise; but you could hear a car ring its bell two or three blocks, if they chose to ring it. The motorman on this car was standing by the door with his hands in his pockets. Witness could not tell who stopped the car, for, when it stopped, it was against the wagon. Jefferson street is very narrow. Three wagons could pass with ease on it. He knew the railroad was on Liberty street, and knew that cars were to be expected on it. Knows that it is a dangerous place, but it is not dangerous if they attend to their business. This is the first time he ever had a close shave with them. He had his mind on his business at the time of the accident. There was other testimony for plaintiffs: That the motorman was standing with his hands in his pockets, and his back against the door; that, if he had been attending to his business, the accident could have been avoided; that the motorman jumped off the car, and the conductor put on the brake; that the wagon was going at the ordinary driving speed,—a slow trot; that the car was going pretty fast; that the team had turned out of Jefferson street when the wagon was struck, Jefferson street being paved with stone, and a wagon makes considerable noise on it; that the view of Liberty street is shut off by a large fence from Jefferson street; that no effort was made by the motorman to stop the car; that it was going very fast; that it stopped right in its place when it collided with the wagon; that Jefferson street is a narrow one, the narrowest in that neighborhood; and that no gong or bell was sounded. The motion for nonsuit was on the ground that, at the time of the accident, Gardner was in direct violation of a section of the Code of Savannah, to the effect that it should not be lawful for any one driving a coach or other carriage to proceed faster than a slow trot, nor for any one driving a loaded vehicle, used to transport any article of merchandise, to proceed in a pace beyond a walk, but all unloaded carts, drays, or wagons might be driven in a moderate trot in all wide streets; provided, however, that the drivers thereon should not be allowed to turn corners, or proceed

through narrow streets or on wharves, in any other manner than a walk, and providing a penalty for violation of this section.

Garrard, Meldrim & Newman, for plaintiffs in error. Saussy & Saussy, for defendant in error

PER CURIAM. Judgment affirmed.

(83 Ga. 319)

**GEORGIA RAILROAD & BANKING CO. v. BURKE.**

(Supreme Court of Georgia. Jan. 27, 1894.)

**RAILROAD COMPANIES—KILLING STOCK.**

The failure of the employes of a railroad company to check the speed of a train and to blow the whistle, in approaching a crossing, will not render the company liable for damages in consequence of the killing of a colt, when the colt was not on the railroad track at the time of such failure, but subsequently attempted to cross the track at a point 300 yards below the crossing, and in so doing ran against the engine, and was thus killed by its own act.

(Syllabus by the Court.)

Error from superior court, Tallahassee county; H. C. Roney, Judge.

Action by John Burke against the Georgia Railroad & Banking Company for damages to personal property. Judgment for plaintiff, and defendant brings error. Reversed.

Jos. B. Cumming and M. P. Reese, for plaintiff in error. H. M. Holden, for defendant in error.

PER CURIAM. Judgment reversed.

(83 Ga. 323)

**RIVES et al. v. JORDAN.**

(Supreme Court of Georgia. Jan. 27, 1894.)

**PRINCIPAL AND AGENT—EVIDENCE OF AGENT.**

1. The evidence showing that the contract sued on was made with the plaintiff by a special agent of defendants' testator, in the lifetime of the latter, and under express authority from him, and that the services of the plaintiff were rendered under that contract, there was no error in refusing to admit evidence tending to prove that another person, at or about the time the contract was made, was the general agent of the testator, and had charge of all his business; this evidence being offered to disprove the fact of special agency,—a fact to which it was irrelevant.

2. The evidence warranted the verdict, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Hancock county; Hamilton McWhorter, Judge.

Action by J. T. Jordan against George S. Rives and others, as executors of George S. Rives, deceased, for services rendered. Judgment for plaintiff, and defendants bring error. Affirmed.

The following is the official report:

Jordan sued George S. Rives et al. as executors of George S. Rives, deceased, for \$300 and interest, alleged to be due as a fee for services rendered as attorney at law, under a contract made with the deceased,

when in life, to represent him and his interests in a suit pending in Hancock superior court, brought by Lewis, ordinary, for the use of the county, against G. R. Brown as principal, and George S. Rives et al. as securities, on the bond of said Brown as county treasurer, which suit was for \$16,000. At the trial the plaintiff introduced the original demurrer in the suit mentioned, filed by him as attorney for George S. Rives, one of the defendants, at the April term, 1889, of the superior court, and the record of said court, showing that the case named was tried in 1889, and was dismissed on demurrer. The present action was brought in the county court. Frank L. Little, the judge thereof, testified that it was tried in that court in 1892, in which trial David L. Rives, now deceased, swore for the plaintiff that at the time or soon after the filing of the declaration in the superior court in the case of Reese, ordinary, for use, v. George S. Rives et al., which was a suit on the bond of George R. Brown, county treasurer, George S. Rives, deceased, heard that the suit was brought, or was about to be brought, against him and the other securities on the treasurer's bond, and had a conversation with David L. Rives about it, in which he told him to go and see Jordan, and tell him, for God's sake, not to let them ruin him (referring to the pending suit on the bond); and David L. went to see Jordan, under this request and authority, and employed him to represent his father, George S. Rives, in said suit, for \$300. David L. further swore that he communicated to his father the result of the suit on the bond after it terminated, and his father expressed himself satisfied therewith. Witness has frequently refreshed his recollection about D. L. Rives' testimony, because he was shot the day after the testimony was given, and died in a few days, and plaintiff requested witness to keep the testimony in mind. The suit on the bond was a long one, and Jordan's service therein was valuable, and reasonably worth \$300. Other lawyers represented the other defendants. George S. Rives was in bad health for a long time before his death, and his son George S. lived with him, while David L. did not. The trial of the suit on the bond was begun one afternoon, and was not concluded until the next day. The trial occupied the greater portion of a day. The plaintiff put in all of his evidence, and the defendants a subsequent bond, and the court adjourned until the next morning, when the case was disposed of on motion. Jordan represented George S. Rives. The interest of the clients of witness, Harrison and Reynolds, was somewhat antagonistic to that of Rives. Witness strove for them to maintain Rives' liability on the bond, so that he would have to share, in the event of ultimate defeat, the loss with his co-securities. George S. Rives, executor, testified: "About the time of the beginning of

the suit on the bond, I received from Jordan a letter, which is now lost, and which I have made diligent search for, and been unable to find, in which he stated that David L. Rives had had a conversation with him about representing my father in said suit; that he knew I represented my father in business, looked after his financial affairs, etc.; and that he wanted to see me about it. I replied to that letter by going to see Jordan. I asked him how much he would charge to represent my father in the case. He said \$300. I told him that was more than we were willing to pay. He declined to reduce the figure, and I left his office, declining to contract with him. I went at once, and employed R. H. Lewis, and paid him. Know that Jordan appeared in the case. Was in the court at the time, but had no idea he represented my father. Did not know whom he represented." P. F. Tye testified: "I was in Jordan's office when D. L. Rives came to him, and said, 'My father told me to see you about representing him in the case against him on G. W. Brown's bond.' They spoke about the amount of fees. D. L. Rives said: 'Is that your idea? Is that the best you can do?' (referring to fees). Before they separated, Rives said, 'You had better write to my brother George about the matter.' Jordan replied, 'Yes, I want to see George about it.' I saw Jordan some weeks after, and asked him if he had seen George. He said: 'Yes, but we could not agree about fees. George said I charged him too much' (this was before the trial of the case of Reese, Ordinary, v. Rives et al.), and said D. L. Rives had employed him, for his father, and agreed to pay him \$300." R. H. Lewis, attorney at law, testified: "Before the return of the case testified about, I was employed by George S. Rives to represent his father therein. He gave me the writ that had been served on his father. I was connected with the case until it was finally determined. Jordan appeared in the case. Didn't know whom he represented, or that he had been spoken to at all when Rives saw me. Hunt & Harley, attorneys, also appeared in the case. The defense made for all the defendants was the same. Hunt and I struck the jury. Jordan did what talking was done. I did not say a word. My recollection is that the trial consumed but a very short time. Certain documentary evidence was offered by plaintiff, and objected to by defendants. Objection was sustained, and case broke down. Jordan made the objection of defendants. Rives made a special contract for services with me, and paid me all I charged." The jury found for the plaintiff. The defendants moved for a new trial on the grounds that the verdict was contrary to law and evidence, and that the court erred in refusing to allow George S. Rives, one of the defendants, to testify that he is the general agent of his deceased testator, and that he was in charge of all the business of every kind of said deceased, and in refusing to al

low Frank L. Little to answer the question, "Do you not know that George S. Rives was at that time the general agent of George S. Rives, deceased, and attended to all his business?" Defendants contend that this question was competent, as illustrating the issue whether David L. Rives was such an agent at the time as would justify the plaintiff in acting on this statement, and also in aiding the jury to settle the question of agency. The motion was overruled, and defendants excepted.

Roberts & Pottle, for plaintiffs in error.  
S. Reese, for defendant in error.

PER CURIAM. Judgment affirmed.

(93 Ga. 817)

**MATTHEWS v. BATES et al.**

(Supreme Court of Georgia. Jan. 27, 1894.)

CONTINUANCE IN CIVIL CASE—ABSENCE OF PARTY—CONFLICTING AFFIDAVITS—SUIT ON NOTE—TRIAL—CALLING CASE OUT OF ORDER.

1. The discretion of the court in denying a continuance will not be overruled, the motion therefor being based on the ground that the party was providentially absent, on account of the sickness of his wife; and the only proof of the providential cause being the affidavit of a physician, made five days before, in which the opinion was expressed that the husband could not safely leave her more than five or six hours at a time during the next week without danger to her; and it appearing by a counter showing that two or three days after the affidavit was made the husband had gone on business to a city in an adjoining county, about eight miles from his home, and that his home was not exceeding ten miles from the place where the court was sitting.

2. The action being upon an unconditional promissory note, to which no defense was filed, except a sworn plea of the general issue, it was within the discretion of the court to call the case for trial out of its regular order on the docket; and there was no abuse of discretion in so doing, nor was there any error in directing a verdict for the plaintiff.

(Syllabus by the Court.)

Error from superior court, Madison county; George F. Gober, Judge.

Action by Bates, Kingsberry & Co. against J. H. Matthews on a promissory note. A verdict was directed in favor of plaintiffs, and defendant brings error. Affirmed.

D. W. Meadow and Berry T. Moseley, for plaintiff in error. W. H. Simpkins and H. C. Tuck, for defendants in error.

PER CURIAM. Judgment affirmed.

(93 Ga. 319)

**MATTHEWS v. BATES et al.**

(Supreme Court of Georgia. Jan. 27, 1894.)

ACTION ON NOTE—PLEADING AND PROOF.

1. The action being upon a promissory note, which was the only evidence introduced for the plaintiff, and there being no plea or non est factum, there was no error in refusing to allow

counsel for defendant to introduce evidence tending to show the note was in fact signed by another person, having the same name as the defendant.

2. As to the other questions made by the motion for a new trial, this case is controlled by *Matthews v. Bates* (just decided) 20 S. E. by *Matthews v. Bates* (just decided) ubi supra.

(Syllabus by the Court.)

Error from superior court, Madison county; George F. Gober, Judge.

Action by Edwin Bates & Co. against J. H. Matthews on a promissory note. Judgment for plaintiffs. From an order denying his motion for a new trial, defendant brings error. Affirmed.

D. W. Meadow and Berry T. Moseley, for plaintiff in error. W. H. Simpkins and H. C. Tuck, for defendants in error.

PER CURIAM. Judgment affirmed.

(93 Ga. 314)

**DODD et al. v. SOLOMONS et al.**

(Supreme Court of Georgia. Jan. 27, 1894.)

RECEIVERS—APPOINTMENT—RESTRAINING ENFORCEMENT OF JUDGMENT.

The petition by unsecured creditors for an injunction and the appointment of a receiver showing on its face that besides the judgment sought to be enforced by levy "there are other judgments" against the debtor, and that "petitioners are informed and believe that there are mortgages on the stock \* \* \* for large amounts in favor of persons to petitioners unknown," and the judgment on which the levy is founded being for the sum of \$1,000 besides interest and costs, and the value of the stock of drugs levied upon being, according to the evidence, not exceeding \$1,500, and the petition not alleging anything against the validity or bona fides of any of the judgments or mortgages to which it refers, there was no cause for enjoining a sale by the sheriff under the levy, nor for requiring him to turn over the stock of drugs to a receiver.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Petition by Solomons & Co. and others, unsecured creditors of one Nottingham, an insolvent trader, for an injunction restraining the sheriff from selling Nottingham's effects under a levy on execution issued by W. J. Dodd. On an order that the injunction issue, and that the property be turned over to a temporary receiver, Dodd and the sheriff bring error. Reversed.

The following is the official report:

On November 22, 1893, a petition for injunction and receiver was brought against Nottingham, an insolvent trader, by three unsecured creditors holding claims amounting to \$449.57. One of these held four notes of Nottingham, three of which, amounting to \$281.27, were not due at that date. About three hours before the presentation of the petition and the grant of a rule nisi and temporary restraining order and the appointment of a temporary receiver, the sheriff of the city court of Savannah levied on Notting-

ham's stock of goods under an execution issued from that court on November 18th, for \$1,800, besides interest and costs, in favor of Dodd. The evidence shows that the stock of goods was not worth over \$1,500, and could not be made to yield that sum except under the most advantageous circumstances; and that the outstanding accounts on the books of Nottingham did not amount to more than \$200, including bills good and bills uncertain as to their collection. By amendment to their petition, plaintiffs allege that when the temporary receiver went to take possession the sheriff of the city court declined to deliver the same; that Dodd knew the petition had been prepared, and that one of the plaintiffs' attorneys was on his way to present it to the judge of the superior court; that he caused the levy to be made for the purpose of hindering and delaying plaintiffs and other unsecured creditors of Nottingham from realizing on their claims, and to place obstacles in the way of the receiver, whom he knew was about to be appointed; that there are mortgages on Nottingham's stock for large amounts in favor of persons unknown, whom plaintiffs ask to be made parties defendant when known; that if the stock of goods is sold at sheriff's sale it would not bring one-fourth of its value; that it is of such a nature that it could be sold to much better advantage at retail; that if the stock is sold by the sheriff, and the notes and accounts remain uncollected until the sale, it would cause a total loss to plaintiffs and other unsecured creditors, to prevent which it is necessary that Nottingham's assets should be administered in a court of equity. Plaintiffs pray that the sheriff be enjoined from proceeding with the execution, and be directed to deliver the property levied upon to the receiver; that he and Dodd be made parties defendant, and be enjoined from enforcing the judgment by levy and sale of the goods or of any other part of the estate and assets of Nottingham, etc. Dodd answered that on November 22d he learned that plaintiffs were about to apply for a receiver under a creditors' bill, and he offered to join with them for that purpose, but was refused by one of their solicitors, whereupon he directed the sheriff to levy his execution, and was actuated only by the desire to guard his interests and protect them from the expenses attendant upon a receivership. He neither intended nor desired to hinder or defeat any creditor of Nottingham. Besides respondent's judgment there are lien debts of Nottingham, to wit, a mortgage to Marsteller for \$384, and to secure indorsements on \$425.33, dated November 11, 1893, and a mortgage to Crosland to secure indorsements of \$520, dated November 4, 1893, and a mortgage to Hall & Ruckert of \$400, dated November 13, 1893; each of which mortgages was duly recorded prior to the appointment of the temporary

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receiver. Nottingham has filed his application for homestead exemption, in which he asks that \$992.63 of the assets levied upon be subjected to his homestead right. The assets, if sold by the receiver, will bring but little, if any, more than if sold by the sheriff under respondent's levy, and under no circumstances could they be made to yield enough to pay the lien indebtedness. Plaintiffs could derive no benefit by the appointment of a receiver and the grant of the injunction, but respondent and other secured creditors will be damaged in heavy costs and in delay of settlement of their accounts.

At the hearing one of the plaintiffs made an affidavit that on the day when the petition for the appointment of a receiver was presented Dodd called on deponent, who stated to him his intention to file the petition, and Dodd approved of this course, and said it was the right thing to do, and that he would himself be willing to join in the application, but there was no necessity for his so doing, and therefore he would not join; whereupon deponent refrained from further pressing Dodd to join in the proceeding, and he at no time offered to join therein, nor did deponent at any time refuse to permit him to do so. The deputy clerk of the superior court made affidavit that the mortgage to Crosland was not filed in the clerk's office until November 24, and not recorded until December 24, 1893; that it was dated November 24th, and was the only mortgage on record in that office from Nottingham to Crosland. The attorney of Hall & Ruckert made affidavit that the mortgage of November 13, 1893, made by Nottingham to Hall & Ruckert, was given to secure advances in goods to be shipped to the amount of \$400; that the negotiations by which the mortgage was executed were conducted for Hall & Ruckert by Marsteller, their agent; that when an order was sent to them for part of the \$400 worth of goods, they refused it, and declined to accept the mortgage; and that on November 29th deponent transmitted the mortgage to them, with the request that they cancel it because of the above facts, and is expecting it to be returned canceled. The court appointed a receiver for all the property and assets of Nottingham, and ordered the sheriff of the city court to deliver the stock of goods to said receiver, who was ordered to report whether the stock could be more profitably sold at public or private sale, by retail or in lots, and to collect all the outstanding debts due Nottingham, and to institute suit upon those that should be sued. The injunction was granted as prayed for. Dodd and the sheriff excepted.

McAlpin & La Roche, for plaintiffs in error.  
Harden West & McLaws, for defendants in error.

PER CURIAM. Judgment reversed.

(93 Ga. 322)

**WOLFE v. HINES et al.**

(Supreme Court of Georgia. Jan. 27, 1894.)

**DISABILITY OF JUDGE—TESTAMENTARY POWER OF SALE—EXECUTION—SUFFICIENCY OF DEED—BONA FIDE PURCHASER—NOTICE OF FRAUD.**

1. Under the facts set out in the bill of exceptions, the presiding judge was under no disability to preside in the case.

2. The terms of a will made in 1855, conferring a power of sale, being in this language: "I will that all my just debts be paid, and for this purpose I invest my executors with power, in their discretion, to sell such portion of my estate, real or personal, as may be deemed by them necessary for this purpose, either at public or private sale, as may be best for the interest of my estate,"—and one of the executors having renounced and failed to qualify, the other, after qualification, could exercise the power alone. A conveyance of land by the executor, made in 1862, reciting the power, and "that it is for the interest of the estate" \* \* \* to sell the property hereinafter described, in order to pay the debts of the same," passed title to the purchaser as against one claiming under the will as a general devisee of a contingent remainder.

3. In order for the purchaser to be affected by a fraudulent exercise of the power on the part of the executor, either participation in the fraud or notice of it by the purchaser would have to appear.

4. The evidence offered by the plaintiff, and excluded by the court, even if admissible, does not affirmatively appear to this court as material, the same not going far enough to affect the purchaser with notice, and no intention to offer additional evidence as to notice being announced.

5. Treating the excluded evidence as admitted, a proper legal valuation of all the facts would necessarily result in the conclusion that, by reason of the sale and conveyance by the executrix, the plaintiff's right in remainder was cut off, and hence there was no error in directing a verdict for defendants.

(Syllabus by the Court.)

Error from superior court, Bibb county; C. L. Bartlett, Judge.

Action in ejectment by Mrs. Estelle Wolfe against R. K. Hines and others. A verdict was directed for defendants, and plaintiff brings error. Affirmed.

The following is the official report:

Mrs. Wolfe sued Hines, Mrs. Hines, and Hines, trustee for Mrs. Hines and her children, in ejectment for the recovery of certain land. The action was brought December 31, 1888. The court directed a verdict for defendants, and, plaintiff's motion for a new trial being overruled, she excepted. The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also, because the presiding judge, Judge Bartlett, erred in ruling himself qualified to try the case, over the objection of plaintiff's counsel, because of the following facts: Plaintiff's counsel stated that the law firm of Dessau & Bartlett, of which Judge Bartlett had been a member, were counsel of defendants in the cases of Mrs. Wolfe v. Johnson et al., Mrs. Wolfe v. Johnson et al., Mrs. Wolfe v. Johnson and others, and Mrs. Wolfe v. Young et al., being actions for ejectment in favor of plaintiff in the present suit now pending,

and the property sued for being part of the same estate, and involving the construction of the same will, to wit, the will of Robert Freeman, as involved in the case at bar. Plaintiff urged this disqualification before the case was begun, and the judge overruled the objection. In a note to this ground, the judge below says: Before the judge decided to try the case, Mr. Dessau was sent for, and stated that Dessau & Bartlett had no connection with the case, had no interest in it, and had never had, nor been consulted about it, and that he did not know that any such case was pending; that this case was in no way connected with the cases defended by Dessau & Bartlett, and no issue involved in this case was involved in those cases. No question was made by the defense in the cases defended by him as to the powers of the executor, or the construction of the will of Robert Freeman. He also stated that Dessau & Bartlett had no interest in or connection with this case, directly or remotely, and never had. The judge stated, as a fact, that he had never had any connection with or knowledge of this case, and did not know such a case was pending until he saw it on the docket; that it was true that Dessau & Bartlett had defended certain cases for lands in suits brought by Mrs. Wolfe, but those cases had no connection with this, and no similarity, except that the plaintiff was the same, the defense being entirely different, and in no way depended on, and would not be affected by, the result in this. Plaintiff's counsel did not insist that this and the other cases were connected, or that Dessau & Bartlett ever had any connection with this case, and, when the case was set for trial, stated, when the question was asked, that the judge was not disqualified; that the case had no such connection with the other cases as would disqualify him; and that the defense to the cases defended by Dessau & Bartlett was entirely different from that set up in this. These facts were not denied by plaintiff's counsel, but admitted. "I desire to say that, if I had ever had the least connection with this case, or had the interest of my former clients been in the most remote degree affected by the result, I would have declined to preside in it. The dockets of the court are full of cases in which I am disqualified, and I find it exceedingly difficult to procure the services of other judges to dispose of the disqualified business, which the law makes it my imperative duty to have tried, and to refuse to preside in any case, to gratify the bare whim of counsel, would result in a denial of justice to the litigants in the court." Also, because the court erred in admitting in evidence, over plaintiff's objection, a deed from Mrs. Freeman, as executrix, to Anderson, dated June 12, 1862, upon the ground that the power of sale under the will of Robert Freeman was a power reposed in the joint discretion of the widow and Comer, who were joint executors; that the power was to

be construed according to the law in force in 1865, the date of the will; that such power of sale under the will, without order of the court, could not be exercised singly by Mrs. Freeman, who alone qualified as executrix; that one executor could not, under the will, make a deed without order of court, and that no such order was shown; further, that plaintiff, not being a party to the deed or claiming under it, is not bound by any recitals of fact therein, and that the recitals of the deed as to the existence of debt are not binding on plaintiff, or evidence of the existence of such debts, against plaintiff; also, that the deed upon its face did not show that Mrs. Freeman, executrix, had power to make the sale for the purpose therein expressed, the recital not following the power created in the first item of the will, and it not appearing from such recitals that she sold the property for the sole purpose of paying debts of the testator, nor such debts as are contemplated by the third item of the will, nor that it was necessary to sell the property or so much of it for the purpose of paying said debts, but only that the sale was deemed to be for the interest of the estate in order to pay the debts of the estate; that no debts were shown to have existed at the time the deed was made, and the deed was inadmissible until the indebtedness was shown; that the burden was on defendants to show this; and that the length of time that had elapsed raised a presumption that the debts of the testator had all been paid, if any ever existed; and on the further ground that the deed was signed by Mrs. Freeman individually, and not as executrix. When the deed was offered, plaintiff had already shown that Comer had renounced as executor, and never qualified. The will of Robert Freeman was dated October 5, 1855, and nominated his friend Comer as executor and his beloved wife as executrix. The third item provided that all his just debts be paid, and for this purpose invested his executors with power, in their discretion, to sell such portions of his estate, real or personal, as might be deemed by them necessary for this purpose, either at public or private sale, as might be best for the interest of the estate. The will further provided that all his estate, except such portion as might be sold for the payment of his debts, he kept together and managed by his executors, for the support of his family and education of his children during the life and widowhood of his wife, and that, if his wife should again marry, then his estate should be equally divided between his wife and children, but, should she remain in widowhood, then, at her death, the estate to be equally divided among the children, children of deceased children to stand in the place of the deceased parent; that, in the event distribution should take place during the minority of any of the children, he appointed his brother to act as testamentary guardian of the property of such minors; that the property by the will given to the children was in

trust for their sole use during their lives, with remainder to their children, etc., his brother being appointed trustee to hold the legal title during the estate for life and the preservation of the remainder; that, if his wife should be enceinte at the time of his death, the after-born child was to be entitled as if born before his death; and that the property given to his wife on the event of her marriage was for her sole and separate use in life, and to be disposed of at her death in such manner as she might direct. The deed from Mrs. Freeman to Anderson was dated June 12, 1862. It was signed, "Harriet B. Freeman," but recited that it was between Mrs. Freeman, as executrix of Robert Freeman, and Anderson. It further recited that Freeman, by his last will, duly proved and recorded, "did fully authorize and empower his executors therein named, in their discretion, to sell any part of his estate, real or personal, at public or private sale, for the purpose of paying his debts," and appointed Mrs. Freeman and Comer his executors; and Comer having disclaimed the trust, and she having alone qualified and entered upon the execution of the will, "and, in the exercise of the discretion in her reposed, the party aforesaid of the first part having determined that it is for the interest of the estate of the said Robert Freeman to sell the property hereinafter described, in order to pay the debts of the same: Now, therefore," etc. Because the court admitted in evidence, over the objection of plaintiff, the deed from the administrator of B. O. Anderson, Jr., deceased, to Hines, trustee, dated April 6, 1890, upon the ground that the deed upon its face purported to be an administrator's deed, and there was no authority shown for the administrator to make the deed. It appears from the evidence that this deed was from J. M. Anderson, as administratrix, for B. O. Anderson, Jr., to Hines, trustee. It contained a recital that the ordinary had authorized the administratrix to make the sale; that legal notice had been given; the property sold according to law, etc. It further appeared that Hines went into possession immediately after the date of the deed, and has occupied the property ever since, fencing it in, and improving it, and his possession had been open, uninterrupted, and adverse. Because the court erred in refusing to admit evidence of Benson, offered by plaintiff, as follows: "Q. From your knowledge and acquaintance of the estate, was it indebted to any considerable extent? A. No, sir,"—the court having refused to receive the same, on the ground that it was a matter of opinion of the witness, the witness having previously testified several times, when asked what the indebtedness of Robert Freeman was, that it did not know. Error in ruling out the following testimony of Benson, which had been introduced by plaintiff: "Q. What was your familiarity with the estate in 1862? A. I was familiar with the place there. I went there a

good deal. Q. Did you know of the existence of any debts? A. None at all. Q. What was your acquaintance with the estate from 1856 to 1862? A. I knew nearly as much—I didn't know his private business, but I knew mighty near as well as our own. My father transacted a good deal of business with him. Q. Did you know at that time of his being indebted? A. I never heard of it." The court ruled this testimony out, upon the ground that it was not competent to prove there were any debts by the opinion of the witness or by hearsay. Error in sustaining defendants' objection to the following question, asked Benson: "Do you know the amount and value of any property sold between 1856 and 1862?" Defendants objected to this testimony, on the ground that it was irrelevant and improper. Plaintiff contends that the inquiry was relevant, because the amount and value of the property sold between 1856 and 1862, in connection with proof that was offered of the condition and value of the estate in 1856, and of the amount of indebtedness in 1856, tended to show that there were no debts existing in 1862, at the date of the sale to George W. Anderson, and that the question of the existence of the debts of the estate at the date of the said sale was relevant and proper. Error in sustaining defendants' objection to the following testimony of Benson, offered by plaintiff, and ruling out the same as irrelevant and improper: "What amount of land and personal property belonged to Robert Freeman in 1856?" The answer to this question is not given in the motion. Plaintiff contends that the inquiry was relevant, because the amount and value of the property belonging to Freeman's estate in 1856, in connection with proof that was offered of the amount of debts in 1856, and the amount of property sold between 1856 and 1862, tended to show whether or not any debts of Freeman remained unpaid in 1862, at the time of the sale to Anderson, and that the question of the existence of debts in 1862 was one of the pertinent and material questions in the case. Error in sustaining defendants' objections to the testimony of Benson that Mrs. Freeman was very extravagant, and ruling out the same as irrelevant and improper; plaintiff contending that this testimony was relevant, as tending to support plaintiff's theory that the debts owing by Mrs. Freeman in 1862, if any, were created by her after her husband's death, in 1856, and not embraced within the class of debts contemplated by Freeman's will, and was therefore material. Error in sustaining defendants' objection to testimony of Benson that, when Freeman died, his estate was in good condition and ruling out the same as irrelevant and improper. Plaintiff contends that the inquiry was relevant for reasons above stated. Because the court erred in ruling as follows: Plaintiff offered an inventory and appraisal of the property of Freeman, as made by duly-appointed appraisers, and returned to the ordinary's

office March 20, 1856, containing an enumeration of the items and value of the property set out in the motion, amounting to \$57,704.21. The court held that the evidence was irrelevant, and failed to show that there were no debts in 1862; and, further, that it was not competent to show the absence of debts in 1862, unless there was proof that George W. Anderson, and those claiming under him, had notice that there were no debts, and that sale by the executrix was for said reason unauthorized and void. Plaintiff contends that the testimony was relevant, as tending to show, in connection with testimony offered as shown in the preceding grounds, that no debts of Freeman's could remain unpaid in 1862; and, further, that the existence of debts of Freeman remaining unpaid in 1862 was a material issue in the case, and, unless there were such debts, the sale by the executrix was unauthorized, and Anderson got no title. Because the court refused to allow plaintiff to show by Benson how much of the property of Freeman's estate was turned into money by his executrix prior to 1862. Plaintiff contends that this testimony, in connection with the other testimony offered, tended to show that there were no debts of Freeman remaining unpaid in 1862, and that circumstances were such as to put any purchaser on inquiry. Error in ruling as follows: Plaintiff offered the annual returns of Mrs. Freeman, as executrix of Freeman, made to the ordinary in 1864, and covering the period between the sale to Anderson and the date of said return; the evidence offered being returns appearing in the original books of the court of ordinary. The testimony was offered to show that such debts as were paid by the executrix with the money received from the sale to Anderson were debts contracted by her after the death of Freeman, and therefore not such as were contemplated by Freeman's will, and to show that there were no debts of Freeman remaining unpaid at the time of said sale, and that the sale was not made to pay debts of the last-named description. Defendants objected to this testimony, on the ground that the original book was not admissible, but that the law made certified copies, and not original books, admissible; and that the testimony was improper, unless plaintiff brought home to Anderson, and those claiming under him, knowledge that there were no debts of Freeman; and, further, that the returns did not show that no debts of Freeman existed, but only showed what use was made of the money. The court sustained the objections. The returns in question were not set out in the motion. Error in excluding all the testimony of Benson upon the subject of the debts of Freeman, upon objection that it was irrelevant, unless Anderson had notice there were no debts, and because hearsay or opinion. This testimony is set out in full in the motion. Plaintiff contends that this testimony was relevant and material, for reasons above stated. Because the court erred



in directing a verdict for defendants, the court stating it was of the opinion there was no issue of fact on the controlling point of the case.

Steed & Wimberly, F. A. Arnold, and Alexander & Turnbull, for plaintiff in error. Lanier, Anderson & Anderson, and R. K. Hines, for defendants in error.

**PER CURIAM.** Judgment affirmed.

(93 Ga. 324)

# **BAXTER v. WOLFF.**

(Supreme Court of Georgia. Jan. 27, 1894.)

**CONSTRUCTION OF WILL — DEVISE TO TRUSTEE — LEGAL TITLE TO REMAINDER — MORTGAGE ON PROPERTY — EFFECT ON UNBORN REMAINDER-MAN—WIDOW'S RIGHTS UNDER WILL.**

1. A devise to the testator's children for life, with contingent remainder to their children, a trustee being appointed "to hold the legal title during the estate for life, and for the preservation of the remainder," does not clothe the trustee with legal title to the remainder, but only with such title to the particular estate. The remainder created is a legal, not an equitable, estate.

2. Where, upon a petition of the trustee, reciting that it was brought in behalf of petitioner as trustee of the life tenants, the judge of the superior court granted an order authorizing the trustee to incumber the land by mortgage for the purpose of raising money to pay off indebtedness incurred by the trustee for the support of the tenants for life, a mortgage executed in pursuance of such order did not bind the interest in the land of an unborn contingent remainder-man, nor did a sale under the mortgage defeat or in any manner affect his title.

3. Authority given by will to the widow, as executrix, to keep the estate together for the support and maintenance of the testator's family during her widowhood, gave her no power to continue this arrangement after her intermarriage with another husband, the will directing that the estate be divided at the termination of her widowhood. Moreover, her letters testamentary abated upon her marriage, and she was no longer executrix.

4. The evidence, taken as a whole, was sufficient to establish title in the plaintiff, as against the defendant, and there was no error in directing a verdict accordingly.

(Syllabus by the Court.)

Error from superior court, Bibb county; R. L. Gamble, Judge.

Action by Estelle Wolff against T. W. Baxter, in ejectment. Judgment for plaintiff, and defendant brings error. Affirmed.

The following is the official report:

Mrs. Estelle Wolff (by a former marriage, Mrs. Freeman) brought her action in ejectment for the recovery of lot No. 8 in the Fourth district of Bibb county, part of the lands known as the "Land of the Robert Freeman Estate," and sometimes as the "Fulton Land," and part of the place known formerly as the "William Scott Mill Place"; and as a sole heir of James Freeman, deceased (her only child by, and the only child of, the former husband, James S. Freeman, deceased), for an undivided interest in said lot. Baxter was the real defendant. After introduction of testimony for plaintiff, de-

fendant introducing no testimony, it was agreed that the court should direct a verdict as he might determine under the testimony submitted, and the court directed a verdict for the plaintiff for one-sixth undivided interest in the lot. To this action of the court, and the refusal of the court to direct a verdict for the defendant, defendant excepted.

There was testimony for plaintiff: Lot No. 8 was in possession of Robert Freeman before his death. He had possession of it in 1855 or 1856, and after his death his widow, Harriet B. Freeman, was in possession of it. He left the following children: Charles, Elinora, James, Rebecca, and Roberta,—of whom the daughters are still living, unmarried, but the sons are dead. After the death of Robert Freeman, Mrs. Freeman remained in possession and control of the property 15 or 20 years. She died 8 or 10 years before the trial, which took place May 19, 1893. Lot No. 8 was not all of the tract, but there was a considerable body of the land,—some 20 lots, all in a body. Mrs. Freeman, who in 1864 married Fulton, was in possession of the body of land. Fulton only lived a year or two, and after that she controlled the land as executrix, witness thought, and farmed on it. There were houses and a gristmill on it. She was living on it when she married Fulton. The particular lot in dispute is a wild lot, but a part of the same body. Mrs. Fulton was the daughter of William Scott, who had two other daughters,—one who married Baxter, and another, Mrs. Hamilton. Scott also had a son named William Byron Scott, who lived across the creek, on the other side, the Freeman land being on "this" side of the creek. Lot No. 8 is on the other side of the creek, about a mile from the old Scott mill, but not more than a half mile from the creek below the mill, in a straight line. It was a part of his plantation. His plantation was on both sides of the creek. It was a part of the Scott place, and was a wood lot. Witness never saw Robert Freeman in possession of this lot, and never saw him on the lot. There was no fence around it, and it never has been fenced, that witness knew of, and has never been cleared or cultivated. The only way he knows it is a part of the Robert Freeman place is because it is included in the Freeman possessions; just knows it from the fact "they" have had possession of it. He does not know that Robert Freeman was in possession of it, but understands he owned it. Was about nine years old when Freeman died, and lived about three-quarters of a mile from the lot. Never saw Freeman cut wood on it, and did not know, about the time Freeman died, that there was such a lot. Did not know the number of it then, but is now familiar with it. Did not know whether Freeman owned the land as his own, or claimed possession of it as executor of William Scott

He saw Mrs. Fulton managing the place, but never saw her do anything with regard to possession of this lot; never saw her cut wood off of it, or have it cut; never had it fenced, and never saw her on the lot. She had no one living on it, and was living in Baltimore. He saw Sanders and Jones getting wood from the lot, and these were the only acts of ownership he had ever seen on that lot by anybody. There were two acres in one corner that were cultivated 15 or 20 years ago by Braswell. This was during Mrs. Freeman's ownership. Some of the other lands were cultivated. Nos. 7, 9, 32, and 46 were cultivated at the time of Freeman's death. There was a sawmill on the place down the creek when Robert Freeman died. When witness first knew the sawmill, Byron Scott was in possession; and after that, Robert Freeman; and after his death his wife was in possession of it. Logs were cut promiscuously about on the land, but he did not know whether any were cut on lot No. 8. Timber was cut before and after the mill was burned, in 1865. Witness did not know anything of the timber being cut; only saw the stumps. Freeman was in possession at his death of the Barfield homestead, on lot No. 8.

It further appeared for plaintiff that her first husband was James S. Freeman, who died September 17, 1886, leaving one child by her; that the child died in August, 1887, leaving no heirs besides plaintiff. Further: There is a small clearing on lot No. 8. Amason is in possession of it as the agent of Baxter, who put him in possession. The little clearing on the lot is known as the "Barfield Settlement," and a house was built on it. As far back as a witness could remember who was 52 years old at the time of the trial, Barfield used to live on the clearing; and, after Barfield, William Scott was in possession of it; and, after Byron Scott was in possession, Mrs. Freeman (that is, Mrs. Fulton) was in possession, and did the renting of it. A short while before Freeman died, about 1855 or 1856, Byron Scott was in possession, and after Robert Freeman's death was in possession, witness thought, attending to the business for his sister Mrs. Freeman, about a year after Robert Freeman died. The witness never saw Byron do anything on the lot, never saw him on the lot, and could not state any act of ownership he did with regard to the lot; all he knew being that he had charge of the interest, whatever it was, after Freeman died, representing Mrs. Freeman. He had hands cutting on it after he was in possession of it, and witness saw his negroes on it. Barfield owned 20 acres of it, in the northeast corner, and the balance was wild, without improvements. The timber was cut south of where the house was. Since witness knew the lot and the Barfield clearing on it, several people have lived on it,—among them, Bartlett, who was the last man Mrs.

Freeman rented to,—but witness did not know from whom the tenants got possession. Bartlett rented on the Freeman place about 11 years, moving there in 1878, and subrenting from Heard when he first went there, after that from Benson, and after that from Mrs. Fulton. Those from whom he subrented were tenants of Mrs. Fulton, who was in possession of the whole plantation, lot No. 8 being nearly in the center of it. The land included the mill, and as far back as Bartlett, who was 44 years old, could remember, it was called the "Freeman Land." When he first knew it, Mrs. Freeman (afterwards Mrs. Fulton) was in possession of it, and during and after the war she was in possession, but he never heard her say how she held it. He never rented lot No. 8 from Mrs. Fulton, but only rented the Barfield settlement on lot No. 8. The lot lay out for several years. Mrs. Freeman rented it out, when it was rented out, simply renting the open part of the cleared land. Bartlett had seen her on the lot at his house, and when she was there she was there to rent him the land. When Herring lived in the house, during the war, he attended to Mrs. Freeman's business.

Plaintiff introduced the will of Robert Freeman, by which Comer was appointed executor, and Mrs. Harriet B. Freeman executrix. By this will it was provided that all testator's estate, except such as might be sold to pay his debts, be kept together, and managed by his executors for the support and maintenance of his family, and education of his children, during the life and widowhood of his wife; that if his wife should marry the estate should be equally divided between her and children, this provision being made for his wife in lieu of dower; that, if she should continue in widowhood, then at her death the estate should be equally divided between the children, share and share alike, and in case of a division, on either of the events above stated, children of deceased children should stand in the place of the deceased parent. The will further provided that, in the event of such distribution during the minority of any of the children, J. O. Freeman should act as their testamentary guardian; that the property given to the children should be in trust for their use, respectively, during life, and at their death, respectively, the remainder to their children,—children of decedents to stand in the place of deceased children; that, should any of the testator's children die without leaving issue at the time of their death, then the legacy to such children should lapse; that J. O. Freeman should be trustee, to hold the legal title during the estate for life, and preservation of the remainder; and that the property given to his wife on the event of her marriage was given for her sole and separate use during her life, to be disposed of at her death in such manner as she might by deed or will direct. The will was probated in 1855, and Mrs. Freeman qualified

as executrix, Comer not qualifying. Plaintiff also introduced a petition to the superior court in October, 1864, addressed to the judge of that court, in which Fulton set up that he had married the widow of Freeman, who at his death left a wife and five children,—among them, James Freeman,—all of whom are minors; that in his will, attached to the petition, Robert Freeman devised his whole estate to his wife and children, but the shares of the children were given to them in trust during their respective lives, for their sole use, and after their respective deaths to their children, share and share alike; that James C. Freeman was appointed testamentary guardian, but declined to accept the trust; that the property was liable to waste; and that the children desired that petitioner should be appointed testamentary guardian and trustee. A guardian ad litem was appointed, and afterwards, in November, 1864, the court appointed Fulton trustee for the property, and guardian for the minor children. Plaintiff also introduced a petition, addressed to the judge of the superior court, entertaining jurisdiction in chancery, of Mrs. Fulton, in which she referred to the will of Freeman, and to the fact that J. C. Freeman had been appointed trustee, declined to accept the trust, and that Fulton was appointed trustee and guardian, and continued to act until his death, in August, 1866. The petition stated that the property continued undivided, and prayed for an order appointing her trustee for the children; stating that there was no occasion for the appointment of a guardian, the property not being divided. Also, an order of the judge of the superior court, showing that in 1866 Mrs. Fulton was appointed trustee for the minor children of Robert Freeman. Also, a petition addressed to the judge of the superior court, entertaining jurisdiction in chancery, making the following averments: The petition was in behalf of petitioner, as trustee for her children Charles and Ellinora, who were 21 years of age, and James, Rebecca, and Roberta, who were minors. That, at the close of the war, petitioner held in her own right, and as trustee, a large number of slaves, since freed, and also upwards of 7,000 acres of land (among them, lot No. 8, with other lands), which were about all the property left the petitioner and children after the close of the war. That they resided there, cultivating a portion of the land, for several years, but, because of the disastrous seasons, made small crops, and were unable to meet expenses. That they were unable to pay off debts contracted for subsistence, some of which were in judgment, partly against petitioner as trustee, and partly against her individually, which had been levied on the lands. That the lands constituted one large body, and a valuable mill site and a saw and grist mill thereon, and were well adapted for carrying on an extensive manufacturing, milling, and agricultural business under a common direc-

tion. That petitioner could not sell a part of them without making a great sacrifice, and was advised that it would be to the advantage of herself and children if she could manage to hold them a year or so longer, within which time it was thought probable they would be able to sell the whole body advantageously. That her relative and friend, Baxter, desirous of freeing the land from judgment, and her and her children from debts, had offered to loan them for this purpose \$5,000, provided she would give her note, individually and as such trustee, therefor, and secure the same by a mortgage in his favor on the lands, after being duly authorized to execute the mortgage and note. She prayed for an order authorizing her, as such trustee, to execute the note and mortgage for said purposes, and, as far as the same might be needed, to use balance, if any, in supplying the wants of her family, and on the plantation. If deemed advisable, she prayed for a guardian ad litem to represent the minor children. This petition was signed by Mrs. Fulton and by Ellinora and Charles Freeman; and at chambers, in 1870, a guardian ad litem was appointed, who the same day answered that he had considered the statements in the petition, and believed they were true, and recommended that the prayer therein be granted. And on the same day, at chambers, the judge passed an order reciting that, having examined and considered the petition, it was ordered that the prayer of petitioner be granted,—petitioner signing the note and mortgage as trustee and individually, and using the money, when received, as designated,—and that she report her actings and doings at the next term of the court, and that these proceedings be entered on the minutes. All of which was done. Plaintiff introduced a mortgage given by Mrs. Fulton, as trustee and individually, upon the land, for \$5,000, which was executed in pursuance of the above order. Also, mortgage *fi. fa.* in favor of Baxter against Mrs. Fulton, individually and as trustee for her children, levied on the property in March, 1877, and in September, 1877, sold by the sheriff to Baxter. Baxter was in possession under this sale. Plaintiff also introduced, as an admission, two pleas filed by defendant Baxter in another case pending against him, involving the title to lot 32,—part of this same body of land. In one of these pleas it was alleged that about 1870 he made a loan to Mrs. Fulton, as trustee, under the will of Robert Freeman, of the minor children entitled under the will, and in her own right, to the amount of \$5,000, in pursuance of an order of the judge of the superior court of the county, as chancellor, and, in accordance with said order, took a mortgage upon said lot 32, with other lands; that the proceedings before the chancellor were in good faith; that there was still due on the mortgage debt \$4,500; that the mortgage was duly foreclosed, execution issued thereon, and the property was sold, de-

defendant being the purchaser at the sale, and going into possession of the land then and there. By the other of the pleas it was alleged that defendant claimed the land in controversy by virtue of the mortgage executed in 1870 by Mrs. Fulton; that he is entitled in equity, at least, to the ownership of five-sixths of the property, inasmuch as he advanced \$5,000 to the beneficiaries who claimed to be the owners thereof, for Mrs. Fulton and her five children, all of whom went before the judge, and under his direction and order, the same being at their request, executed the mortgage under which he (Baxter) claimed title.

Dessan & Hodges, Tracy Baxter, W. H. Felton, Jr., and J. L. Hardeman, for plaintiff in error. Steed & Wimberly, Alexander & Turnbull, and F. A. Arnold, for defendant in error.

PER CURIAM. Judgment affirmed.

(33 Ga. 327)

**GUNN v. PETTYGREW et al.**

(Supreme Court of Georgia. Jan. 27, 1894.)

**EXECUTORS AND ADMINISTRATORS — APPLICATION BY WIDOW FOR YEAR'S SUPPORT — BURDEN OF PROOF—EVIDENCE—COMPETENCY OF WITNESS.**

1. Under the evidence act of 1889 a party is not incompetent as a witness by reason of the death of a person whose estate is to be affected by the result of the suit, unless the suit is prosecuted or defended by the personal representative; and the widow is not such in a proceeding in behalf of herself and minor children to obtain a year's support. By the terms "personal representative" the statute embraces only an administrator, executor, or other person entitled to represent the decedent in the ownership or management of his general estate. It follows that one contesting with the widow the title of the decedent to property set apart or sought to be set apart for a year's support is not incompetent as a witness against her, because of her husband's death.

2. According to *Cheney v. Cheney*, 73 Ga. 66, the applicant for a year's support is, upon the trial of an appeal in the superior court from a judgment of the ordinary, entitled to open and conclude, where the contest is with the representative of the estate. But according to *Robson v. Harris*, 7 S. E. 926, 82 Ga. 153, where the contest is with an adverse claimant of the property, the burden of proof is upon the latter, from whence it follows that he is entitled to open and conclude when both parties introduce evidence.

3. As to some of the hay set apart in this case the uncontradicted evidence indicates that it was the property of the caveator, and was never the property of the decedent nor claimed by him.

4. On the trial of objections to a year's support, as provided for by the act of October 9, 1885, where the sole issue is as to title to the property set apart, a verdict finding for the applicant against the caveator a sum of money is contrary to law. The only legal finding in such a case is for or against the applicant on the question of title to the property in controversy.

(Syllabus by the Court.)

Error from superior court, Bibb county; O. L. Bartlett, Judge.

Action by U. M. Gunn against E. E. Pettygrewe and others in the nature of a caveat to the return of certain appraisers. Judgment for defendants, and plaintiff brings error. Reversed.

The following is the official report:

Mrs. Pettygrewe and her children had set apart to them as year's support, out of the property of W. M. Pettygrewe, among other things, 100 bushels of corn, 3 beds of seed cane, 70 bushels of seed potatoes, and 20,000 pounds of hay. Gunn caveated the return of the appraisers as to the corn, seed potatoes, and cane, because those articles were not the property of Pettygrewe, but were his (Gunn's) property; and as to the hay, because it was raised and owned by him (Gunn), as the crop of the then year, and never was either owned or claimed by Pettygrewe. The verdict was in favor of the applicants, and, Gunn's motion for a new trial being overruled, he excepts. His motion contained the general grounds that the verdict was contrary to law, evidence, etc.; also because the court refused to allow his counsel to open and conclude the argument of the case to the jury, but allowed the opening and conclusion to plaintiff's counsel, over the objection of his counsel. Error in charging: "If nothing more appeared than that Pettygrewe borrowed and agreed to return the hay, that would not authorize you to find in favor of defendant." Alleged to be error, because calculated to mislead the jury, and make the impression upon their minds that nothing else did appear throwing light upon the question of delivery. Error in refusing to allow Gunn, as a witness in his own behalf, to answer the following questions: "Who controlled the land upon which the hay in controversy was grown? Was the land upon which this hay was grown ever in the possession or control of Pettygrewe? Who gathered and harvested the hay? Was the hay in controversy ever in the possession or control of Pettygrewe? In whose possession was this hay at the time of Pettygrewe's death? To whom did this hay belong?" Defendant's counsel stated to the court that he expected to show by the answers to these questions that the land upon which the hay was grown was in defendant's control, and had never been in the possession of Pettygrewe; that the hay was gathered and harvested by defendant, and had never been in possession of Pettygrewe, and that it was the property of defendant. The court refused to allow the questions and admit the testimony, upon the ground that Pettygrewe was dead.

L. D. Moore, for plaintiff in error. Jas. A. Thomas, for defendants in error.

PER CURIAM. Judgment reversed.

(93 Ga. 309)

**FISHER et al v. STATE.**

(Supreme Court of Georgia. Jan. 27, 1894.)

**CRIMINAL PROSECUTION—BREAKING INTO RAILWAY CAR — PLEA IN ABATEMENT — COMPETENCY OF GRAND JUROR — SUFFICIENCY OF EVIDENCE — CONDUCT OF TRIAL.**

1. There was no error in sustaining a demurrer to a plea in abatement to an indictment charging the accused with breaking and entering a railroad car of a named railroad company, and stealing therefrom certain property of that company, the plea alleging that one of the grand jurors who found the indictment was an agent of the company, and that, although the name of a natural person not connected with the company appeared as prosecutor on the indictment, the company was the real prosecutor; it also appearing that the accused had had a commitment trial, and had been bound over to answer the charge set forth in the indictment, and thus had warning to challenge the juror before the bill was found. *Lascelles v. State*, 16 S. E. 945, 90 Ga. 347.

2. Where error is assigned upon the court's allowing certain questions to be asked witnesses on the stand, and it does not appear what, if any, objections were made at the trial to the questions, nothing for review by this court is presented.

3. There was no error in refusing to suspend the trial in order to give counsel for the accused time to obtain certain receipts; it not appearing that these receipts were pertinent or material to the issue on trial, and counsel for the accused having announced ready without having them in his possession.

4. The evidence as to the sealing of the car being in general terms that the witness sealed it, without disclosing expressly whether both doors were sealed, or only one, and one door being found sealed when the car reached its destination, and the other not examined, the evidence as to the breaking of the car was incomplete, and for that reason alone the verdict was unwarranted.

(Syllabus by the Court.)

Error from superior court, Morgan county; *W. F. Jenkins, Judge.*

U. C. Fisher and others were convicted of breaking and entering a railway car and stealing goods therefrom, and bring error. Reversed.

Calvin George, J. B. Park, Jr., J. H. Holland, and Harrison & Peeples, for plaintiff in error. H. G. Lewis, Sol. Gen., and Hines, Shubrick & Felder, for the State.

**PER CURIAM.** Judgment reversed.

(93 Ga. 300)

**FOLLENDORE v. THOMAS et al.**

(Supreme Court of Georgia. Jan. 28, 1894.)

**PRIVATE WAY—ESTABLISHMENT BY PRESCRIPTION.**

One claiming a private way by prescription over the land of another cannot, after having obtained a prescriptive right to one track, abandon it, and obtain a prescriptive right to another track, parallel with it, or approximately parallel, for any distance. The law does not contemplate the establishment of a private way over another's ground by prescription, which shifts from one place to another as to any part of the route, but intends that the same ground shall be occupied all the while, and the way kept in repair on that ground.

(Syllabus by the Court.)

Error from superior court, Bibb county; *C. L. Bartlett, Judge.*

Action in the court of ordinary by I. F. Thomas and another against Emily Follendore. From a judgment of the superior court overruling a writ of certiorari by which the case was taken to the superior court by defendant, Follendore, she brings error. Reversed.

The following is the official report:

Seaborn and I. F. Thomas, by their petition to the court of ordinary, asked that Mrs. Follendore be commanded to remove certain obstructions which they alleged she had placed on a private way leading to their land. The ordinary ordered the removal of the obstructions, and Mrs. Follendore took the case by certiorari to the superior court, which certiorari was overruled, to which ruling she excepts. The error alleged in the petition for certiorari was that the ordinary should not have ordered the removal of the obstructions. The evidence introduced for plaintiff was: A private way had been located across the land for more than 7 years, and Frank Thomas and others had used the same uninterruptedly since the time when Thomas acquired the ownership of his place, which was 6 or 8 years ago. The private way had been kept in repair, and was not more than 15 feet wide. Frank Thomas had traveled in the road running parallel to the "one" since he owned the place, there being an old road which had formerly been the road used, and at another place four parallel roads. At one or two places the road was more than 15 feet wide. There was another road which was 25 or 30 feet wide, which he traveled sometimes. The road might have been more than 15 feet wide in some places, but he was not sure, as he had never measured it, but was certain that it was not more than 15 feet at any place. Seaborn Thomas had known the road in dispute for more than 20 years. The private way now claimed to have been obstructed had been used uninterruptedly for more than 7 years. At one point on the road on Mrs. Follendore's place there were four roads leading down the hill for 25 or 30 yards; but only one of them is now in use, and only one had been in use for the past 7 years or longer. He had worked that road; had hauled pine straw to it, and kept it in repair. Said private road was his only road to get into or out from his place, and the road proposed by Mrs. Follendore was impracticable on account of the hills. It would be a great expense on him and others to make a road at the place suggested by Mrs. Follendore, as the hills are so numerous and steep, and a team of mules could not pull an empty wagon up some of the hills. Joseph McGee had known the private way for several years, and it was in moderately fair condition. In one or two places there are turnouts from the road, where the original road had become bad, and in one place, where the road went down the hill, the road

was bad, and four roads went down the hill. The width of the road would not average more than 15 feet, but at some places, on account of turnouts, the road was more than 15 feet. At one place a tree had fallen across the road, and, instead of cutting it out, the parties traveling over the road had driven around it. From the looks of the tree, it had been across the road very long. He had known the road to be used by plaintiffs and others for 12 or 15 years, or longer. Skipper testified that this road had been located across the land for 30 or 40 years; that various changes were made in it from time to time, up to about 10 or 12 years ago. Since then he had not passed over it. One Hunnicutt testified that the average width of the road was not more than 15 feet, but there were turnouts in it from its being bad, but its condition was fair; that it had been open and used by the public for more than 30 years; that the turnouts in the road were within the 15 feet; and that work had been done on it. For the defendant there was evidence: In one place the road was 44 feet wide, a witness having measured it the day before; that at this place there were four roads that had been made because the original road was in bad condition, and three roads had been in use within the past 7 years; that the four roads continued for about 25 yards through the land of Mrs. Follendore, but came together again; that at another place the road was 25 feet wide, a new road having gone to one side of the old road on account of the miry condition of the old road; that this new road was not traveled more than 4 years ago, up to that time the old road having been exclusively used; that the new road ran parallel to the old road a distance of between 30 and 75 yards; and that, after the abandonment of the old road, Thomas Follendore threw brush into it. Defendant testified that she was willing to give petitioners a road in the line of her land, and, where the hills made it necessary, that said road could run through her land, but that it would be impossible to make a road on her land without cutting down or cutting around the hills, and, if they went around the hills, the road would be obliged to go over on another person's land.

Nottingham & Brunson and Gustin, Guerry & Hall, for plaintiff in error. Alex. Prouditt, for defendant in error.

**PER CURIAM.** Judgment reversed.

(93 Ga. 295)

**GORMAN v. McAULIFFE et al.**

(Supreme Court of Georgia. Nov. 27, 1893.)

EQUITY—LACHES.

The plaintiff, claiming as heir at law of her deceased husband, and her right, if any, depending upon the surrender of a deed which her husband had executed to the intestate of the

defendants to defraud the husband's creditors, and this surrender having occurred some years before the death of the husband, her ignorance of the fact affords no legal excuse for her delay to bring suit. She being in privity with her husband, and he having had knowledge of the fact, his knowledge is imputable to her.

(Syllabus by the Court.)

Error from superior court, Richmond county; H. C. Roney, Judge.

Action by Mary Gorman against M. J. McAuliffe, as guardian, and others, to recover possession of a tract of land. Judgment for defendants, and plaintiff brings error. Affirmed.

The following is the official report:

The widow and sole heir of Mark Gorman brought an equitable petition to recover of the heirs of James Gorman certain land situated in Glascock county. The court granted a nonsuit, and afterwards overruled a motion to reinstate the case, and the plaintiff excepted. The following appears from the evidence: In September, 1859, a suit for damages was pending against Mark Gorman, and his brother James proposed that Mark convey the land in question to him, so that it could not be sold in the event of a recovery by the plaintiff in that suit. Mark thereupon made to James a deed to the land, reciting a consideration of \$1,000; but no money was paid. On February 20, 1861, judgment was rendered against Mark Gorman in the suit mentioned for \$124.50, and the execution docket shows an entry that on March 1, 1866, Mark paid \$109. Walden, who was one of the subscribing witnesses to the deed, testified that after Mark paid the judgment off he asked James a good many times to give him back his papers, and James refused, but said he would give them to Maria, Mark's then wife. John Gorman, a brother of Mark and James, testified that Mark owed James \$40 on a debt contracted before the war, and in 1867 or 1868 Mark wanted his deed back, and James refused to give it back unless Mark paid the \$40 and 10 per cent. interest on it. The next year Mark made the payment so exacted, amounting to \$90, and the deed he had made was returned to him. Mark married the plaintiff in February, 1871, and died intestate in the next October. On February 20, 1872, James caused a copy of the deed from Mark to himself to be established before the ordinary on the affidavit of Walden, saying that Mark and Maria were both dead, and he (James) might as well have the place as anybody else. This copy was recorded a few days later in Glascock county. It describes the land as 180 acres in said county, "adjoining lands of Isaac Downs, Elizabeth Kitchens, and others; one hundred acres of the land being the same conveyed by J. P. Usry to Mark Gorman, April 4th, 1857, and eighty being the same conveyed by Calvin Logue to Mark Gorman, July 25th, 1855." Certificates of the clerks of Glascock and Warren

counties are that there is no record, in the office of either, of any conveyance from either Calvin Logue or J. P. Usry or any other grantor to Mark Gorman of land in Glascock, formerly Warren, county. The tax digest showed returns of the 180 acres in 1858 and 1859 by Mark and in 1861 by James Gorman (the digest of 1860 having been lost); for 1866-1871 by Mark, and for 1872 by James. By three witnesses it was shown that Mark settled on the land in 1858, cleared and fenced it, and built houses on it, and lived there until 1867, when he moved to Burke, renting the place to various tenants during the following years, inclusive of 1871, and witnesses paid him rents therefor. Mrs. Clarkson testified that not quite five years after Mark's death Mike Gorman (another brother) told her he thought of suing James for a part of this land; that James was holding it, and he (Mike) wanted to get a share; and that the reason he did not sue him was that Mark's widow knew nothing of it, and he did not want her to know it. Witness told James what Mike had said, and James said the property was not his, and his brothers could take it, and divide it. He said it was his brother's land. Witness did not inform Mark's widow of this. John Gorman testified that James and Mike took possession of all Mark left at his death,—corn, cotton, potatoes, mules, furniture, etc.; and that he never told plaintiff, until about four or five years ago, of the circumstances above related, touching the return of the deed, etc. The plaintiff testified: "My husband told me in his lifetime that he had some land in Glascock county, and intended the next year to improve it. That is what he said. He did not say much about it. After my husband's death, his brother James took possession of all my husband left. I asked Mr. James Gorman about my husband's personal property after his death, and he said it was all used up in his funeral expenses. I asked him after that about my husband's land in Glascock county, and he said he left no land there. I never knew about my husband having bought the land there from Mr. James Gorman until Mr. John Gorman told me about six years ago. I got information my husband had land there. The information was that Mrs. James Gorman was going to get married again, and the land was to be sold. I went to Mrs. James Gorman and told her what brought me. Went from her to Mr. John Gorman, and he told me what he has said here. He said the land was my husband's, and he had paid for it. This was the first knowledge I had of it." The plaintiff brought suit against the defendants for the same cause of action to the August term, 1888, of Glascock superior court, and dismissed that suit at the February term, 1890. The present action was commenced on September 30, 1890.

F. W. Capers and Salem Dutcher, for plaintiff in error. Bryan Cumming, for defendants in error.

PER CURIAM. Judgment affirmed.

(38 Ga. 307)

### STEVENS v. STATE.

(Supreme Court of Georgia. Dec. 18, 1890.)

CRIMINAL LAW—IMPROPER REMARKS OF JUDGE—CONTINUANCE—NEW TRIAL—REMARKS OF BYSTANDERS.

1. The rule of law which forbids a judge to express or intimate his opinion as to the facts of a case, or as to the guilt of the accused, has reference to the expression or intimation of such opinion during the progress of the trial. Code, § 3248. No such expression or intimation of opinion is involved in the use of the word "murder" in the order calling the special term "for the purpose of trying criminal business, and especially to try such as may be indicted for the murder of J. G. Wells."

2. No facts being shown in support of the motion for continuance on the ground of public excitement and want of time to prepare for trial, it does not appear that there was any abuse of discretion in overruling the motion.

3. Where, after a grossly improper remark by a bystander has been made on the arraignment of a prisoner, and in the hearing of persons summoned as jurors, the defendant allows the case to proceed without objection, and without moving to postpone the trial, or in any way invoking the ruling of the court, such improper remark does not furnish cause for a new trial; especially where, as in this case, the presiding judge promptly rebuked the offender, and had him removed from the court room. Improper remarks made by another bystander, but not heard by the court, no attention being called thereto until after the trial, will not require a new trial.

4. Grounds of a motion for a new trial, based on the admission of testimony over objection, will not be considered where it does not appear what objection was made.

5. There was no error in the charges of the court complained of. The verdict was warranted by the evidence, and there was no error in refusing a new trial.

(Syllabus by the Court.)

Error from superior court, Terrell county; J. M. Griggs, Judge.

Harrison Stevens was convicted of murder, and brings error. Affirmed.

M. O. Edwards, Jr., and E. J. Hart, for plaintiff in error. H. C. Sheffield, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

(38 Ga. 304)

### BURGESS v. STATE.

(Supreme Court of Georgia. Dec. 18, 1890.)

CRIMINAL LAW—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—DECLARATIONS OF ACCUSED—SUFFICIENCY OF EVIDENCE—KILLING DURING RIOT.

1. To render alleged newly-discovered evidence available as cause for a new trial it should appear that the evidence itself is newly discovered, not merely that certain named witnesses, by whom the facts can be proved, were unknown until after the trial.

2. In the present case, after deducting from the alleged newly-discovered evidence so much of it as is cumulative merely, and so much as the exercise of full diligence before the trial would in all probability have procured for use at the trial, the residue is not of sufficient consequence and materiality to warrant the grant of a new trial on account of it.

3. It is no ground for a new trial that an alleged accomplice, jointly indicted with the accused, has been tried and acquitted since the accused was tried and convicted, thus rendering it safe for the accomplice to disclose and testify to certain facts favorable to the accused, which he could not have done without criminating himself when the accused was tried.

4. Evidence that the accused was armed, two weeks before the homicide, with weapons similar to those with which he armed himself on the night of the homicide, is admissible together with his declarations implying that he then anticipated some such occasion as actually arose when the homicide was committed, and on which occasion a weapon similar to one of those previously seen on the person of the accused was actually used in inflicting the mortal wound.

5. The homicide having been committed while several persons were engaged and apparently co-operating in the prosecution of a riot, in the nighttime, and there being evidence from which the jury could rightly find that the accused was one of the rioters, and some evidence tending to show that the mortal wound was inflicted by him, although there was also evidence tending to show that it may have been inflicted by the hand of another member of the riotous party, the verdict was warranted, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Walker county; W. M. Henry, Judge.

Dave Burgess was convicted of murder, and brings error. Affirmed.

Copeland & Jackson, for plaintiff in error. W. J. Nunnally, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

**PER CURIAM.** Judgment affirmed.

(93 Ga. 298)

**COOK et al. v. GAMMON et al.**

(Supreme Court of Georgia. Dec. 18, 1893.)

**RIGHT OF WAY—PRESCRIPTION.**

Merely passing through an alley two feet wide, in a city, belonging to the owner of adjacent property, and kept open by him for his own use, or the use of his tenants, will not ripen into a right to continue such passing by any lapse of time, no repairs being made, nor any other acts being done so as to give notice to the owner of a claim of right to pass, as distinguished from a mere license or permission.

(Syllabus by the Court.)

Error from superior court, Chatham county; B. Falligant, Judge.

Action between Fred Cook and others and John A. Gammon and others, executors, and others. From a judgment for Gammon and others, Cook and others bring error. Reversed.

Saussey & Saussey, for plaintiffs in error. Denmark & Adams, for defendants in error.

**PER CURIAM.** Judgment reversed.

(94 Ga. 483)

**CITY OF COLUMBUS v. SIMS.**

(Supreme Court of Georgia. April 9, 1894.)

**DUTY OF CITY TO LIGHT STREETS—MEASURE OF DAMAGES—MORTALITY TABLES.**

1. A city which is under no statutory obligation to light its streets is not, as matter of law, bound, when lighting them voluntarily, to do it in such a manner as to enable persons using them to see any obstruction that the city may have placed in the street, irrespective of whether the obstruction, such as a water plug, was a reasonable and proper one or not.

2. Taking the whole charge of the court together, it was free from substantial error, save in that part of it which related to lighting the streets.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Action by J. H. Sims against the city of Columbus. There was a judgment for plaintiff, and defendant brings error. Reversed.

The following is the official report:

Sims sued the city of Columbus for damages from personal injuries which he alleged he sustained, caused from driving his buggy, in which he was riding, about 8 o'clock at night, against a fire plug or hydrant which the city had caused and permitted to be placed on a public street of the city, in the roadway used for passage of vehicles, and there being nothing to give notice to persons of such location. He obtained a verdict for a thousand dollars, and, defendant's motion for a new trial being overruled, it excepted.

The motion contained the grounds that the verdict was contrary to law, evidence, etc., and was excessive in amount. Also, because the court erred in charging: "When the system of waterworks is used in the city, the officers of the city have a right, and it is their duty, to construct and place the water plugs in such positions in the street as, in their judgment, may be necessary for the protection of the property in case of fire; but, in constructing and placing such hydrants or plugs, it is the duty of the city to place and locate them in such a manner, and to exercise such care and prudence in the placing thereof, as not to endanger persons who might be passing along the street in the ordinary modes of travel, either by the day or night time, and to adopt such precautions as to point out the dangers, to enable persons who are passing or using the streets, by the exercise of ordinary care and prudence, to avoid the danger: If the city neglected to do so in this case, and injury resulted to the plaintiff therefrom, then the city would be liable to him in whatever damages he might have sustained by reason thereof. If the jury believed from the evidence that the fire hydrant or plug had been located or placed on the streets by direction of the city authorities, as alleged by plaintiff, then it was the duty of the city to see that the hydrant or plug was so placed as not to endanger persons passing along the streets in the ordinary mode of travel, either



in day or night time. If a person traveling along the street or highway intentionally or carelessly and unnecessarily leave the traveled route, and is injured by an obstruction in the street or highway, entirely outside of the traveled route, then the city would not be liable for the injury; but if the obstruction is so near the traveled route that the traveler, in the exercise of ordinary care, should accidentally and unintentionally deviate slightly from the traveled route, and be injured thereby, and by such obstruction, without fault on his part, then the city will still be liable for such injury, although the obstruction was necessary for fire purposes, as in this case. Certain mortality tables have been admitted in evidence for the purpose of showing the number of years a man of plaintiff's age may expect to live. If you believe from the testimony that the plaintiff has been permanently injured, then you may refer to these papers to ascertain the number of years which a man of plaintiff's age may be expected to live. Then ascertain from this what his earning capacity for one year. If his earning capacity has been diminished, then take the proportion of what he could have earned, and multiply it by the number of years of his expectancy. I suggest here, gentlemen, that these tables are given to you for the purpose of your making calculations. You take his earning capacity at the time he was injured, and multiply it by the number of years he was expected to live, and then make such adjustment of the difference between his earning capacity now, if it is a permanent injury, and his earning capacity at the time he received the injury, if any he received, and multiply that by the number of years he is expected to live. Take that sum of money which, placed at interest at seven per cent. for the number of years of his expectancy, would be the amount of principal and interest to the sum so found. And this will be the proper manner of arriving at the amount to which he would be entitled, but this is not conclusive upon the jury. It is submitted to them, to be considered by them, in connection with other testimony, to arrive at the amount of damages. They may consider in connection with the evidence the fact that the plaintiff's declining years during the time of his expectancy, and his diminished capacity for earning money by reason thereof, his liability for sickness, and the probability of his earning capacity being diminished by other causes during such time. And, on the other hand, they may consider whether or not the earning capacity may be increased by his greater experience in the business during such time. All these circumstances may be considered by the jury in arriving at what would be the proper amount of damages. The city having undertaken to light its streets it was their duty, after they undertook to light that street, to have lighted the street in such a manner as parties could see any obstruc-

tion in the street. If the plaintiff could have avoided this accident by the use of ordinary care upon his part, then, though the city may have been negligent, the plaintiff would not be entitled to recover; but if the plaintiff was traveling along the street, and by reason of negligence upon the part of the city he unavoidably ran onto that plug, and received injuries,—personal injuries,—by which he was damaged, both in person and property, and he could not have avoided it, then he would be entitled to recover just such sum of money as you may see proper to give him under the rules of law I have given you in charge. In regard to measure of damages for pain and suffering, the law says that is left entirely to the enlightened consciences of honest jurors. Whatever you believe he is entitled to, as honest jurors, you may give him for pain and suffering. If you find that the plaintiff is entitled to recover, then whatever amount you may see proper to give him for pain and suffering you will add to whatever amount he has proven by reason of loss of time, and whatever amount he may be entitled to for damages to his property. Whatever amount he is entitled to for pain and suffering, and whatever amount he would be entitled to for loss of time, and whatever amount you may see proper to give him by reason of his incapacity by reason of the injury sustained, after having computed the same by the life tables and the rules I have given you, whatever amount he has sustained by reason of damage to his property, if any, you find the sum total."

Worrill & Little, for plaintiff in error. McNeill & Levy, for defendant in error.

PER CURIAM. Judgment reversed.

(94 Ga. 407)

CASEY & HEDGES MANUF'G CO. v. DALTON ICE CO.

(Supreme Court of Georgia. March 19, 1904.)

ACTION ON CONTRACT—PLEADING—DEMURRER—AMENDMENT—ATTACHMENT.

1. A declaration which alleges a contract between the plaintiff and defendant by which the latter agreed to furnish to the former by a certain day one boiler, complete, and a failure and refusal to deliver it, whereby the plaintiff was damaged, sets forth a cause of action.

2. A special demurrer which complains that the declaration "states no item of damage" is not good to a declaration which does state an item of damage, but only needs further certainty and particularity. The demurrer should have pointed out this defect, instead of complaining that no item of damage was stated.

3. The amendment to the declaration, properly construed, does not set up a new and distinct cause of action. While a declaration in attachment is amendable after the first term, damages cannot properly be laid, either in the original or amended declaration, at more than the amount claimed in the attachment.

(Syllabus by the Court.)

Error from superior court, Whitfield county; I. W. Milner, Judge.

Action by the Dalton Ice Company against the Casey & Hedges Manufacturing Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

The following is the official report:

To the action of the Dalton Ice Company against the Casey & Hedges Manufacturing Company for \$250, the defendant demurred on the grounds that the declaration sets forth no cause of action and states no item of damages. The declaration was amended, and the defendant demurred to the amendment on the grounds that it sets up a new and distinct cause of action, and shows no cause of action or right to damages, and states no item of damage, and was not filed at the first term. To the overruling of the demurrers defendant excepted. The declaration alleges that in 1891 the defendant contracted to furnish plaintiff certain machinery, to wit, one boiler, complete; that, relying upon the same, they made said contract, the machinery to be delivered to them by the 8th of May, without which plaintiff could not operate its other machinery used in manufacturing ice for some of plaintiff's customers, of which defendant had full notice; that defendant did not deliver said machinery as it had engaged to do, but failed and refused to deliver it or any part of it; and that by reason of this failure and refusal plaintiff was unable to operate its machinery or to manufacture ice, and had to go to other parties and purchase the same, and pay much more therefor,—by reason of which it has been damaged \$250. The amendment alleges that defendant, from time to time, after the boiler was to be delivered, kept promising to deliver it and requesting plaintiff to wait, and at such requests plaintiff did wait until July, 1891, when defendant refused to deliver the machinery, and that during said delay the reasonable profits arising from the running of plaintiff's machinery used in making ice would have amounted to \$500, at which sum plaintiff fixes its damages for defendant's failure. It was conceded that the words, "of which defendant had full notice," in the original declaration, were interlined by plaintiff's counsel at the time when the amendment was written and dated.

John W. Akin, for plaintiff in error. R. J. & J. McCamy, for defendant in error.

**PER CURIAM.** Judgment affirmed.

(94 Ga. 400)

#### WILLIAMS v. STATE.

(Supreme Court of Georgia. March 20, 1894.)

CRIMINAL LAW—EVIDENCE—CONFESSIONS—BURGLARY.

1. It is competent for a witness to testify that the accused sent for him in order to confess to him, the accused himself having so stated to the witness.

2. A suggestion from a witness to the accused, after a confession has been freely and voluntarily made by him, that it would be better for him if he would disclose who were his accomplices, will not render inadmissible a confession as to his own guilt subsequently made by the accused to another witness.

3. The evidence warranted the verdict, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Burke county; H. C. Roney, Judge.

Alfred Williams was convicted of burglary, and brings error. Affirmed.

The following is the official report:

Alfred Williams was convicted of burglary, and his motion for a new trial was overruled. The special grounds of the motion are: "Because the court erred in allowing witness Wilkins to testify as to confessions made to him at the jail, and after certain inducements had been made to the defendant by a partner of said Wilkins. Because said court erred in allowing witness Wilkins and William E. Jones to state that they went to the jail because they had received a message from the defendant." The indictment charged the defendant with breaking and entering the storehouse of Wilkins, Neely & Jones, and stealing therefrom one gun and three pairs of shoes. In the brief of evidence contained in the bill of exceptions the following appears: "William E. Jones testified: 'Defendant was arrested on Tuesday after the burglary. I had a talk with him down at the bank. We tried to get him to tell us if he had been down in the store or not. And then I had another talk with him, down at the jail. At that time he sent me word by his father to come down there to see him, and I went; and Mr. Bentley and his father and myself took him to one side, and talked with him. I never offered him any inducement at all to make any confessions to me. He admitted to me that he was in the store Saturday night at time of burglary. He told me all about how burglary was committed, and that he went to the store before we closed up. (Counsel for defendant asked to examine the witness at this point, which was allowed by court.) I told him that it would be better if he told the whole thing. I had no right to tell him what the court would do. I told him that the court was sometimes lighter on parties who told it all. I swore that I said that to him in the committing court, but what I have told that he told me about his committing burglary was first told me by him, without any inducements from me whatever; and then, after that, I told him that the court was sometimes lighter on the party who told it all, but I offered him no inducement to get him to tell me what he did. He sent for me to come out there,—that he wanted to tell me all about it; and when I got there he told me that he had sent his father for me, so that he could make to me this confession. This pin goes through the window

facing, and this key is inserted in the hole. And he told me that they would go around there on Saturday night, pretending to get water, and pull the pin or key out, and put it down over the pin, this way [indicating], and then they could go on the outside, and pull the pin out, and get in that way; and then they would close the window, and key it properly, and come out the door, and leave it open, so we would not get onto how they got in. We had had burglaries to occur, and we had endeavored to find out how they got in, but could not. I stayed there all night myself, trying. He said that they had been in there several times. He said that they got two guns, two pairs of shoes, and "rashins"; that they carried them off in "croker-sacks." I tried to get him to tell who was with him, but he would not; and I told him that if he would come out, and tell the whole thing, it might be lighter on him, and then he gave me a list of names who he said was in there with him. I came back to the store, and I found the window just as he said it was, and then I could see a little sign on the wall, on the outside, where they had climbed in through the window. He also told me that the coat was his, and that he pulled it off, so, if he had to run, he did not want any coat on. [The coat was identified by other witnesses as having been left in the storehouse on the night of the burglary, and as belonging to defendant.] He told me who the other parties were, and I had them arrested; but I could not find out anything against them, except what he said, and I turned them loose. I did not believe what he said about them. I do believe what he said about himself.' W. A. Wilkins testified: 'I had a talk with Alfred a few days after he was arrested. I think it was the same day Mr. Jones had his conversation with him. (Question: What did he tell you? Counsel for defendant here objects to witness Wilkins testifying to any confession made by defendant to him, on the ground that witness Jones had held out inducement. By the Court: "If there was any promise held out to the defendant, it was to tell who the other parties were; and any admissions as to who the other parties were I don't think would be admissible, and so rule. But, according to the witness' testimony, he held out no promise to him to get any confession as to his own guilt.) I went out there in response to a message that I had received, and he told me how they got in. He said that one or two would go back there, and one would watch, and the other would remove the key. Then when they came back, one of them would go through the window, and then open the door and let the others in; and the first thing they would do would be to fasten this window back properly, so we would not find out how they got in, and they would go in again. He said one of them would stand on the corner, and watch up the street while the other

opened the window. He told me that he stole a gun, a watch, and some shoes; and these articles were missed, and it shows his statement must have been true. He did not know what we had missed. He said that they carried the things off, and I told him that he could find them, and he said that if he could get out of jail he could; and I told him that I would see Mr. Hurst, and let him go and point out the things. It was in that way that he got out of jail. He said that they had been in there before four or five times, and we always found the door open, and the window closed. It was commenced as early as March, and it was always on Saturday night, because the store would be open until 10 or 11 o'clock; and these boys would go in there, and pretend to get water, and unkey this window, and if he had not told us we would not have known anything about it yet.'"

G. F. Cox and R. O. Lovett, for plaintiff in error. W. H. Davis, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(94 Ga. 420)

#### DEMPSEY v. CITY OF ROME.

(Supreme Court of Georgia. March 28, 1894.)

DEFECTIVE SIDEWALK — NEGLIGENCE OF CITY — QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.

1. The evidence showing that the plaintiff was injured at night by getting his foot fast in a hole which had existed for two weeks or longer in a plank crossing upon one of the most-frequented streets of the city, the plaintiff at the time using the crossing, as one of the public, for a footway in passing over it, the case was one for submission to the jury on the question of negligence by the city authorities in having and leaving the crossing in that condition.

2. The evidence further showing that the hole extended longitudinally along the crossing, and was about 10 or 15 inches long, 3 inches wide, and 2 or 3 inches deep, and that the plaintiff had observed it a week or two before he was injured, and that at the time he stepped into it he "had his hands in his pants pockets, was walking very peart, and wasn't paying any attention," it was a question for the jury whether, under these circumstances, he was negligent in not thinking of the defect in the crossing, looking out for it, and taking care for his own safety. It was error to grant a nonsuit.

(Syllabus by the Court.)

Error from superior court. Floyd county; W. M. Henry, Judge.

Action by Richard Dempsey against the city of Rome. There was a judgment of nonsuit, and plaintiff brings error. Reversed.

Following is the official report:

Dempsey sued the city of Rome for damages from personal injuries. The nature of his action will appear from the report of the testimony. Upon the conclusion of the evidence for plaintiff the defendant moved for a nonsuit, upon the grounds: There was no

evidence showing the city had notice of the defect in the sidewalk, or was guilty of negligence causing the injury, and that the evidence showed that the plaintiff, by the exercise of ordinary care and diligence, could have avoided the injury. The nonsuit was granted. Plaintiff testified: About 7 or 8 o'clock on the night of December 13, 1891, while walking down Broad street, in Rome, his foot was caught in a hole in a plank crossing on the street, and he was thrown violently to the ground, and badly hurt. He was with his wife, and perfectly sober. The plank crossing was a continuation of Broad street sidewalk, and crossed another street, the name of which he did not know, flat on the ground. It was just beyond a certain hotel. In coming down town this way, he generally walked on the opposite side of the street from which he was injured, though possibly, once or twice a week, he came down the side of the street on which he was injured. Broad street is the most public street in Rome. He had seen the hole a week or two before he was injured. He was going home, walking along with his wife, when injured; had his hands in his pockets, and walking very peart; wanted to get home, and was paying no attention, and was walking along on the crossing. His foot was caught in a hole about 10 or 15 inches long, 3 inches wide, and 2 or 3 inches deep, and he was twisted around and thrown down. He detailed his injuries. The hole was nearly half across the street on one side, and was located so as to be in the direct pathway of one when two persons were walking together. He did not see the hole until after he fell. With his wife's assistance, he got back to the edge of the brick sidewalk, and lay down near the lamp-post. Does not remember whether there was a light burning that night or not. Other witnesses testified that plaintiff was sober on the day in question; that they had seen this hole several weeks before plaintiff was hurt; that a negro woman fell and was hurt at the same place afterwards, and after this one of the city's hands filled up the hole; and that the hole was about 8 or 10 inches long, 3 or 4 inches wide, and 2 or 3 inches deep,—not quite the size of a brick. Another witness testified that she got hurt at the same place, her foot being caught in the hole in the crossing, and she being thrown down; that she got her fall in the daytime; that it was a little place, and did not look like any one could get hurt; and that she was walking along, and not thinking, and her foot went down in the hole. There was medical testimony as to the nature and extent of plaintiff's injury.

McHenry, Nunnally & Neel, for plaintiff in error. R. A. Denny and Reece & Denny, for defendant in error.

PER CURIAM. Judgment reversed.

(94 Ga. 416)

**HOWARD v. DAYTON COAL & IRON CO. et al.**

(Supreme Court of Georgia. March 26, 1894.)  
TRESPASS AGAINST TWO DEFENDANTS—JUDGMENT AGAINST ONE—EVIDENCE.

1. In a joint action against two defendants for trespass upon land, the plaintiff may recover against one if it appear that the trespass was several, and not joint.

2. The evidence showing that the plaintiff was probably entitled to recover at least nominal damages to vindicate his right, it was error to grant a nonsuit.

(Syllabus by the Court.)

Error from superior court, Walker county; W. M. Henry, Judge.

Action by Edward L. Howard against the Dayton Coal & Iron Company and others. There was a judgment of nonsuit, and plaintiff brings error. Reversed.

Following is the official report:

The petition of Howard alleged: He owns that part of land lot 217, in the ninth district and fourth section of Walker county, which lies on the west side of the Chattanooga Southern Railroad, 20 acres of the northeast corner of lot 235, and 20 acres of the southeast part of lot 234, in the tenth district and fourth section of said county. On November 4, 1890, he entered into a contract with West, Acosta & Tharp, also known as the Nickajack & Mining Company, then of Walker county, but now nonresidents of the state (which was duly recorded in the clerk's office of the superior court), by which he agreed to convey to them the land above mentioned for \$3,750, \$200 being paid cash, and the remainder to be paid not later than January 1, 1892; it being provided therein that failure to pay said remainder by the time mentioned should cause a forfeiture of the contract, and all claims to benefits thereunder should be lost by West, Acosta & Tharp. By this agreement the mineral interest in the part of lots 234 and 235 so conveyed was exempted. It was further provided in the contract that West, Acosta & Tharp should survey the land, cut it into lots and blocks, with necessary streets and alleys, have maps made, and sell the lots, and as each sale was made the proceeds should be paid petitioner as a payment on the amount due him; such sales to continue until his claim should be fully paid, and he to make deeds to the purchasers as sales were made and the proceeds so applied. Under this contract it was contemplated and understood that the survey was to be made at once, and the lots put upon the market and sold as rapidly as possible, and their proceeds applied to the balance of purchase money by January 1, 1892. West, Acosta & Tharp have failed to carry out this agreement, having had only a very small portion of the land laid off, and having made no efforts to put the lots on the market, and having made no sale of the same, nor endeavored to do so, and have only paid petitioner \$50 of the \$3,550. They were the own-

ers of the mineral interest in the portion of lot 235 mentioned. After the agreement they commenced to mine from ore on this portion, and in connection with the mining enterprise have constructed a railroad from the mine, through lot 235 and through that part of lot 217 mentioned in the contract, connecting this road with the Chattanooga Southern Railroad at a point on lot 217, which they operated in connection with transporting ore from the mine to the Chattanooga Southern Railroad. Some time afterwards, under some agreement by West, Acosta & Tharp with the Dayton Coal & Iron Company, they transferred to that company all rights and privileges they had to the mineral on lot 235, but not to their interest in the land, and also afterwards conveyed to the Chattanooga Southern Railroad Company all right to operate the line of road so constructed to the land, and to construct and operate said road. The Dayton Coal & Iron Company and the Chattanooga Southern Railroad Company, at the time these rights were so conveyed to them, knew of the existence of the contract between petitioner and West, Acosta & Tharp. He has demanded of West, Acosta & Tharp payment of the balance due as purchase money for the land on January 1, 1892, and the same was refused, whereupon the contract, together with all rights and privileges thereunder of West, Acosta & Tharp, and of all persons holding under them, became forfeited, and petitioner became invested with the right to the possession of the land. Notwithstanding this, the Dayton Coal & Iron Company are continuing unlawfully to operate the mine by digging and removing the earth, cutting and destroying timber, and cutting up the land to make and by making roads over the same. It has erected houses upon the land for use of its operatives, and is cutting a large amount of timber for firewood for them, and committing other wrongs, to petitioner's damage \$1,000. It is insolvent as to property in this state, and so are West, Acosta & Tharp. The Chattanooga Southern Railroad Company, under its contract with West, Acosta & Tharp, is illegally operating the railroad constructed through lots 217 and 235 by West, Acosta & Tharp, and operating the same, in connection with the Dayton Coal & Iron Company, in hauling iron ore mined by the latter on lot 235, and thereby being parties to the unlawful trespass upon petitioner's land by the Dayton Coal & Iron Company. The Chattanooga Southern Railroad Company is of doubtful solvency, if not utterly insolvent, and has no right to operate said road through the land, nor have West, Acosta & Tharp any such right. Petitioner prayed that the contract first mentioned be declared at an end, and all rights and privileges thereunder be forfeited to him, and he be awarded free and uninterrupted possession of the land; that the Dayton Coal & Iron

Company be enjoined from entering upon the land, from mining thereon, or from digging or removing the earth, or from cutting and destroying timber thereon, or constructing roads, or in any way trespassing upon the land, or from removing any of the improvements placed thereon by them or by West, Acosta & Tharp; that the Chattanooga Southern Railroad Company and the other defendants be enjoined from operating or using the line of railroad through the lots, or from interfering with the same; that petitioner have judgment against defendant for \$1,000 damages, as above mentioned, and general relief. West, Acosta & Tharp, the Dayton Coal & Iron Company, and the Chattanooga Southern Railroad Company were named as parties defendants, and process prayed against them. Answers were filed by the Chattanooga Southern Railway Company and the Dayton Coal & Iron Company, but none, so far as appears, by West, Acosta & Tharp. The bill of exceptions specified, as a portion of the record material to be transmitted to this court, the amendment made by plaintiff striking West, Acosta & Tharp as parties defendant, but no such amendment appears in the record. Upon final hearing a motion for nonsuit, made at the close of the evidence for plaintiff, was granted, and to this ruling plaintiff excepts.

Plaintiff introduced the contract mentioned in his petition, the terms of which have been sufficiently set forth, and himself testified: "I think the Dayton Coal & Iron Company commenced working at the ore on lot 235 about September 1, 1891. I suppose it was their ore. It was not mine. The \$3,550 has not been paid me. I received only \$37.50. West, Acosta & Tharp did a little work on lot 235. They opened it up and worked on until they sold it. Do not remember just what work they did. Then the Dayton Coal & Iron Company took charge of it. I was in possession of the land. Am now, and have been for a number of years. Five houses have been built on it after the Dayton Coal & Iron Company went there, and I think they had them built. One was already there when they took charge. They remained in possession of the houses until recently; until they quit work. They had a good deal of timber cut that I was in possession of, thereby damaging me \$200. They dug up the land and made great cuts, throwing slate on my land; one of the cuts being about seventy feet deep and one hundred feet long, one about two hundred feet long and six or eight feet deep and wide, and one about three or four hundred feet long and eight or ten feet deep. I put this damage at about \$500. They cut several roads through my land, thereby damaging \$50, I think. They made a deep cut through my land in order to reach ore on their own land. They were getting out ore all the way through that cut. Scarcely any of these ditches were cut before they went there. I do not know that

they had done much in the way of cutting ditches except what was necessary to get out iron ore, but do not think it was necessary to throw this dirt and slate out on my land as they did. Think they could have gone in there without doing that, and that they could have tunneled under the hill and got it out. They did a good deal without taking off the top. They had these tunnels in before they ran the ditches. Had the tunnels started, and when the Dayton Company came there it went to moving the earth and getting ore out on top. One cut I expect is twenty-five feet deep before they struck the ore. The ore crops out at the top. They were stripping the ore and removing the slate from the top, and threw it off on the land. They hauled no further than was necessary to get it out of the way. Could have gotten the ore without stripping it. The deep cut was made in order to get a track into the ore on that line. They cut timber anywhere they wanted to. Made tramroads and fires out of it. Cut a good deal of firewood wherever they came to it. They had to remove the timber to cut that deep cut. Did not use that timber; threw it out. They cut a large amount of timber for firewood. There is a spur railroad track built across lots 217 and 235, connecting with the Chattanooga Southern Railroad. West, Acosta & Tharp graded it and put the cross ties on it, and the railroad company laid the iron. This was built right after my contract with West, Acosta & Tharp. I did not consent to the building of that road, more than was expressed in the contract, and it renders my land of 'right smart' less value running right through it. West, Acosta & Tharp shipped ore over this road, and afterwards the Dayton Coal & Iron Company shipped ore over it from where they were mining on lot 235. The railroad company ran their trains on it, and shipped ore from lot 235. I spoke to the superintendent of the Dayton Coal & Iron Company about my contract with West, Acosta & Tharp, and I told him the whole contract, and how much they owed me on the land before they [the Dayton Coal & Iron Company] came and took possession. I might have passed along when the railroad company was laying the track. I knew it. I was not there. Never knew that West, Acosta & Tharp decided that track to the railroad company until long after they sold out to the Dayton Coal & Iron Company, and never thought of such a thing. Never gave any directions how to build the road, but made no objection to the railroad company going in and laying this track, nor said anything to them about it or about operating it. The railroad company ran their cars up there and had their switches there, and the coal and iron company had nothing to do with that, that I know of. I had two or three acres of land cleared on lot 235, and had been using it. These folks burnt part of the fence on it, or had it done, tore down fence, and built

houses on part of the cleared land. When they went to build the houses they tore the fence down. When the coal and iron company went into possession the fence was not down, I think, except where the railroad went through."

Other witnesses testified for plaintiff: There has been a great deal of timber cut on lot 235, which makes the land less valuable; the damage to the timber, one witness thought, being \$200. Where the coal and iron company have been mining on the land, they cut ditches where they took out ore, made cuts, built road, took out dirt and slate, and piled it on the side of the hill where there was no ore, which damaged the land \$150. The damage from cutting the ditches through and tearing up the ground was \$100. The making of the cuts and removing the dirt was for the purpose of getting out ore, but witness could not say whether these cuts were necessary or not. Some of the timber that was cut was on the lead of ore and some not. All the timber on the hill was cut, but witness did not know who cut it. Saw "them" cutting trees for firewood. Saw Acosta and Tharp there a good deal, but they did not cut much of it. They cut a tunnel up there. They had no families living in the houses, except probably one. The removing of the earth to get ore was all on lot 235. The coal and iron company has cut off timber, wagon ways, tramroad, and moved the dirt in getting out ore. The timber that this witness saw cut was for mining purposes and firewood. The damage done by West, Acosta & Tharp and the coal and iron company could have been separated by persons there who might know where one left off and the other set in. Witness knew they both worked there. Plaintiff put in evidence a deed to him, dated April 20, 1877, and properly recorded, conveying to him 35 acres from the northeast corner of lot 235.

The motion for nonsuit was on the grounds: (1) The testimony failed to show any privity between defendants either by contract or of tort. (2) The testimony is so indefinite and uncertain that it is impossible to determine what damage, if any, was done by West, Acosta & Tharp, what by the coal and iron company, and what by the railroad company. (3) Because it was admitted in plaintiff's declaration that the coal and iron company owned the mineral interest on lot 235, on which the damage is claimed, and the evidence did not show a single act except what was necessary in order to successfully raise and mine their ore, nor beyond the right they had on account of owning the mineral interest. (4) There is no evidence going to show that the railroad company had any knowledge of the existence of the contract between petitioner and West, Acosta & Tharp. (5) There was no evidence that petitioner ever objected to or opposed any of the acts he is now complaining of; and, gen-

erally, under the evidence, he is not entitled to any relief as against defendants.

Copeland & Jackson and Payne & Walder, for plaintiff in error. Lumpkin & Shattuck, for defendants in error.

**PER CURIAM.** Judgment reversed.

(94 Ga. 452)

**WINN v. MORRIS et al.**

(Supreme Court of Georgia. March 26, 1894.)

**SALE—BREACH OF CONTRACT TO DELIVER—DAMAGES.**

The agreed price for a mule being \$70 at the place where the contract of sale was made, and where the mule then was, with \$1.80 added for delivering the animal at another place (both amounts being paid down), and the contract embracing an express stipulation for delivery at the latter place, and no delivery having been made at either place or elsewhere, the purchaser is entitled to recover of the seller, in an action for a breach of the contract, a sum equivalent to that paid, with interest thereon. The death of the mule after the expiration of the time within which delivery should have been made under the contract would be no obstacle to a recovery.

(Syllabus by the Court.)

Error from superior court, Paulding county; C. G. Janes, Judge.

Action by J. Henry Winn against Morris & Cathcart on a contract for the purchase of a mule. Verdict and judgment for defendants, and plaintiff brings error. Reversed.

The following is the official report:

Winn sued Morris & Cathcart for \$71.80 and interest, alleging that defendants agreed to sell him a mule (describing it), and to deliver the mule the next day to one Watson, at Douglasville, and in pursuance of the agreement he paid them \$71.80, and that they failed and refused to deliver the mule, and fail and refuse to return him the money. Defendants pleaded not indebted. There was a verdict in their favor. Plaintiff moved for a new trial, and, his motion being overruled, excepted. The grounds of the motion were that the verdict was contrary to law, evidence, justice, and equity, decidedly and strongly against the weight of the evidence, and without evidence to support it. Upon the trial, Winn testified: On or about March 7, 1892, in Atlanta, he bought from defendants a mule for \$70, and told them he would purchase the mule if they would deliver it at Watson's stable, at Douglasville. He paid them \$1.80 additional to deliver the mule at that stable, and they agreed so to deliver it. After the time arrived at which the mule should have been so delivered, he sent to the stable on two different days for it, but it was not there, as promised. He bought the mule on Monday, and on the following Friday saw it at McClarty's stable, in Douglasville, dead. Defendants did not deliver the mule at Watson's stable, as they had agreed to. He would not have bought the mule unless defendants had agreed to deliver it at Douglas-

ville. The stables of McClarty and Watson were both talked about, and the agreement was to deliver it at Douglasville, to Watson's stable. A witness who was in charge of Watson's stable at the time in question testified that the mule was not delivered there; that two men called on different days, and stayed all day, waiting for the mule; and that the stable and yard of Watson were safe and substantial. Another witness testified that he heard Cathcart tell Winn that Cathcart & Morris agreed to send the mule to Watson's stable. Cathcart testified that he sold the mule to plaintiff for \$70, and agreed to send it to Watson's stable, and plaintiff paid him \$1.80 to deliver the mule there, and told witness he did not want the mule unless they could send it to Douglasville, and to send it to the stable of Watson, in Douglasville; that witness agreed to deliver the mule to that stable, the stables of Watson and McCarthy being both talked about, but the agreement being to deliver to Watson's; and that witness did not know whether the mule was delivered there or not. Morris testified that he priced the mule to Winn at \$70, but Cathcart made the trade; that he knew nothing of the matter, except what Cathcart told him; that they paid a man two dollars to carry the mule to Douglasville; and that he understood the mule was to be delivered at Watson's stable, in Douglasville.

A. L. Bartlett and L. M. Washington, for plaintiff in error. Geo. P. Roberts, for defendants in error.

**PER CURIAM.** Judgment reversed.

(94 Ga. 414)

**RICE et al. v. DODD et al.**

(Supreme Court of Georgia. March 26, 1894.)

**PLEADING—VERIFICATION—INSOLVENCY—PROOF OF CLAIM—APPOINTMENT OF RECEIVER.**

1. A petition for injunction and receiver, which is imperfectly verified at the time a restraining order is made and a temporary receiver appointed, may, with leave of the presiding judge, be duly verified at the interlocutory hearing before the appointment of a permanent receiver.

2. In this case the verification, as finally made, was sufficient.

3. Unsecured creditors of an insolvent debtor, each of whose claims by an open account is partly due and partly not due, may proceed under the insolvent trader's act (Code, § 3149a, et seq.) upon so much of their accounts, respectively, as is due, with or without setting forth such parts of the same as are not due; and an affidavit submitted at the hearing as evidence of demand for payment, which states that demand was made "for payment of the debt due," may be construed as meaning, not that the whole amount was demanded, but only so much of it as was due.

4. On the pleadings and evidence there was no abuse of discretion in granting an injunction and appointing a receiver.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by G. T. Dodd & Co. and others against Rice & Saxe. There was a judgment for plaintiffs, and defendants bring error. Affirmed.

The following is the official report:

Dodd & Co., Boynton, and the Frank E. Block Company filed their petition, in the nature of a general creditors' bill, against Rice & Saxe, alleging: They are unsecured creditors of Rice & Saxe, a firm of traders in the retail grocery business. Rice & Saxe are indebted to them for goods furnished,—to Dodd & Co., \$273.12; to Boynton, \$56.48; to the F. E. Block Company, \$56.41. These amounts, or parts of them, are past due, and payment has been demanded since maturity, and refused. The firm of Rice & Saxe is insolvent. Said firm has given a chattel mortgage for \$1,800 to the wife of Rice, which petitioners charge was given without consideration, to hinder, delay, and defraud their creditors in the collection of their debts, and is void. They prayed for appointment of receiver, temporary and permanent; that Rice & Saxe be enjoined from interfering with the receiver; and that the mortgage to Mrs. Rice be canceled. Discovery was waived, and process prayed against Rice & Saxe. The affidavit to this petition was by J. E. Singer, as agent for Boynton, that the statements contained in the petition were true so far as it related to his own acts, and as derived from information and belief he believed them to be true. Upon this petition a temporary receiver was appointed, to preserve and hold the assets of defendants until further order, temporary restraining order was granted, and defendants were required to show cause why the prayer for injunction and receiver should not be granted. This order was passed November 25, 1893. The petition was amended as follows: By adding as exhibits the itemized accounts of Rice & Saxe with petitioners, the exhibits showing the dates of each sale and time of maturity of each account. All said accounts were exhibited to defendants after maturity, and defendants failed and refused to pay the same, or any part thereof. It is true that a portion of the accounts is not all due, but the remainder was past due at the filing of the petition, and payment has been demanded therefor, and has been refused. Replying to a portion of defendants' answer, where they set up mortgages to petitioners, petitioners say that the same were after the order for injunction and receiver was passed, and, immediately upon being informed of that fact, the same were returned to defendants, and retained by them. It is untrue that, at the time of filing the petition, petitioners had any liens or security for their said accounts. Petitioners further show, as badges of fraud on the mortgages set up by defendants: Mrs. Rice is the wife of one of defendants, Miss Saxe, as they are informed, is a sister of the other, and M. L. Tolbert is a brother-in-law of Rice. Defendants were insolvent at the

time of the giving of these liens. These mortgages attempt to convey all the assets of Rice & Saxe, of every kind, pertaining to said partnership. There is no entry on the books of Rice & Saxe showing the receipt of any money from the mortgagees except from Mrs. Rice, and one entry on the books gives her credit as having paid \$600 into the firm assets on September 1, 1893, whereas the bank books show no deposit of any such amount in that month. On the dates of the giving of the notes to the other mortgagees, the books show no receipt of any money or other assets from said parties. Rice & Saxe, believing they had fully covered their assets by said mortgages, were willing to give as many other second mortgages as their creditors would take, and in pursuance of this idea gave Tidwell & Pope a mortgage as set out in their answer, which was not given to the clerk of the court until after the order granting injunction and receiver was signed. Said mortgage, though marked filed on Saturday, November 25th, was not filed on that day, but was given to the clerk at his house, and filed in office properly, November 27th. The mortgagees do not appear to be objecting to the appointment of a receiver, but these defendants are attempting to make a defense which properly belongs to the mortgagees. Said mortgages were given with the intention to hinder and delay petitioners and the other creditors of Rice & Saxe, and petitioners pray permission to make this attack upon them whenever they shall make themselves parties to this case. The attempt to mortgage the accounts of defendants is utterly void, since defendants have no power to give a lien on their accounts to one creditor in preference to others, and, should a receiver be refused as to the stock, one should be granted as to the accounts. If the mortgages are valid, still the prayers of the original petition should be granted, as the assets are largely in excess of the mortgages, amounting to \$8,272.76, which amount includes \$2,488.86 doubtful accounts, \$597.53 doubtful notes, and \$2,123.05 good accounts. Rice & Saxe, to obtain credit, stated to the Dun & Co. Mercantile Agency (which statement was circulated among petitioners), on November 16, 1892, that their assets amounted to \$8,341, and liabilities for merchandise \$3,700; that they had real estate in the name of Rice, in Atlanta, worth \$9,000, and in Austell, worth \$2,000, and owed on real estate \$3,900,—making a total estimate worth, in and out of business, of \$11,741. They made a similar statement to the Bradstreet Company in the fall of 1892, and on November 15, 1893, made to Dun Mercantile Agency a statement of assets amounting to \$8,075, with liabilities of \$3,000, and surplus in business \$5,075; and Rice, when asked about his real estate which he had previously reported as above, said he had raised money on it, and did not care to give it in now as an asset. Petitioners charge that these statements were made to obtain



credit, and that the mortgage indebtedness, which defendants now claim to owe, was concealed or did not exist. The affidavit to this amendment was made by Boynton, and was "that the facts contained in the foregoing amendment are true, and such statements as are made on information and belief he believes them to be true." Attached as exhibits were the accounts of Boynton for \$61.48, \$56.48 of which he made affidavit was past due; of the F. E. Block Company for \$87.41, \$55.21 of which was sworn to be past due; of Dodd & Co., for \$271.12, \$38.30 of which Dodd made affidavit was past due. Various other creditors of Rice & Saxe were made parties plaintiff, whose accounts were sworn to be unpaid, demand made for payment, and payment refused, and some of which were past due. Defendants moved, before the hearing, to vacate the order appointing a temporary receiver, because the petition was not sworn to by any one professing to know the facts alleged; because there was no allegation calling for the appointment of any receiver until after defendants should be notified, and have opportunity to resist the application; because there was no allegation of any definite sum overdue and unpaid from defendants to plaintiffs, or to any other creditors; because the allegation of demand for payment, and refusal by defendants, is too general and indefinite, no time nor place being given when or where the demand was made and refusal given. Defendants also set up the following as matter in law against appointing a permanent receiver: There is not sufficient allegation in the petition to authorize the appointment. It does not contain any sufficient allegation that the claims of plaintiffs were past due at the time of filing the petition, nor any sufficient allegation that the payment of plaintiffs' claims had been demanded and payment refused. For further grounds of demurrer, defendants alleged that there was no equity in the petition; that it was argumentative in the main, and alleged conclusions and not facts; that it consisted mainly in recounting what plaintiffs say they can prove, and how they can prove it, not alleging facts which are issuable; that many of the allegations are immaterial, except as matters of evidence; and an issue tendered in the same would be an immaterial issue, the decision of which would settle no question, this objection being specially applicable to all that part of the amended petition setting forth alleged statements made by defendants to Dun & Co. and to the Bradstreet Company. For further grounds of demurrer, defendants alleged that from the allegations in the petition it appears that other persons, not parties to the suit, hold mortgages on defendants' assets over which a receiver is appointed; that such mortgages are necessary parties defendant; and that the want of them as parties is a fatal defect and good ground of demurrer. Defendants answered the petition, the nature

of which answer will fully appear hereafter from the report of the evidence. No direct ruling was made upon the demurrers, but they were considered in passing upon the case. A hearing being had, the court below ordered that upon original plaintiffs giving a bond in the sum of \$500, conditioned to pay defendants such damages as they might sustain in the case, the order for injunction and receiver be thereafter vacated and adjudged erroneous, the injunction prayed for be granted, and the temporary receiver be appointed permanent receiver, with authority to convert into cash the assets of defendants, and hold and preserve the proceeds until further order. The bond was given, and to the decision granting the injunction, and appointing the receiver, defendants except.

On the hearing, in addition to the original and amended petition, with the affidavits attached thereto, plaintiffs put in evidence: Affidavit of Dodd that he made demands on Saxe for the payment of the debt due his firm, on Saturday, November 25, 1893, between 6 and 7 p. m., payment was refused, and Saxe said, "We are broke all to pieces." Similar affidavit of Simpson as to the claim of the Block Company, and by Singer as to the claim of Boynton, except that the last two affidavits did not contain the statement of Saxe as to defendants being "broke." Also, affidavit showing that Mrs. M. L. Rice made no tax returns to the county tax receiver for 1893 of any notes and accounts as held by her; that Miss Mary Saxe made no returns of any assets; that Mrs. M. M. Tolbert, guardian, made no return; and that M. L. Tolbert made no return of any notes and accounts as held by him. Also, affidavit of Saunders that he was appointed temporary receiver for defendants Saturday, November 23d, received the order appointing about half past 7 o'clock p. m., and took charge of the store, by obtaining the keys of Saxe, about 8 o'clock the same evening; that since his appointment he has made an inventory of the assets of the firm, showing they amount to \$3,272.76, of which \$2,488.86 are doubtful accounts, \$957.53 doubtful notes, \$2,123.06 good accounts, \$98.40 good notes, and the balance merchandise, cash, fixtures, wagons, etc.; also of the liabilities, which amount to \$9,140.50, of which the bills payable are \$4,085.48, and the remainder mortgages, not including the mortgage claimed to have been given the original petitioners; that there are no entries on the books showing any of the mortgage indebtedness as a liability against defendants, except entries in favor of Mrs. Rice and Tidwell & Pope, and no entries at all showing indebtedness to any of the other mortgagees; that the amount of notes and accounts marked "Doubtful" was so marked upon information and belief received from defendants; that he believes collections can be made on some of those marked "Doubtful," but of what proportion he is unable to say. Affidavit of T. D. Meader: It is true a

mortgage following the previous mortgages was given by Rice & Saxe through Rice, but under the following circumstances: After the creditors whose accounts are stated in the original petition had engaged Mr. Hill, of Mason & Hill (lawyers), to prepare the petition, and it was verified, and Mr. Hill had gone to procure the signature of the judge, one of them suggested that Rice & Saxe might give them a mortgage; so affiant, Dodd, and Singer, representing Boynton, went to Rice's house, and he agreed to give the mortgage. Singer then hunted up a notary public, and the mortgage was executed, the time thus consumed being about an hour. On returning, they found Hill with the order of the judge, granting the injunction, and appointing a temporary receiver. He said to them, on their own petition representing they were unsecured creditors, the order had been passed before the execution of the mortgage, and that the same was worthless, and they had better return it. Affiant immediately went to Rice's house, rang the bell, etc., but without arousing him. Thinking he had gone down town, affiant returned to the center of the city, and looked for him without finding him. He again went to Rice's house, and tried in every way to arouse him, without effect, and then placed the mortgage between the sashes of one of the front windows, and left. Next morning he sent Rice a note stating what had been done, and Rice sent word back that "It was all right." Affidavit of W. P. Hill: Between 7 o'clock and 7:30 p. m., Saturday, November 25th, as attorney for creditors in the original petition, he obtained from the judge an order granting injunction and appointing temporary receiver. About 10 minutes afterwards he delivered this order to the temporary receiver, and instructed him to go at once to defendants' store and get possession. Perhaps a few minutes after 8 the same evening he was told by Mr. Meador that he and Mr. Dodd had just returned from Rice's house with a mortgage, and he (affiant) told them the judge had signed the order, and to return the mortgage to Rice. Affidavit showing that the mortgage to Tidwell & Pope was carried to the house of the clerk of the superior court at 7:30 p. m., November 25, 1893, the office being closed at 5 p. m. that day, and that, on the Monday following, the mortgage was put on the filing docket, and placed upon the proper records. Affidavit of Dodd, Simpson, and Boynton that the statements of fact contained in the original petition were true, except the allegations in reference to the mortgage given Mrs. Rice, and from information and belief they believed said statements to be true. Also, affidavit verifying the allegations in the petition as to statements alleged to have been made to the Dun Mercantile Agency and the Bradstreet Mercantile Agency.

For defendants, Rice made affidavit: Rice & Saxe justly owe Mrs. Rice \$1,879.15, for

which they gave their note September 1, 1893. She acquired her funds thus: In the spring of 1890 he owned a city lot with improvements on the corner of Calhoun and Houston streets, which he then sold for \$7,500, which sum, less commissions for the sale,—some \$187.50,—he gave to his wife. She took \$2,500, and invested it in a vacant lot on Luckie street. Five hundred dollars, on January 9, 1891, she deposited with Rice & Saxe, and on January 13, 1891, \$366, to hold, and from the same to pay monthly dues she owed the Hibernian Building & Loan Association, at the rate of \$60 per month, on a loan she had obtained from the same. All of said sum and \$292.70 was ultimately paid out by Rice & Saxe in this way, and other small matters for her. The residue of the \$7,500 was used by her in building on Luckie street, along with other funds she borrowed. For this and other purposes she borrowed \$3,500, less broker's commissions, from Mrs. Oliver, of Baltimore, using enough of the sum, taken with the other funds, to put a house on said lot costing about \$4,700. To secure the loan she gave a deed under the Code to Mrs. Oliver, which is still of force and the debt unpaid. Of this \$3,500 so borrowed, Mrs. Rice loaned, at different times from January 1, 1892, to January 5, 1892, to Rice & Saxe, sums aggregating \$1,476.57. She bought the Luckie street lot in January, 1891, got deed to it July 25, 1891, and built the house on it in the fall of 1891. On September 1, 1893, when the \$1,879.15 note was given her by defendants, there was justly due her \$95.28 as interest on said loans, which was put in as part of the sum for which the note was given. On May 8, 1893, she borrowed \$600 from the Germania Building & Loan Association, and to secure it mortgaged her house and lot, which mortgage is of record, and loaned the sum to defendants, which is part of the consideration of her claim of \$1,879.15. At the time he gave the money above mentioned (\$7,500) to his wife, Rice & Saxe were entirely solvent. He owned a two-thirds interest in the firm, and Saxe one-third. Their assets were worth \$5,000 cash, and their liabilities did not exceed \$3,500, and the business of the firm was prosperous. All the debts the firm then owed have been paid and discharged. At the same time he was perfectly solvent, doing well in business, and fully able, without interfering with his business, to give his wife said sum, leaving him amply solvent. Rice & Saxe had been doing a good business, and were not seriously embarrassed until some eight or ten months since, when, because of the general pecuniary embarrassment of the country, their customers failed to pay what was due them, and so withheld the means to continue their former prosperous business. The affidavits of Saxe, J. J. Tolbert, and Mrs. Rice corroborating the statements in the affidavit of Rice. Another affidavit of Rice: Neither he

nor his firm made the statement alleged to the Dun Mercantile Agency or to Bradstreet, to the effect that he had real estate in Atlanta and Austell, as stated, and good notes and accounts amounting to \$4,000. At said time there were notes and accounts on the books amounting to about \$4,000, some good and some bad, and so he then stated. He did not know how much were good. He had no real estate in his own name in Atlanta, and did not own any there, and did not so state. Some time before, he and M. L. Tolbert had bought some in Austell for \$2,000, each paying one-half, and afterwards he bought out Tolbert's interest for \$400, which he still owes Tolbert. He can get title to the property only by paying \$400, which, because of the depreciation in the property, is more than it is worth. In his opinion it is not worth more than \$250. About 15 minutes before 8 o'clock p. m., November 25, 1893, after he had gone home, Dodd, representing Dodd & Co., Meador, who claimed to be acting for the F. E. Block Company and for the Oglesby & Meador Grocery Company, and Singer, acting for Boynton, came to deponent's house, spoke of defendants having given other creditors mortgages, and asked him to give a mortgage to said several parties; and at their request he did so, and delivered the same to them. Meador wrote the mortgage in Dodd's presence, and, while it was being drawn, Singer went to get a notary to attest the execution, and soon returned with one, and deponent, in the presence of all parties, signed the firm name of Rice & Saxe to the mortgage, and it was witnessed and delivered to said persons for the mortgagees. They received the mortgage, and carried it off with them, and he saw nothing more of it, and heard nothing more of it, until the next morning, when his wife found it in her parlor, and on looking at it he found written in pencil on the back of it: "Mr. Rice: After consulting the parties to the mortgage, they refuse to accept it; so I return it. Thomas D. Meador." He never consented for the mortgagees to return this mortgage, and says they did accept it from him, made for the firm, unconditionally. The original mortgage is attached to this affidavit. He did not send word back to Meador that it was all right, as stated in Meador's affidavit. Affidavit of Saxe: He was the book-keeper of defendants. The exhibit contains a true and correct statement from defendants' books of the claim of Mrs. Rice, to secure which and other claims the mortgage was given, as set forth in defendants' answer. The item of \$600 in that account, of September, 1893, was for that sum of money loaned by her to defendants some time before that date, to wit, May 8, 1893, and on May 9, 1893, they deposited in their bank \$730, which included the \$600, which on May 8th they borrowed of her. Since filing the answer he has drawn off a full and accu-

rate list of the accounts and notes due the firm, which he attaches as an exhibit. The claims not good and of little value foot up \$3,270.49, and those he regarded as good aggregate \$2,214.45,—the merchandise, \$2,093.85, fixtures, \$505.05, and cash, etc., \$12.42. It is true that the dealings between the defendants and the other mortgagees were not entered on defendants' books, and the reason was because, said mortgagees being relatives and friends of defendants, they did not find it necessary to keep an account of the same on their books, but all the time hoped soon, and intended, to pay them. The omission to enter the same on the books was not for improper purposes, nor to deceive any of their creditors, and to the best of his knowledge and belief had no such effect on plaintiffs or any of their creditors. He remained at the store, in charge of it, until about 8 o'clock p. m., November 25th, then went to the store of Tolbert Bros., and after he had been there about 15 minutes the temporary receiver came, and notified him he had been appointed receiver, which was the first intimation deponent had that a receiver had been appointed, or steps taken to appoint one. Before leaving the store it had been closed for the night. Between 6 and 7 o'clock the same evening Dodd called by the store, and inquired of him about the mortgages defendants had given, and asked him how much they owed Dodd's firm. He answered, "Some \$150," and Dodd said, "More than that,—over \$200." Dodd then asked where Rice was, and deponent told him, and Dodd then said he would go over and see him, and started off in that direction. About 7:30 the same night, Skinner, for Dodd & Co., called at the store, and asked him if defendants could not turn over to them some accounts to secure or pay their claim. He said no, because the mortgages were on file, and that he did not know that they could. Neither Dodd nor Skinner presented any account to him, nor specified any definite amount, nor demanded payment, and at no time before the filing of the petition was the account of Dodd & Co. presented and payment refused. When defendants made the bill with Boynton it was agreed that they were to have 60 days' time on it, and that at the end of that time, if they could not conveniently pay cash, they could settle by 30-day note. The goods were bought on these terms, and when, about 7 o'clock p. m., November 25th, Skinner came to the store, and asked deponent to pay Boynton's bill, "says none of Boynton's bill was due." No demand was made to pay the claim of the Block Company before the petition was filed. About 7 o'clock p. m., November 25th, Simpson called on deponent at defendants' store, and requested him to transfer Simpson's account on defendants' books to the Block Company, to go as a credit on the Block Company claim (the account was for \$2.13), and this was not done, because he did not think

be then had the right to do so, and Simpson went off making no demand for payment of the account, and presenting no account to deponent. On the same evening, and before Dodd called, Meador called at the store (this was after night, and after the mortgages to Mrs. Rice and others were filed in the office of the clerk for record), and made inquiry as to defendants' having given mortgages, and got deponent, for defendants, to agree that the balance of a certain account, being about \$88, might be transferred to the Oglesby & Meador Company on their claim. At that time Meador inquired where Rice was, and, on being told, said he would go and see him, and went off in that way. Several items of the claim of Haralson Bros. & Co. are not due, and may never become due (specifying them). This account has never been presented to either of defendants, and payment demanded, but only a part thereof was ever presented. Part of the account of the Morgan Grain Company was not due when the petition was filed, etc., and this claim was never presented to defendants, and payment demanded. Deponent also corroborated the affidavit of Rice as to alleged statements made the Dun Agency and Bradstreet, and as to status of the Austell property. To this affidavit were annexed exhibits as mentioned therein. Affidavit of Mary Saxe: Some few years since she received, as one of the heirs of her deceased brother, \$490, which she loaned Rice & Saxe, and for that amount they gave her their note, and still owe her that amount, which is a valid and just debt. Affidavit of Mrs. M. M. Tolbert, guardian of A. C. Spliers: As guardian of Spliers she loaned Rice & Saxe \$750, for which they gave her their note, and still owe her that amount, and the debt is a valid and just one, due her as such guardian. Affidavit of Frank Myers: He was acting as deputy clerk of the superior court on November 25, 1893, and had gone home. Between 9 and 10 p. m., the original petition in this case was brought to his house, and he was asked by Mr. Hill to file it in office that night. Deponent was then carried with the petition to the clerk's office, where, about 10 o'clock p. m., the petition was put into the office, and marked "Filed." He had no notice of the petition until presented to him as above stated.

Defendants also introduced mortgage dated November 25, 1893, from Rice & Saxe to M. M. Tolbert, guardian of A. C. Spliers Mrs. M. L. Rice, Mary Saxe, M. L. Tolbert, Tolbert Bros., and E. N. Broyles on all their entire stock of goods and merchandise, fixtures, and other personal property, then in the possession and control of said Rice & Saxe, in their brick storehouse occupied by them on corner of Hunter and Loyd streets, in city of Atlanta, including also such other goods and merchandise in their said business as shall

come into their hands thereafter, and also all choses in action which they own, connected with said business, consisting of open accounts and notes in said store, and the books of said Rice & Saxe. The mortgage recited that it was made to secure indebtedness to Tolbert, guardian, of \$750, by note dated November 1, 1893, and due at one day; to Mrs. Rice, \$1,879.15, by note dated September 1, 1893, due at one day; to Mary Saxe, \$490, by note dated January 1, 1893, and due at one day; to M. L. Tolbert, \$550, by note dated November 23, 1893, due at one day; to Tolbert Bros., \$133, by note dated November 23, 1893, due at one day; and, to E. N. Broyles, \$250, by note dated November 25, 1893, due at one day. The mortgage was indorsed as filed in the proper office for record November 25, 1893, at 5 o'clock p. m., and duly recorded November 27, 1893. Also, mortgage by Rice & Saxe to the Oglesby & Meador Grocery Company and others, and dated November 25, 1893, covering in substance the same property last above mentioned, and given to secure to the Oglesby & Meador Grocery Company notes and accounts to the amount of \$251.51; to Dodd & Co., \$273.12; to the F. E. Block Company, \$57.41; and, to H. A. Boynton, \$290.63. This mortgage was not recorded. On it was the pencil writing from Meador to Rice hereinbefore mentioned. Defendants also put in evidence a mortgage by them to the Neal Loan & Banking Company, dated November 25, 1893, filed for record at 5 o'clock p. m. same day, and recorded November 27th, covering the same property as the other mortgages above mentioned, and to secure the payment of two notes, each of \$250,—one dated October —, 1893, due at 60 days; the other November 21, 1893, due at 60 days. Also, a mortgage by them to Tidwell & Pope, dated November 25, 1893, filed for record 7:50 o'clock p. m. same day, and recorded November 27, 1893, covering the same property as the others, and made to secure \$558.87, evidenced by three notes,—one for \$259.84, dated October 27, 1893, due at 40 days; one for \$123.02, dated November 24, 1893, due at 30 days; and one for \$123.01, dated November 24, 1893, due at 90 days. Also, various notes described in the mortgages, except those described in the mortgage to the Oglesby & Meador Grocery Company et al. Also, deed from M. L. Tolbert to Montre L. Rice, dated July 25, 1891, upon the expressed consideration of \$2,500, and recorded September 28, 1891, conveying property near the corner of Luckie and Spring streets, Atlanta.

Broyles & Son, for plaintiff in error. Mayson & Hill, Calhoun, King & Spalding, Simmons & Corrigan, and Gaines & Etheridge, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 427)

## COLEMAN v. NEVIN.

(Supreme Court of Georgia. March 26, 1894.)

## CHATTEL MORTGAGES—PRIORITIES—PURCHASER OF PROPERTY WITH NOTICE—DISTRIBUTION OF PROCEEDS OF SALE.

1. A mortgagor of a stock of goods having, with consent of the mortgagee, sold and delivered the stock to a person who bought it with notice of the mortgage, and upon the understanding that it was to remain bound until he himself paid off and discharged the mortgage, which he agreed to do, and the mortgage having been duly recorded before this transaction took place, all the stock, as it then existed, except as to the articles afterwards sold by the purchaser, remained subject to the mortgage lien for any balance of the mortgage debt left unpaid; and this mortgage would take priority, as to this identical property and its proceeds at a judicial sale, over a subsequent mortgage executed by the purchaser to his own creditor, but the lien of the latter mortgage on additions made to the stock, and their proceeds, would be unaffected by the existence of the former mortgage.

2. There being an agreement of the parties to sell by the receiver free from the liens of both mortgages, and to contend for the proceeds, and the evidence showing that at the time of the receiver's sale the value of that part of the property sold by him which was covered by the first mortgage was equal to or greater than the value of the other part of the property, and both parcels having been sold together, and their proceeds intermixed, the court erred in not awarding at least half of these proceeds to the first mortgage, and in giving the second mortgage, as to the whole amount due upon it, priority over the first.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Contest between F. C. Coleman and M. A. Nevin as to the priority of their claims on a fund in the hands of a receiver. There was a judgment for Nevin, and Coleman brings error. Reversed.

The following is the official report:

A fund of \$470, arising from the sale of the stock of goods of J. J. Childs by James McGuire, receiver, in the case of James & Co. et al. v. J. J. Childs, was contended for by two mortgage creditors, F. C. Coleman and M. A. Nevin, who were made parties to the cause. The contest was submitted to the judge without a jury, and he decided that the Coleman *fi. fa.* should be postponed to the Nevin *fi. fa.* Mrs. Coleman excepted, alleging that her debt should have been first paid in full, being the oldest lien, but, at all events, that it should have been allowed to prorate with the Nevin debt. The evidence is as follows:

F. C. Coleman's mortgage was dated February 18, 1891, and was filed on that day, and recorded five days later, being properly attested. The debt secured by it was \$575 principal, besides interest. The property mortgaged was: "My entire stock of goods, fixtures, furniture, and tools, and all property of every kind, in my storeroom in the city of Rome, at No. 4 Third avenue, consisting of plumbing goods and materials of every kind, gas fixtures, gas and water pipes,

bath tubs, water closets, supplies and traps, sewer pipes and connections in iron, and clay pipes and lead pipes and water sinks, water motors, plumbers' brass goods, iron boilers, solder, basin cocks, glass lamp globes, injectors, inspirators, steam-packing supplies, one pair scales, three stepladders, one wheelbarrow,—above stock of the value of \$1,450; my tools, machine dies, cutters, tongs, drills, vises, furnace, and pipe-cutting machines, of the value of \$350; my office furniture, including two desks, letterpress, and chairs, worth \$50." This was signed by James McGuire. It was foreclosed on January 2, 1892, and the clerk of the superior court, who was also clerk of the city court, issued a mortgage *fi. fa.* for the sum due thereon, against the property described. The foreclosure proceedings were indorsed thus: "Entered, No. 3, page 581, Jan'y 2, 1892. Wm. E. Beysiegel, Clerk." The *fi. fa.* was made returnable to the city court, and the clerk made two indorsements thereon: (1) "No. 24. Floyd county city court, March term, 1892." (2) "Ga., Floyd county. Entered, No. 1, Gen. Ex. Docket, Floyd superior court, page 240, this Jan. 4, 1892. Wm. E. Beysiegel, Clerk."

On January 5, 1892, Mrs. Coleman filed her suit against J. J. Childs in the city court, to recover her debt, in which suit certain garnishment proceedings were had, and various persons served as garnishees on January 6, 7, and 8, were discharged on January 22, 1892. Said suit alleged: Childs is indebted to petitioner \$575 principal, \$28.55 interest, and \$60.35 attorney's fees, secured by mortgage made February 18, 1891, by James McGuire, then engaged in the plumbing business. Said debt is for money loaned, and is a prior lien on the property described in the mortgage. July 13, 1891, McGuire sold the property to Childs, who had no means to pay for his purchase, and undertook and promised to pay petitioner's debt if he could buy the stock from McGuire, who held the title thus incumbered. McGuire and Childs agreed on the sale and purchase of the stock. The consideration was, Childs should pay the notes secured by the mortgage. McGuire delivered the stock to Childs on the day of purchase and sale. Nothing has been paid to McGuire on the sale, nor is anything due him; and the stock delivered to Childs, largely in excess of said debt, in its value, about six months since, has been used by him in business and trade until the statement was recently made by him that he had but little of the property in possession. He is insolvent, has put no funds in the business of his own, but has used and drawn much out of the business, and thereby reduced and endangered the security pledged to payment of the notes. But for his promises to pay said debt, he could not have bought the stock from McGuire without first making payment of the notes, nor have obtained any indulgence from petitioner in

the collection of her mortgage debt. By his purchase, Childs derived and enjoyed large pecuniary benefit and gain. Petitioner suffered corresponding injury, loss, and damage. While frequent and urgent demand has been made on him to pay the debt, it remains entirely unpaid; while admitting his liability on his original promise to pay it, he refuses to pay the same, or any part of it.

James McGuire testified: "I sold the stock of goods covered by the Coleman mortgage to Childs, July 13, 1891. About \$1,900 worth of goods on hand at time of sale. Price agreed to be paid was Coleman mortgage, \$575, and compromise a junior mortgage at \$300 in favor of James, and give me employment with him. Am a practical plumber, and familiar with value of goods. When trade was made, Henry Walker was present, representing Mrs. Coleman; W. C. Huff, representing James. Childs knew nothing about the business. Had no money, only half dollar. His contract was to pay off Coleman mortgage, as part of purchase money. Was to pay \$60 per month. Nevin knew Childs went in possession of my stock, and succeeded me in the business. My business license granted by the city was transferred to Childs by Nevin, as clerk of city council. The transfer was in Nevin's handwriting. The license is lost. Childs borrowed from Nevin \$300, and compromised James mortgage, which was junior to Coleman mortgage. This was done at time of sale. I had no talk with Nevin as to terms of sale. Don't know whether he knew of these terms or not. As receiver of this court, I sold goods for \$470. Of this stock, there was \$550 of old stock sold by me to Childs, and \$810 of new stock, by the invoices. New stock consisted of light goods, and was not very salable. Old stock was of heavy, staple goods, included brasses, tools, and fixtures, and was very salable, and worth more than new stock. At the sale, Fouché was present, and Walker, representing Mrs. Coleman. It was announced the whole title to goods would be sold unincumbered, free from the mortgages; purchaser would get a perfect title. Receiver sold the property free from incumbrances. Walker said he would claim the money for Mrs. Coleman. Walker dunned Childs for the money nearly every day. Did everything he could to get the money out of him. I tried to get him to pay off the mortgage. There was never any agreement made at the time of sale, or at any time, that Mrs. Coleman should surrender her mortgage, or cancel it. No money was paid prior to the suit brought against Childs. Walker told me, unless Childs paid Coleman mortgage, I would have to pay it. My sale to Childs left me insolvent. Gave him all property and means I had, to pay Coleman mortgage and other debt. Childs was insolvent. Coleman mortgage was given to secure a debt for borrowed money. At sale to Childs, it was understood Coleman mortgage fol-

lowed stock in his hands. At receiver's sale, it was stated Coleman and Nevin mortgages would look to fund arising from sale of stock for payment."

Henry Walker testified: "After deducting money realized on the garnishments, there remains due on the mortgage \$380.50 principal, and eight months' interest on that sum. Nevin was present at the sale, when it was stated property would be sold free from incumbrances. Representing Mrs. Coleman, I consented it should be so sold. Childs was present, and consented likewise. Fouché was present, and asked if the property was being sold free from incumbrances, and it was so announced at the sale.

R. T. Fouché stated that he was not representing Nevin's mortgage when the receiver made the sale. Representing Nevin at this trial, he admitted that the property was sold by the receiver freed from all incumbrances, and that the purchaser had a perfect title to it. This statement was accepted as true.

Nevin's mortgage was made on January 22, 1892, to secure a note for \$300 dated November 13, 1891, and due February 13, 1892. It was foreclosed on April 13, 1892, and thereupon a *fi. fa.* issued against the property set out in the mortgage, and J. J. Childs. Said property was: "All my stock, consisting of pipes and filling, office furniture, brass goods, bath tubs, hot water boilers, and all other materials used in the plumbing business, and all the stock and personality, of every kind and description, now contained in my plumbing establishment, situated at No. 327 Broad street, Rome, Georgia; also, all stock, of every kind, that may hereafter be purchased by me; it being the intention of mortgage to cover my entire stock in bulk, but changing in specifics. [Signed] J. J. Childs."

Henry Walker, and J. Branham, for plaintiff in error. Fouché & Fouché, for defendant in error.

PER CURIAM. Judgment reversed.

(34 Ga. 469)

BLALOCK et al. v. JACKSON.

(Supreme Court of Georgia. April 2, 1894.)

EXECUTION IN FAVOR OF EXECUTORS — LEVY — BOND FOR DEED — CONSTRUCTION — AGREEMENT TO ACCEPT LESS THAN AMOUNT DUE — CONSIDERATION.

1. Where one holding a bond for titles executed by a partnership, binding the firm to convey land upon the payment of the purchase money, renews the purchase-money note after the death of one of the partners, making the new note payable to his executors, who, by a settlement with the surviving partners, had acquired full ownership of the original note,—these executors, at the time of taking the new note, giving to the maker their bond for titles, stipulating in the bond to convey to him, with warranty, upon the payment of that note,—the executors, after obtaining a judgment upon the

note and filing a warranty deed, and having it recorded as prescribed in section 3654 of the Code, may have the land levied upon and sold to satisfy the judgment, without obtaining, or causing to be made, any conveyance by the surviving members of the firm, or by the heirs of the deceased member.

2. Inasmuch as executors, in their representative capacity, have no legal power to warrant the title of land conveyed by them, a bond in which they are merely described as executors, without stipulating that they are to convey as such, and which obligates them to warrant the title, should be construed, in such a case as the present, as their personal undertaking, and a deed executed by them as individuals, and containing the stipulated warranty, whether it describes them as executors or not, is sufficient, when duly filed and recorded, to enable them to enforce a judgment already obtained for the purchase money.

3. An executory agreement by the plaintiff in execution with the defendant to accept in payment less than the whole amount of the debt is not obligatory without a fresh consideration to support it, and mere payment of a part of the sum agreed on will not serve as a consideration.

4. Applied to the pleadings and facts, it results from the foregoing rulings that the first and third grounds in the affidavit of illegality were insufficient in law, and that the second ground, under the evidence admitted, together with that which ought to have been omitted, was without substantial merit.

(Syllabus by the Court.)

Error from superior court, Upson county; J. J. Hunt, Judge.

Action by H. F. Blalock, executrix, and S. N. Woodward, executor, of the estate of A. J. Blalock, deceased, against Cary Jackson, in which there was a judgment for plaintiffs. Execution was issued on the judgment, and defendant filed an affidavit of illegality. There was a verdict and judgment in favor of plaintiffs for part only of the amount claimed, and they bring error. Reversed.

The following is the official report:

An execution in favor of Mrs. H. F. Blalock, executrix, and S. N. Woodward, executor, of A. J. Blalock, for \$795.78 principal, \$47.82 interest, and 10 per cent. attorneys' fees, against Cary Jackson, from a judgment of the superior court of July 20, 1888, was levied, and the defendant filed an affidavit of illegality on the following grounds: (1) No good and sufficient and legal title to the land has been made to deponent, and filed in the office of the clerk of the superior court, in accordance with the bond for title to deponent from Stafford, Blalock & Co., who have made no deed to deponent, although they agreed to do so, and he holds their bond for title to the land. In 1875 he purchased the land from W. W. Jackson for \$900, one-half cash and the other half on time, and took a bond for title from Jackson; and when he had paid to Jackson all of said purchase money except \$150, in 1879 or 1880, Jackson traded the note for said balance to Stafford, Blalock & Co., and with deponent's consent made them a deed to the land. Deponent surrendered to Jackson his bond for title, and Stafford, Blalock & Co. then gave deponent their bond for title, conditioned to make

him a good and sufficient warranty deed to the land when the balance of purchase money was paid, which bond he took in lieu of the bond of Jackson. A. J. Blalock, plaintiffs' testator, was one of the firm of Stafford, Blalock & Co., and the *fi. fa.* is in part for said purchase money. (2) Plaintiffs have not executed and filed in the office of the clerk of the superior court a good and sufficient warranty deed to deponent to the land, in accordance with the bond for title he holds from them. After the death of A. J. Blalock, plaintiffs, as his executrix and executor, voluntarily executed and delivered to deponent their bond for title to the land, conditioned upon the payment by him of the balance due by him on the same; but they have not complied with the terms of said bond, or made the deed they bound themselves to make. (3) The *fi. fa.* is proceeding for about \$150 more than is due on it. When Stafford, Blalock & Co. traded for the note, only \$150 was due on it; but deponent was security to them for several debts which he had to pay, and, not having the money, he gave them his individual note for the same, and included said \$150 in the new note, and paid them 24 per cent. interest per annum on the whole amount, which interest was included in said note. He afterwards renewed the note several times at same rate of interest; and, when plaintiffs finally sued it, he employed counsel to defend the same, to plead said usury, etc. At the term of court when the judgment was rendered, S. N. Woodward, as plaintiffs' attorney and one of plaintiffs, agreed with defendant, if he would not make said defense, and let him take the judgment on which the *fi. fa.* is based, he would give him the benefit of the defense in time to pay the same; that deponent might make payment in annual installments of such amounts as he could pay until the whole debt was paid. Upon that consideration deponent consented not to, and did not, defend the suit. When he made the first payment of \$50, October 5, 1890, said Woodward agreed with him that if he would waive the annual installment payments, and pay it all at once, he would settle the *fi. fa.* for \$900, including the \$50 that day paid, and that Stafford, Blalock & Co. would make the deed to the land; and J. W. Stafford, one of that firm, agreed that said firm would make said deed. Deponent accepted the proposition, and paid \$353, which is credited on the *fi. fa.*, and negotiated with W. P. Blasingame for \$450, through a loan association, for the balance, which he tendered plaintiffs upon Stafford, Blalock & Co. making a warranty deed to the land; but they declined to make the deed, and the association refused to loan the money on a deed made by plaintiffs, on the ground that a deed from them would not be legal,—they, being executors, could not legally buy or sell the land from Stafford, Blalock & Co.,—and Woodward then told deponent he could not make a legal deed with-

out going to considerable expense. Which \$447 deponent then tendered, and now tenders, in full payment of the balance due on the fl. fa., whenever he receives a warranty deed to the land in accordance with his bond for title from Stafford, Blalock & Co.

To this affidavit plaintiffs demurred, and the demurrer was overruled. The jury found due on the fl. fa. \$450 principal and \$121.50 interest to May 4, 1893, and that the fl. fa. was proceeding illegally. Plaintiffs moved for a new trial, which was denied. They excepted to both rulings mentioned. The grounds of the demurrer are: (1) The first ground of illegality sets forth no valid reason why the fl. fa. should not proceed, the affidavit showing that Stafford, Blalock & Co. are not parties to this case, and that, since the date of the bond for title from them, the deponent gave his note for the same debts he formerly owed them to plaintiffs, and accepted their bond for title to the same land. (2) The second ground does not set forth in what consists the failure of plaintiffs to comply with their bond for title to defendant. It does not deny that a deed was filed before the levy. It simply alleges that good and sufficient warranty deed has not been made in accordance with plaintiffs' bond, etc. (3) The allegation of usury in the third ground is an effort to go behind the judgment, and so is the allegation of an agreement to collect the judgment in installments; the latter allegation being also an effort to vary the judgment by parol. The allegation of an agreement to compromise for \$800, and a partial payment made thereon, is an attempt to set up a new contract as to the judgment, without a consideration to support it, and an attempt to set up an agreement to settle an existing debt by a promise to pay a part of it, which is void for want of consideration,—a *nudum pactum*. (4) Defendant pleads tender, and sets out that about \$150 less than the full amount due on the fl. fa. was tendered; whereas a tender, to be available, must be in full of the debt. (5) Defendant admits that a large sum is due on the fl. fa., but did not, at the time of filing his affidavit, pay, nor has he since paid, the sum admitted to be due. (6) The grounds of the affidavit are not plainly and distinctly set forth, but are set out in a manner so obscure, partial, indistinct, uncertain, and illusive as that an issue cannot intelligently be made. Besides the general grounds, the motion for a new trial sets forth the following: That the court erred in ruling out of evidence a deed, made on the day before the levy, to the land levied on, by Mrs. H. F. Blalock and S. N. Woodward, individually, to the defendant, reciting a consideration of \$847, properly signed, witnessed, filed, and recorded. And that the court erred in refusing to admit in evidence a quitclaim deed from Ora B. Woodward, Fannie B. Grace, and James A. Blalock to Mrs. H. F. Blalock and S. N. Woodward, properly signed, witnessed, filed, and record-

ed, expressing a consideration of \$10. It was objected to on the ground that Ora B. Woodward, being the wife of S. N. Woodward, could not sell him any property without an order of court. He testified that the deed was made at his suggestion, without any money consideration, for the purpose of completing the chain of title in the plaintiffs. And that the court erred in admitting a warranty deed dated November 23, 1876, properly executed and recorded, from W. W. Jackson to Stafford, Blalock & Co., conveying the land levied on; plaintiffs objecting that the deed was irrelevant and did not illustrate any issue raised by the pleadings. And that the court erred in allowing defendant to testify that the note which he owed Stafford, Blalock & Co. was infected with usury, and, when sued by plaintiffs on the note which was in renewal of the note just mentioned, he employed counsel to plead usury; and to testify about an alleged agreement made with plaintiffs to the effect that, if defendant would not file said plea, they would give him three years in which to pay the judgment. The objection was that it was an effort to plead usury after the judgment, and to go behind the judgment, and to ingraft by parol prior stipulations and conditions to an unconditional judgment. The court instructed the jury that the testimony was not introduced for the purpose of reducing the amount of the judgment, as the time for pleading usury was past. And that the court erred in refusing to reject and rule out all testimony as to negotiations and conversations made prior to the judgment, and in allowing defendant to testify about an alleged contract made with Woodward, by which the judgment was materially lessened after the rendition of the judgment. And that the court erred in his charge, in that he did not present fully and fairly the theory of plaintiffs, and did not charge on all the legal issues raised, but only charged on the theory of defendant, utterly and entirely ignoring plaintiffs' theory; and only charged that the jury could find on one theory, thereby intimating an opinion on the evidence. And that "the court erred in directing the jury that they could find the amount due on the fl. fa., and could find that it was proceeding illegally, it being two verdicts in one, and does not give the jury the right to find that the fl. fa. was proceeding legally."

The court charged the jury that before the fl. fa. could legally proceed it would be necessary for a deed to be filed in the clerk's office of the superior court, from the executors of the estate to the defendant, and, if such deed had not been introduced, they should find that the fl. fa. was proceeding illegally. This is assigned as error, plaintiffs claiming that a deed from Mrs. H. F. Blalock and S. N. Woodward, individually, to the defendant, conveyed title, and was a sufficient compliance with the bond for title; and that, if there was no title in plaintiffs, the fl. fa. could still proceed, or at any rate the defend-



ant had a leviabie interest in the land which was subject to the fl. fa.

S. N. Woodward, for plaintiffs in error. J. Y. Allen and M. H. Sandwich, for defendant in error.

PER CURIAM. Judgment reversed.

(94 Ga. 430)

WESTERN UNION TEL. CO. v. HINES.  
(Supreme Court of Georgia. March 26, 1894.)

BEST AND SECONDARY EVIDENCE—NOTICE TO PRODUCE.

In an action by the sendee of a telegram against the company for special damages, the case being one in which the contents of the telegram sent are material, the loss by the plaintiff of the telegram received will not lay the foundation for introducing parol evidence of its contents without accounting, by notice to produce or otherwise, for the nonproduction of the telegram written and delivered by the sender for transmission. If the case of *Railway Co. v. Disbrow*, 76 Ga. 253, is to be construed as at variance with this ruling, it is in conflict with sections 8767 and 8768 of the Code, as well as with the established law as it existed prior to the Code. For this reason the case mentioned should be treated as colored and controlled by its own peculiar facts, including the circumstance that the party whose duplicate of the contract was not lost was probably put upon notice prior to the trial that the duplicate of the other party had been lost, this notice resulting from the examination of a witness by interrogatories before the trial to prove the loss and verify a copy of the instrument.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by J. O. Hines against the Western Union Telegraph Company for damages. Judgment for plaintiff, and defendant brings error. Reversed.

Bigby, Reed, Berry & Foote and Wrights & Harper, for plaintiff in error. W. T. Turnbull and W. H. Mitchell, for defendant in error.

PER CURIAM. Judgment reversed.

(94 Ga. 471)

CENTRAL RAILROAD & BANKING CO.  
v. BRIDGER.

(Supreme Court of Georgia. April 9, 1894.)  
CARRIERS—CONTRACT OF SHIPMENT—CONSTRUCTION—CONNECTING LINES—LIMITATIONS OF LIABILITY.

1. In order for a common carrier, by whom the transportation begun on a preceding connecting line is to be completed, to take the benefit of a special contract between the shipper and the initial carrier limiting liability in case of loss to a stipulated value per 100 pounds, it must appear either that the contract was such as to bind the initial carrier for full performance, so as to make the second carrier the agent of the first, or else that the reduced rate forming the consideration of the special contract was not confined to the line of the first carrier, but was, either by the contract itself or by the act of the second carrier in rating and

billing the goods over its line, extended and applied to that line also.

2. A special contract, expressed in a bill of lading and in the written assent of the shipper to its terms, which relates to a consignment of goods from a given point on one railway to a given point on another, and which purports on its face to be a through bill of lading, but expressly limits the undertaking of the first company to performance on its own line, with no further duty on its part but to deliver to the connecting line, and which names no rate of freight further than the terminus of the first line, but expressly excludes any guaranty of a rate beyond that point, does not bind the first company, the one with which the contract was made, to complete, either by itself or by the second company as its agent, the whole transportation; and although the contract provides on its face for extension to the second company, at the option of the latter, of the benefits secured to the former in consequence of the reduced rate, yet, it not appearing that the second company availed itself of this privilege by shipping the goods over its line at a reduced rate, and the goods having been destroyed by fire upon that line, presumably by reason of negligence on the part of this company, the latter is liable to account therefor to the owner at full value, there being, so far as appears, no consideration to uphold any agreement with it, express or implied, to accept the conventional value agreed upon with the first company, and specified on the face of the bill of lading.

(Syllabus by the Court.)

Error from superior court, Wilkinson county; W. F. Jenkins, Judge.

Action by Mrs. R. Bridger against the Central Railroad & Banking Company for the value of certain property. Judgment for plaintiff, and defendant brings error. Affirmed.

The following is the official report:

Mrs. Bridger sued the Central Railroad & Banking Company for the value of certain property which she alleged she delivered to the Richmond & Danville Railroad Company, to be by it carried from Toccoa to Atlanta, and by defendant from Atlanta to Gordon. She alleged that, through the negligence of defendant, the property was destroyed by fire, and never redelivered to her. She obtained a verdict for \$1,048, and, defendant's motion for a new trial being overruled, it excepted. The motion contained the general grounds that the verdict was contrary to law, evidence, etc.; also, because the court, over defendant's objection, admitted in evidence the market value of the goods (it was not stated in this ground what objection was made by defendant to this evidence when offered); because the court charged that the bill of lading under which the goods were shipped was not, as between plaintiff and this defendant, an express contract; because the court charged that plaintiff was not bound by the valuation of the goods as expressed in the bill of lading, and that such was not the measure of plaintiff's damages; because the court charged that any benefits which might belong to the Richmond & Danville Railroad under the bill of lading would not inure to the benefit of defendant. It was admitted on the trial by defendant that the goods were received of the Richmond & Dan-

ville Railroad Company in good order, and receipted for as such by defendant; and that they were destroyed by fire at Sunny Side, a station on the line of defendant, and while the same were in its possession. It was also agreed that the market value of the goods was \$1,048.

Lawton & Cunningham, for plaintiff in error. Washington Dessau and J. W. Lindsey, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 493)

ROBERTS v. MULLINDER.

(Supreme Court of Georgia. April 16, 1894.)

RECEIVERS—APPOINTMENT—PAROL GIFT—TITLE.

According to Hughes v. Clark, 67 Ga. 19, and Howell v. Ellisberry, 5 S. E. 96, 79 Ga. 475, the plaintiff in error had no title, by reason merely of a parol gift of the land, and the making of valuable improvements thereon, which she could assert in a claim case; and it not appearing that her possession was adverse to the donor for 20 years, but the evidence showing that he was in possession within that period, and exercised acts of ownership, such as conveying the land as security for his debt, there was no abuse of discretion in appointing a receiver to secure and preserve the rents and profits of the land pending the claim case; the claimant having interposed her claim upon an affidavit in forma pauperis, without giving bond and security, and the value of the premises being probably insufficient to produce at sheriff's sale a fund large enough to pay off the judgment founded on the debt to secure which the land was conveyed to the creditor by the defendant in the execution levied thereon to enforce the security deed.

(Syllabus by the Court.)

Error from superior court, Talbot county; W. B. Butt, Judge.

Action by Margaret Mullinder against M. E. Roberts for an injunction, and for the appointment of a receiver. From the judgment, defendant brings error. Affirmed.

The following is the official report:

This was a petition for injunction and receiver. The following appears from the record: February 1, 1887, plaintiff made a loan to J. M. Smith, of Meriwether county, and to secure the same took his deed to 235 acres of land in Talbot county. February 22, 1893, plaintiff obtained, in Meriwether superior court, a general verdict and judgment for \$500 principal, \$172.40 interest, \$67.24 attorney's fees, and costs. April 13, 1893, plaintiff filed for record in the office of the clerk of Talbot superior court a deed conveying the land to Smith, and the same was levied on two weeks afterwards, by virtue of the execution which issued from the judgment, "as the property of James M. Smith, the defendant, and found in possession of defendant." Thereupon, Mrs. Roberts interposed her claim to the land, in forma pauperis. Smith died in July, 1893, and in the next October the plaintiff brought a petition for injunction, and for a receiver to take charge of and hold the rents and profits of the land, alleging that the claim was interposed, not in good faith,

but for delay, and for the purpose of hindering and delaying the collection of the judgment, and to enable Mrs. Roberts to cultivate, rent, and use the land for her own benefit; that she has no legal or equitable interest in the land, and is insolvent; and that the land is poor, badly worn, and not worth over \$700, and is decreasing in value, and the improvements on it are not being kept up. It was further alleged that Smith had no interest or ownership in any other property, was insolvent when he died, and there is no administration on his estate. Defendant answered that the allegations that her claim was not filed in good faith, but for delay, and that she has no interest in the land, are false; that in 1871 Smith, who was her step grandfather, gave her the land, and placed her in possession of it, and she has so remained ever since, claiming it as her own, and making valuable improvements on it, and her possession and claim were open and notorious; that Smith was not in possession of it at the time of the levy; that she is not insolvent, but was forced to interpose her claim in forma pauperis, having no one to appeal to stand her bond, but her neighbors, who, like herself, were of limited means; that the land is worth \$2,000, and she has placed on it improvements which are in good and reasonable repair; and she denies that it is not kept up. She further alleges that the superior court of Meriwether county had no jurisdiction to render a judgment establishing and fixing a lien upon land in Talbot county, and that she is informed that plaintiff obtained judgment by default, and that, if any motion was ever made to set it aside and render a different judgment, neither Smith nor his counsel ever had notice of it. At the hearing there was evidence by affidavits, etc., in support of the petition and answer. The judge ordered that the defendant, within 10 days, give a bond for \$1,500, payable to the plaintiff, conditioned to pay such damages as the jury, on the trial of the claim case, should assess, and, in default thereof, that a receiver be appointed and injunction be granted as prayed. Defendant excepted.

Thornton & McMichael, for plaintiff in error. H. W. Hill, J. J. Bull, and Calhoun, Ming & Spalding, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 510)

RUSSELL v. ALABAMA MIDLAND RY. CO.

(Supreme Court of Georgia. April 23, 1894.)

SUBSCRIPTION FOR RAILWAY STOCK—GROUNDS FOR NONPAYMENT—MISREPRESENTATIONS—VIOLATION OF CHARTER.

1. One who subscribes to the capital stock of a railway company chartered under the general law for incorporating such companies must take notice, notwithstanding any representations made to the contrary, that the railroad company has no power to issue or deliver to its stockholders any stock in an existing or future construc-

tion company. It follows that oral representations made touching the construction company, its resources, or the value of its stock are not pertinent as a defense to an action by the railroad company against a subscriber to enforce payment of his subscription.

2. In subscribing for the capital stock of a railroad company, it is not matter for settlement or stipulation that the company will retain for a given time the control and management of its railroad and the conduct of its business. This is for regulation by the charter and by the law applicable to like corporations.

3. Acts done in violation of the charter, such as issuing preferred stock, or changing a terminus of the railway line or the principal office of the company, will not defeat the collection of subscriptions to the capital stock.

4. That the real ownership of the note sued upon is not in the railroad company, but in a construction company, is no answer to an action brought and prosecuted by the former company; nor is it any defense that the railroad company, together with another company, has bought a railroad in Alabama, created an indebtedness therefor, and issued bonds on the same; nor is it any defense that there has been an over-issue of stock as an aggregate of stock in two companies,—the railroad company and the construction company,—there being no allegation that this overissue applies to the stock of the railroad company separately.

5. The vice president of a railroad company has no power to make a contract and a deal with other companies by which all the franchises, roadbed, track, and other property of the former will pass into the hands of the latter; nor can such contract operate to disable the former to issue stock to subscribers to its capital stock. In an action to compel payment of a subscription to capital stock, it is not competent to inquire whether the plaintiff, by a traffic arrangement or otherwise, has placed its entire business and management in the hands of other companies, and has thereby defeated competition, in violation of its charter.

6. That plaintiff (the railroad company), "without the consent of defendant, instructed its canvassers for subscriptions to its capital stock to take the names and notes of insolvent and worthless parties, which they did to the injury and in fraud of defendant," is too general and vague to present any matter of fact upon which to take issue, and should be disregarded.

(Syllabus by the Court.)

Error from superior court, Decatur county; B. B. Bower, Judge.

Action by the Alabama Midland Railway Company against D. A. Russell. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Following is the official report:

The Alabama Midland Railway Company sued Russell upon a promissory note for \$500, dated April 29, 1887, and which it alleged was due July 5, 1889; that date being the date of the publication of the decision of the board of directors of plaintiff that said road was completed to a point on the east bank of the Chattahoochee river at or near Gordon, Ala., in conformity with the conditions expressed in the note. The note was payable to the Alabama Midland Railway Company, as chartered under the general railroad law of Georgia, or any amendments that might thereafter be made, its order, or assigns, the amount of the note, to be paid in cash on demand at its maturity,

being the amount of the maker's subscription to the capital stock of plaintiff. It recited that the amount should become due whenever plaintiff's board of directors should decide that the railroad had been finished to a point on the east bank of the Chattahoochee river at or near Gordon, Ala., from Bainbridge, Ga., and that the road is of standard gauge, laid with steel rail; and that publication of said decision in one of the daily papers of Montgomery, Ala., should be final and conclusive notice to the payee of the same; and that should plaintiff fail to complete the work necessary to make this obligation binding by October 1, 1890, then this instrument was to be void. Defendant made various pleas, to which plaintiff demurred upon the ground that individually and collectively they did not make an issue for adjudication by the jury or court. The demurrer was sustained, except as to the plea of general issue and the plea that the road was not completed in time. Defendant waived any technical benefit on the subject of general issue, but relied upon his other pleas. He admitted that plaintiff had proof of publication of completion of the road to the Chattahoochee river, in compliance with the requirements of law, and within the time specified therein; and the note being introduced, and there being no further evidence, the court directed a verdict for plaintiff for the amount sued for. The defendant excepted to the striking of his pleas and to the directing a verdict against him, and alleges that the pleas severally and collectively made issues that should have been inquired into by the court with the aid of a jury, and if true, as admitted by the demurrer, were a complete bar to plaintiff's recovery.

The pleas stricken were:

The consideration of the note has entirely failed, and was procured from him by fraud, and is therefore void, in this: The consideration was five shares of stock subscribed for by defendant in the capital stock of plaintiff and the Alabama Terminal & Improvement Company, which stock is utterly worthless, and was so when the note became due. Defendant had no idea of subscribing to the stock until the general officers of said company came to Bainbridge for the express purpose of inducing the people of Decatur county to take stock in the enterprise, and Woolfolk, who was president of the Alabama Terminal & Improvement Company, and vice president of plaintiff, and Wiley, president of plaintiff, and Henderson, secretary and treasurer of plaintiff, and other general officers and agents of said companies, came to Bainbridge and called a meeting of the citizens. At this meeting Woolfolk made a speech from elaborate data, in which he made the following statement, substantially: Every dollar that was subscribed by the people of Decatur county (defendant was sued as of Decatur county)

to the Alabama Midland Railway Company, then in process or contemplation of construction, could not be lost to the subscriber, because the road was to be built by the Alabama Terminal & Improvement Company, and that they had a contract at \$16,000 per mile to build said company(?), and it would not cost exceeding \$8,000 per mile for them to build it, and they would thereby have a clear profit of \$8,000 per mile on the average. That, owing to the advantageous circumstances under which they were operating, it would be utterly impossible for them to make less than three dollars for every one invested. That he knew that the Georgia Terminal & Improvement Company, which built the railroad from Columbus to Atlanta, had paid three dollars for one; this was not stated as a mere opinion, but as a fact. That the terms of the contract by which the Alabama Terminal & Improvement Company were to build the Alabama Midland Railway Company were far more advantageous than that under which the Georgia Terminal & Improvement Company built the railroad from Columbus to Atlanta. That every one who subscribed for stock in the Alabama Terminal & Improvement Company would receive two-thirds of the subscription in the common stock of the Alabama Midland Railway Company, and one-third in the Alabama Terminal & Improvement Company, and that, therefore, if we lost the entire amount of stock issued in the Alabama Midland Railway Company, we would get it back by receiving three for one in the Alabama Terminal & Improvement Company, and therefore it would be a physical impossibility for a subscriber to lose anything. These statements were made by Woolfolk in the presence of all the general officers of said company, and acquiesced in by them, and induced defendant to sign his name to the note for \$500 for stock in the Alabama Midland Railway Company and the Alabama Terminal & Improvement Company, as set out in plaintiff's declaration, when in fact the statement of Woolfolk, in the presence of such officers, acquiesced in and ratified by them, that the stock of the Georgia Terminal & Improvement Company, which built the railroad from Columbus to Atlanta, was worth three dollars for one, was absolutely false, and misled defendant, coupled with the statement of Woolfolk that the contract for the building of the Alabama Midland Railway was far more advantageous than the building of the Georgia Midland, the road from Columbus to Atlanta, and caused him to sign the note, when he would not have done so had he known he was signing the note for worthless stock and a worthless paper, and had he known that Woolfolk's statements were untrue when made. The stock of the Georgia Terminal & Improvement Company has never been worth three for one; and the statement of Woolfolk at the time, which made defendant sign the

note, was untrue, as he has inquired from the general officers of such company since that time, and herewith furnishes evidence of the truth of his statement. The stock which defendant was to receive in consideration of said note was worthless when he subscribed for it, and is now, and Woolfolk, who induced him to sign the note, knew it at the time, and knows it now.

Further: At the time he signed the subscription to the stock of the Alabama Midland Railway Company, under the promise of Woolfolk that he should receive one-third of his stock in the Alabama Terminal & Improvement Company, and two-thirds in the general stock of the Alabama Midland Railway Company, under the promises and pledges set forth, Woolfolk then and there stated that it was usual for new railroads to soon pass into the hands of purchasers,—in other words, that “big fish eat up small fish,”—but that he had so arranged and managed the Alabama Midland Railway Company that it was impossible for it to pass beyond the control of the immediate company until after four years expired, whereas, in fact, said statement was untrue, and the railroad has passed out of the control of the Alabama Midland Railway Company, and has gone into the hands of the Plant Investment Company, within less than four years from the time of said subscription, as will be shown by the evidence herewith produced, and that the statement of Woolfolk then and there made, and which induced defendant to sign the note, was untrue and misleading.

Further, that the note was fraudulently procured, in this: The inducement and promise was made by Woolfolk, president and vice president, as above stated, in the presence of the other officers and directors mentioned, in a public meeting in Bainbridge, and by their other agents, employed by plaintiff, and who were inducing people to sign said notes and subscription list to their capital stock, that if defendant and others similarly situated would give their notes for such stock the stock would be good and valuable, and would pay good dividends,—that is, the one-third of it contained in the Alabama Terminal & Improvement Company, three dollars for one,—because said Woolfolk knew the Georgia Terminal & Improvement Company's stock had paid three for one; and upon this promise and pledge, and relying strictly upon this statement, it being a statement of fact, and not a mere opinion, defendant then and there signed the subscription list, and afterwards, still believing it, carried it out by signing the note, whereas in fact the statements were false, and said stock is worthless.

Further: As an inducement to defendant and others similarly situated to sign said stock, they promised and represented to him and to them that they, plaintiffs, would only issue stock under the plan then and there proposed,—that is, that each subscriber should take two-thirds of the common stock of the

Alabama Midland and the other one-third in the Alabama Terminal & Improvement Company, and that all should fare equally and properly,—whereas, in fact, Woolfolk and those connected with him in the management of the Alabama Midland issued many thousand dollars of preferred stock in the Alabama Terminal & Improvement Company, so as to control all the cash assets and dividends of said company; and that by reason of said issue to these they control every dollar—more than a million dollars—of the assets of said company, and have not paid a dollar to the common subscribers, to the great detriment and fraud of every one whose name is on their paper. Woolfolk and about a dozen others, whose names defendant cannot now fully give, have absorbed the stock of the Alabama Terminal & Improvement Company, and received and appropriated the last dollar paid them by the Plant Investment Company for the Alabama Midland Railway,—more than \$500,000,—and have never accounted to them for a dollar of it. Wherefore the whole transaction, so far as concerns the signature of defendant and others, similarly situated, is and was a deliberate fraud, and the notes are void and without consideration.

Further: As an inducement to him and others similarly situated to give said note, and sign such subscription list, Woolfolk and the general officers of said company, and agents in their pay, apointed to get subscriptions and notes, represented to defendant and others that they had a contract with the Savannah, Florida & Western Railroad Company, with the Southern Express Company, and the Manhattan Bank of New York, by which there could be no possible “gobble-up” or foreclosure of any lien or mortgage on the Alabama Midland for four years from the date of building the same and signing of the bonds of the same, thus giving the stockholders ample time and opportunity to protect themselves from any “scoop” that might be attempted on them by their creditors, whereas in fact, in little more than a year from the time these things were done, by a direct arrangement between the Savannah, Florida & Western Railway Company and the Southern Express Company, on one part, and the Alabama Midland Railway Company, represented by Woolfolk, and the Alabama Terminal & Improvement Company, represented by Woolfolk, on the other part, the entire control of the Alabama Midland Company, its franchises, roadway, etc., was transferred to the Savannah, Florida & Western Railway Company, or the Plant Investment Company, utterly ignoring the rights of the stockholders and subscribers of the original Alabama Midland, all of which was in direct conflict with the representations made by Woolfolk, in the presence of the president of the company and others, in said public meeting at Bainbridge, and therefore his statements, which induced defendant to sign the note, were false and fraudulent.

Further: From the general purport of the speech and representations of Woolfolk in the public meeting mentioned, it was gathered by defendant and others that stock would be issued only upon a fair, honest basis, each man receiving stock according to his subscription, and every man faring alike, whereas in fact Woolfolk drew around him a certain crowd of favored individuals and issued to them preferred stock, giving them 10 per cent. interest on the same from the time of payment of their subscriptions, and fraudulently concealed this fact from all the balance of the subscribers, who might have gone into it the same way, and thereby created a favored class of creditors or stockholders, to the great detriment and loss of the general stockholders, of whom defendant is one. Wherefore he claims that the note was procured from him by fraud, and its consideration has failed.

Further: The Alabama Midland has ceased to own the notes, and as plaintiff has no further interest in them, and had turned the entire assets, known as subscription notes and lists, over to the Alabama Terminal Improvement Company, controlled by Woolfolk, as president of said company, in their barter and trade with the Plant Investment Company, the Savannah, Florida & Western Railway Company and the Southern Express Company have so manipulated as to hold all said assets as a clear gain to themselves, and a fraud upon the part of each and every signer of the same; and in this view defendant is informed and believes, and therefore alleges, that the Alabama Terminal Improvement Company is an entirely speculative machine, headed by Woolfolk, and instead of sticking to the charter, as granted by Georgia and Alabama, and carrying out its contract to build the Alabama Midland, it has, without defendant's consent or connivance, agreed to build a railroad to Tuscaloosa, Ala., beyond Montgomery, and therefore violated its contract and released defendant from any obligations.

Further: The Alabama Midland and the Alabama Terminal, after defendant's signature to the note and subscription list, in violation of the constitution of Georgia, bought a railroad in Alabama, known as the “Luverne Extension,” and made an indebtedness of \$500,000, and issued bonds on the same, contrary to the consent or wishes of defendant, and therefore, the contract being violated between plaintiff and its assigns and defendant, the contract is void.

Further: Woolfolk and the general officers of the Alabama Midland and Alabama Terminal being present, through the speech of Donnalson, one of the directors of said company, stated that only \$2,000,000 would be subscribed to the stock of the two companies, which would be enough to build the road and leave a large surplus to be divided among the stockholders, whereas, in fact, Woolfolk and his confreres in this enterprise issued more

than \$2,000,000 of stock in the two companies, issued to a favored few the leading stocks of the Alabama Terminal, then sold out to the Savannah, Florida & Western Railway Company and Southern Express Company, and left their subscribers in the lurch, with a total loss of the amount subscribed, if they are forced to pay the same. Therefore he says the whole transaction has been fraudulent from its conception, and is fraudulent in its ending.

Further: Woolfolk, in the presence of the officers mentioned above, at the public meeting in Bainbridge, openly stated that it was utterly impossible for any subscriber to that stock to lose a dollar, because two-thirds would be issued in general stock of the Alabama Midland, which might be lost, but one-third would be put in the Alabama Terminal, which he knew would pay three dollars for one; that Woolfolk then and there gave a reason for that statement,—that he knew of his own knowledge that the Georgia Terminal & Improvement Company paid three for one; and by these statements then and there induced "all of us," who had the most thorough confidence in him and his associates, to believe that the signing of these subscriptions was only lending credit to that which would be of great public benefit to a good country, and that it would be impossible for "us" to lose anything on the same,—whereas, in fact, his statements were untrue, and if we are forced to pay these subscriptions it is a dead loss to every man who has it to pay. For these reasons the consideration of the note and subscription has entirely failed, and was procured by fraud.

Further: Woolfolk, as president of the Alabama Terminal and vice president of the Alabama Midland, made a contract and deal with the Savannah, Florida & Western Railway Company and the Southern Express Company by which all the franchises, road-bed, track, and other property of the Alabama Midland passed into the hands of the Savannah, Florida & Western and Southern Express Company,—or the Plant Investment Company, which has a controlling interest in the two named,—except as to the subscription notes; and this was done without the knowledge or consent of defendant, and deprived the stock that might be received by him from the Alabama Midland of any value; and therefore the stock is utterly worthless, if issued by Woolfolk, or the Alabama Midland as then organized, under the law. Under the trade made between the Alabama Midland, as engineered and dictated by Woolfolk, and the said purchasers, it is now out of the power of Woolfolk and the Alabama Midland, as organized, and to which defendant subscribed, to issue to defendant any stock whatever of any value, and therefore his subscription and note are without consideration and void.

Further: Plaintiff, in direct violation of its charter, making Bainbridge its terminal point,

has without the consent of defendant changed the same to Thomasville.

Further: Plaintiff, without the consent of defendant, instructed its canvassers for subscription to its capital stock to take the names and notes of insolvent and worthless parties, which they did, to the injury and in fraud of defendant.

Further: By the charter of plaintiff it is compelled to keep its principal office in Bainbridge, unless a majority of the board of directors, after notice given as required by the charter, move the office to some other point. The change has never occurred in the manner required by the charter, nor does the corporation keep its principal office in Bainbridge, but keeps it in Montgomery, Ala. This provision in the charter was one of the reasons inducing defendant to subscribe to the stock and give the note, because the maintenance of the chief office in Bainbridge, where he resides, would largely increase his property and the prosperity of the town. Said change was made without his consent and against his interest and in violation of his contract and the charter, and all of these objections and wrongs done by plaintiff, in furtherance of the failure of consideration of the note, were communicated to plaintiff before payment was legally demanded of him.

Further: Plaintiff, in violation of its charter as granted by the state of Georgia, and under which it operated, has, either by absolute sale of the entire property, or by transfer of a majority of its stock, or by a traffic arrangement, placed its entire business and management in the hands of the Savannah, Florida & Western Railway Company, or the Plant Investment Company, either by themselves or in connection with other corporations, and has thereby defeated the competition that the facilities of said line would naturally suggest and create. This was done without defendant's consent or knowledge, and plaintiff has therefore violated the contract by violating the charter and the law.

Further: At the time he signed the subscription and note, it was represented to him, by Woolfolk and other general officers of plaintiff, that Bainbridge should be the terminus of the road, and that by reason of a borrowing arrangement they had made with the Plant Investment Company, the Savannah, Florida & Western Railway Company, and the Southern Express Company this autonomy and arrangement could not and would not be changed within four years from the completion of the road, whereas plaintiff has made arrangements either with one or all of said corporations by which the terminus of the road will practically, so far as running of trains and the traffic is concerned, be in Thomasville, instead of Bainbridge. One of the main inducements which impelled defendant to sign the note and make the subscription was that Bainbridge should be the terminus of the road, and not otherwise, for had

it not been for this arrangement and statement on the part of said officers, as above stated, he would not have made the subscription nor signed the note.

Further: All the work specified as a condition in the note was not completed within the time specified, to wit, by the — day of —, 18—, and therefore the note is void and of no effect, according to the terms thereof.

Further: Defendant has never acted as a stockholder of plaintiff, nor has he ever been recognized as such in any manner.

Further: The note sued on is not the property of plaintiff, but is yet in the control and custody of the Alabama Terminal & Improvement Company, of which Woolfolk is the president and controlling, and he and his company are fraudulently urging the suit, and not a dollar of interest therein belongs to plaintiff.

Further: That payment of the note was not demanded of the defendant at Troy, Ala., as required therein. (The note was payable at the banking house of Farmers' & Merchants' Bank, Troy, Ala., to be paid in cash on demand at maturity.)

Calhoun, King & Spalding, W. M. Hammond, Townsend & Harrell, and Russell & Russell, for plaintiff in error. Donalson & Hawes and Harrison & Peeples, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 446)

#### ROME R. CO. v. BARNETT.

(Supreme Court of Georgia. March 26, 1894.)

CIVIL ACTION FOR HOMICIDE—DEGREE OF PROOF—CONTINUANCE—ABSENCE OF WITNESS—CREDIBILITY OF WITNESS—REVIEW ON APPEAL.

1. The denial of a continuance where the sole ground of the application was the absence of a nonresident witness, whose testimony might have been taken by interrogatories, but was not, the movant having relied upon his promise to attend court, and showing as an excuse for his nonattendance that he was hindered by providential cause, was certainly no abuse of discretion.

2. It is no cause for a new trial that counsel read reported cases to the court, and commented upon them, in arguing a question of law to the court, whether this was done in the hearing of the jury or not.

3. In a civil action against the master for damages for a willful or reckless homicide committed by his servant, it is not requisite that any element of the case should be established with such certainty as to leave no reasonable doubt upon the minds of the jury.

4. The facts in evidence did not render it necessary to charge the jury that anything which would excuse the servant criminally would excuse the master civilly.

5. Unless a particular witness, in behalf of the plaintiff below, testified truly, the verdict would be an outrage upon justice. The credibility of this witness was attacked by every means known to the law, including contradiction by another witness, evidence of bad character, and his own previous affidavit to a written report of the facts, at variance with his testimony at the trial. Yet the jury, if not themselves corrupt, must have believed him, for they found for the plaintiff; and, the court be-

low having approved their finding, this court is constrained by law to acquiesce. Relatively to the revising powers of this court, the jury are the exclusive judges of the credibility of witnesses. The law provides for setting aside judgments obtained by perjury after conviction of that offense.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by Mrs. Mattie Barnett against the Rome Railroad Company for damages. Judgment for plaintiff, and defendant brings error. Affirmed.

The following is the official report:

After the decision in this case, as reported in 89 Ga. 718, 15 S. E. 639, another trial was had, resulting in a verdict for \$5,000 in the plaintiff's favor. So much of the declaration as claimed punitive damages was stricken from the declaration. The defendant moved for a new trial, on the grounds that the verdict was contrary to law and evidence, and was excessive, and on other grounds to be stated. The motion was overruled, and exception was taken. The special grounds are as follows: Refusal to continue the case on the following statement, made in his place by defendant's counsel: Ashley, a material witness for the defendant, was absent without permission, direct or indirect, of defendant, its agents or attorneys. Counsel expected to be able to get the testimony of the witness at the next term. The application for continuance was not made for the purpose of delay, but to enable defendant to get the testimony of the absent witness. Ashley was an employé of the Central Railroad Company, running as an engineer from Griffin to Chattanooga and return, spending half the time in Griffin when not on the road, and half in Chattanooga. He had agreed to attend the trial. There was a courtesy between the railroads to always send their employés to testify in behalf of other railroads, and to give them leave of absence and transportation for that purpose. Counsel had frequent personal assurance from Ashley that he would come promptly whenever the case was called for trial. Promptly upon counsel's return from Florida, where he had been for his health, and about a week before the trial of this case, he made inquiry for Ashley, and learned that, several days prior to the inquiry, Ashley had obtained leave of absence from the Central Railroad Company, and had gone to Hot Springs on account of his health, and would be there a month, when he would return. He was absent solely on account of his health; and affiant had every reason to believe, and did believe, that but for his sickness he would have attended the trial; and affiant felt sure that, if the case was passed for a few weeks, he would be able to obtain the testimony of the witness. Defendant expected to prove by the witness that, frequently after the accident resulting in the death of Barnett, Joe Herrick had stated to him that no one on the engine saw Barnett in time to stop; that

he (Herrick) did not see him at all, as he was down on the deck of the engine firing at the time; that he did not know he was there until after the accident. Over objection of defendant's counsel, the court permitted the plaintiff's counsel, during the course of his opening argument to the court and jury, to read at length the statement of facts and the decision in the case of Railroad Co. v. Denson, 84 Ga. 774, 11 S. E. 1039, contending that the facts of the Denson Case were analogous to the facts of the case on trial, and the decision thereon controlled the case on trial. Plaintiff's counsel was discussing the decision of the supreme court in this Barnett Case, as contained in the second and third headnotes, its meaning and interpretation, and, in so doing, read from the Denson Case as throwing light upon the Barnett decision. The reading and comments were addressed to the court alone, no part of them to the jury, though both were in the presence and hearing of the jury. Refusal to give the following instructions to the jury, as requested: "If, in the consideration of the issue as to whether the engineer was guilty of willful homicide, you should have a reasonable doubt as to his guilt, you will give the railroad company the benefit of that doubt." (Plaintiff's counsel had contended to the jury that it was not incumbent on them to believe that the engineer was guilty of a willful homicide beyond a reasonable doubt.) "In this case you cannot find for the plaintiff unless you believe beyond a reasonable doubt that George, the engineer, was guilty of murder or some other indictable offense. I charge you, gentlemen, that, in considering the guilt or innocence of the engineer, the railroad company would be entitled to all reasonable doubt; and if, after considering all the evidence in the case, you have a reasonable doubt of his guilt, then it would be your duty to give the railroad company the benefit of the doubt, and find for the defendant. Anything that would excuse the engineer criminally would excuse the railroad company civilly."

W. W. Brookes and W. T. Turnbull, for plaintiff in error. Wright, Meyerhardt & Wright and O. N. Featherston, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 490)

**COLLINS v. CAMP, Sheriff, et al.**

(Supreme Court of Georgia. April 2, 1894.)

**SUMMONS — SERVICE ON DEFENDANT'S WIFE — WHEN SUFFICIENT—JUSTICE'S EXECUTION—VALIDITY.**

1. Where a married man, having a permanent abode in this state, determined to change his residence and establish it in a distant state, and, with the avowed intention of doing so, took his departure, but left his wife (who was all of his family) here, where she remained un-

process in a suit brought against him

was served by leaving a copy with her at the same abode he occupied with her when he left, which abode she continued to occupy, such service was effectual; there being no evidence that he had acquired a residence elsewhere, or even that he ever reached the state to which he intended to remove, and no evidence that he intended to abandon his wife. The service was made within the same calendar month in which the defendant in the process left this state, and his wife did not leave until more than a month after the service was effected.

2. An execution regularly issued by a justice of the peace, and purporting to be founded upon a judgment rendered in a justice's court, is prima facie valid, and no invalidity of it is established by the production of the justice's docket, in which the entry of judgment shows the names and order of the parties, the issuing and service of summons, the fact that the suit was founded upon a note, and an entry of judgment thus: "Judgment in favor of — against — for principal, \$57.45; interest 8 % from date of note, —; interest after judgment at 8 per cent. per annum, —; attorney's fees, 10 % on principal and interest, —; cost, —. This 17th day of August, 1886. G. C. Thompson, J. P. Execution issued 23rd of August, 1886,"—the execution conforming in all material respects, including its date, to the docket. Any ambiguity of the docket as to the party in whose favor, or the party against whom, the judgment was rendered, is sufficiently solved by the execution itself.

(Syllabus by the Court.)

Error from superior court, Campbell county; S. W. Harris, Judge.

Action by J. D. Collins against J. L. Camp, sheriff, and others. There was a judgment for plaintiff, and defendants bring error. Reversed.

T. W. Latham, for plaintiffs in error. J. F. Gollightly, for defendant in error.

PER CURIAM. Judgment reversed.

(94 Ga. 718)

**ADAMS v. BANK OF STEWART COUNTY.**

(Supreme Court of Georgia. April 9, 1894.)

**NEW TRIAL—DISMISSAL OF MOTION.**

1. In a joint action against the maker and the indorsers of a promissory note, the verdict being for the plaintiff, as against the indorsers, but for the other defendant, the maker, and the plaintiff having moved for a new trial, it was no cause to dismiss the motion, at the instance of the maker, that service of the motion was not made upon the indorsers. As the contract of the maker and that of the indorsers were separate and distinct contracts, a new trial could be granted as to the maker without setting aside the verdict as to the indorsers.

2. The general rule as to the first grant of a new trial applies.

(Syllabus by the Court.)

Error from superior court, Chattahoochee county; W. B. Butt, Judge.

Action by the Bank of Stewart County against T. M. Adams and others. There was a judgment for defendant Adams, and from a judgment granting plaintiff a new trial defendant Adams brings error. Affirmed.

The following is the official report:

Suit was brought by the Bank of Stewart County against T. M. Adams, as maker, and J. E. Bivins and W. E. Murphey, as indorsers,



on a promissory note for \$1,354.17 principal, payable to the order of Bivins, at the Bank of Cordele, and reciting that, to secure its payment, 14 shares of the capital stock of that bank are left as collateral, the same subject to public or private sale without notice if this paper is not paid when due. Bivins, though served, made no defense. Murphey pleaded the general issue, and Adams filed a special plea, on which, under conflicting evidence, the jury found in his favor, but found for the plaintiff, as against the indorsers. The plaintiff moved for a new trial on the grounds that the verdict was contrary to the evidence, without evidence to support it, decidedly and strongly against the weight of evidence, and contrary to the principles of justice and equity. The motion was served on Adams, but not on either of the other defendants. At the time for hearing, Adams moved to dismiss the motion for a new trial because the other defendants were necessary parties thereto, but had not been served, nor waived service; the verdict and judgment being one in favor of Adams, and against Bivins and Murphey, and the motion proceeding against Adams only. The motion to dismiss was overruled, and the motion for a new trial was sustained, to which rulings Adams excepted. His special plea was, in substance, as follows: On April 2, 1891 (the date of the note sued on), he made a contract with Bivins for the purchase of 50 shares of stock of the Bank of Cordele, paid Bivins \$3,000 in cash, and gave a note for \$1,041.66, due September 2, 1891, and the note sued on, due February 2, 1892. Contemporaneously therewith he entered into a written contract (setting it forth), whereby Bivins agreed that if Adams wished to sever his connection with said bank on or before February 2, 1892, and did so, he would repurchase said stock from Adams, with 10 per cent. profit to Adams, dividends on the stock received by Adams in the meantime to be considered as profits on the stock. In pursuance with the contract of purchase, Bivins transferred to Adams 36 shares, and retained 14 shares, which latter number he attached to the note sued on, as security for the purchase money, provided Adams elected not to sever his connection with said bank in accordance with the terms of said written contract. Said 14 shares have never been transferred to Adams, nor has title to the same ever vested in him, but the same was, and still is, so far as he knows, in Bivins. In 1891, subsequently to the making of the contract aforesaid, he notified Bivins that he would sever his connection with said bank, and claim the right guaranteed to him under said contract, when Bivins insisted that he hold on until February 2, 1892, promising Adams that he would not dispose of the note held by Bivins, before described. Shortly thereafter he again notified Bivins that he would sever his connection with said bank on or before February 2, 1892, and to hold himself in readiness to comply with his con-

tract of repurchase. On February 2, 1892, he did sever his connection with said bank, and at the same time transferred to Bivins the stock which had been transferred to him, and demanded the money paid by him to Bivins, and a surrender of the notes which had been given to him by Adams. Bivins refused to accept the stock, and refused to pay him the money therefor, and to return to Adams said notes. Plaintiff is not the bona fide owner of the note sued on, but the possession of the same was a part of a scheme entered into on the part of Bivins and Murphey and plaintiff, in order to defraud Adams out of the amount represented by the note. Bivins is insolvent. The stock in the Bank of Cordele is almost, if not entirely, worthless. Bivins knew this at the time he contracted to sell it to defendant, Bivins having been cashier of said bank for a long time prior to, and within a few days of the time of, said contract. Bivins represented said stock to be worth \$110 for every \$100 of its stock, and Adams, relying upon said representations (which were false), made the contract of purchase. The stock was of little or no value. Wherefore, the consideration of the note sued on wholly failed. Murphey, to whom Bivins transferred the note, knew of the failure of consideration thereof, and of the contemporaneous contract above set forth, and of Adams' intention to claim the fulfillment thereof, before said note was transferred to him; and plaintiff had like notice before the note was indorsed to it by Murphey.

Peabody, Brannon, Hatcher & Martin, for plaintiff in error. Watts & Hickey and Thornton & McMichael, for defendant in error.

PER CURIAM. Judgment affirmed.

(92 Ga. 787)

GARRARD v. HULL et al.

(Supreme Court of Georgia. Jan. 27, 1894.)

RES JUDICATA—EFFECT ON PERSONS NOT PARTIES  
—PURCHASER OF LAND—NOTICE OF EQUITIES—  
POSSESSION BY MARRIED COUPLE—PRESUMPTIONS  
—EVIDENCE.

1. Although, by the dismissal of a bill in equity on general demurrer, it may have been adjudicated that, as between the complainant and the defendants in that bill, the title to certain land was not in the complainant; this was no adjudication upon the question of title as between the complainant and vendees of the defendants, who held under a deed from the latter made before the bill was filed.

2. Where husband and wife lived together upon a tract of land to which neither of them had, nor ever had, the legal title (the wife, however, claiming the land as her own by virtue of a secret equity), the mere fact of her living upon the land with her husband was not sufficient to defeat a perfect legal title in another who purchased without knowledge or notice of her equity, or of the fact that she claimed to be owner, and when inquiry would have shown that the husband occupied the land as tenant of one from whom the purchaser derived title, this title being consistent with such tenancy, and the tenancy being inconsistent with the wife's alleged equity. In such case the husband alone

should be treated as the person in actual possession.

3. It was error to allow a witness who was the maker of an absolute deed, the consideration of which, as expressed on its face, was \$2,500, to testify that when he signed the deed he thought it was a mortgage given to secure \$400; this evidence being offered to impeach the deed, as against a subsequent bona fide purchaser for value.

(a) Error assigned upon the admission of other evidence cannot be considered, it not appearing what, if any, objections were made to it when offered.

4. The court committed no error in granting a new trial.

(Syllabus by the Court.)

Error to superior court, Hancock county; McWhorter, Judge.

Execution proceedings by Hull & Tobin, survivors of the firm of George R. Sibley & Co., against Pierce & Culver and L. Pierce and G. P. Culver, and Mrs. Ann E. Garrard, as claimant. Judgment for plaintiffs, and claimant brings error. Affirmed.

Reese & Little, for plaintiff in error. J. A. Harley, J. T. Jordan, and R. H. Lewis, for defendants in error.

LUMPKIN, J. This was a claim case in which Hull & Tobin, survivors of the firm of George R. Sibley & Co., were plaintiffs in execution, and Mrs. Ann E. Garrard was the claimant. The defendants in *fi. fa.* were Pierce & Culver and L. Pierce and G. P. Culver. The jury found for the claimant, and the court granted a new trial.

1. It appears beyond dispute that in 1881 Beverly Amos owned a tract of land known as the "Lawson Place." On the 1st day of January, 1882, Amos conveyed this land to Pierce, Little & Co. On the 17th of March, 1883, W. F. Little, W. A. Buckner, and G. P. Culver, members of the firm of Pierce, Little & Co., quitclaimed to Lovick Pierce, who was the remaining member of this firm, their entire interest in this land. On the 9th of April, 1885, Pierce & Culver made a deed conveying the land to George R. Sibley & Co., predecessors of Hull & Tobin, which deed was recorded on the 8th day of April, 1886. It does not appear why Culver's name was affixed to this deed, the entire title at the time of its execution being, apparently, in Lovick Pierce alone; but this is immaterial, and, indeed, in the argument here this deed was treated by counsel on both sides as a conveyance from Pierce to Sibley & Co. It was made to secure a debt which was afterwards reduced to judgment in favor of Hull & Tobin, survivors of Sibley & Co. There was also in evidence a deed from Sibley & Co. to the defendants in execution, dated October 18, 1888, and recorded October 24, 1888, which contained the following recital: "This deed being executed as directed by the judgment and decree of the superior court of said Hancock county, in the case of Hull & Tobin, survivors of George R. Sibley & Co., vs. Pierce & Culver, that the execution found-

ed on the judgment rendered in said case against said Pierce & Culver might be levied on said land, and the same be sold in satisfaction thereof, in preference to all other claims." In 1887 Mrs. Garrard filed a bill against Beverly Amos, Lovick Pierce, and others, alleging that the land in question was her property, and praying that Amos be required to make her a deed to the same, and that the two deeds first above mentioned be canceled. Sibley & Co. were not made parties to this bill, nor was there any allegation therein as to the deed from Pierce & Culver to them. At the October term, 1888, this bill was dismissed on general demurrer. In the argument here it was insisted that this dismissal was an adjudication that the title to this land was not in the complainant, Mrs. Garrard; that this adjudication was binding upon her in the present controversy, and therefore, as between herself and Hull & Tobin, the question of title was *res adjudicata*. Whatever may have been the effect of the dismissal of the bill as between Mrs. Garrard and the defendants in that bill, certainly nothing was thereby adjudicated as between herself and the plaintiffs in execution in the present case. It must be borne in mind that the conveyance from Pierce & Culver to Sibley & Co. was made before the bill of Mrs. Garrard was even filed, and therefore, relatively to that bill and the decree thereon, there is no privity whatever between the grantees in that deed and the defendants to the bill. If the bill had resulted in a decree in Mrs. Garrard's favor, it could not be contended that Sibley & Co., or their successors in title, would be estopped by it. Not having been parties to the bill, they were in no way bound by an adjudication against their predecessors in title, rendered in a proceeding not instituted till after the deed to Sibley & Co. was made. Whatever may have been the equities existing between Mrs. Garrard and Pierce & Culver with reference to this land, Sibley & Co., and their successors, could not be affected, one way or the other, by the result of litigation over matters upon which they had not been heard, and as to which they were in no legal sense concerned. If, as between Sibley & Co. and Mrs. Garrard, the former would not have been bound by a decree in her favor upon the bill she filed, it is perfectly clear that as to them Mrs. Garrard is not estopped by the dismissal of the bill. The litigation between herself and the respondents in that bill was, as to Sibley & Co., *res inter alios acta*; and, of course, Hull & Tobin stand in the same position as Sibley & Co. would have stood. The proposition that the question of title, as between the claimant and the plaintiffs in execution, is not *res adjudicata* because of the disposition made of the above-mentioned bill, is to our minds absolutely free from difficulty, and, in our opinion, requires no further argument. In this connection, the court charged the jury as follows: "If you believe

from the evidence that the bill filed by Ann E. Garrard against Pierce, Little & Co. and L. Pierce covered the subject-matter of this litigation; and if you further believe that the same issues involved in this case were actually adjudicated by the court in that case; and if you further believe that the present plaintiffs in *fi. fa.*, though not parties to that case, are the vendees of L. Pierce under a deed made to secure a debt, and that the title is yet vested in L. Pierce,—then the former judgment is conclusive of the questions involved, or that could or should have been presented by due diligence; and such judgment would, in that event, be conclusive between the parties thereto, and be conclusive between the claimant and the vendee of L. Pierce, to wit, Hull & Tobin, and you would be authorized to find the property subject." In view of what has been stated above, this charge was error. Whether, as between the parties to the present case, the question of title was *res adjudicata*, should not have been submitted to the jury at all. On the contrary, the court should have held outright that Mrs. Garrard, so far as the plaintiffs in execution are concerned, was not estopped, by the dismissal of her bill in the former case, from setting up title to the land in dispute.

2. The error above pointed out, being against the claimant, would be no cause for setting aside a verdict in her favor. Upon the actual merits, however, the verdict was wrong, and the court properly granted a new trial. It appeared beyond controversy that, at the time the deed of Pierce & Culver was made to George R. Sibley & Co., they took it without knowledge or notice of any kind that Mrs. Garrard either owned, or claimed to own, the land. They were, in the strictest sense, bona fide purchasers for value, and without notice of the secret equity set up by the claimant. The evidence also shows conclusively that neither Mrs. Garrard nor her husband at that time had, or had ever held, the legal title to the land. The fact that they were living together upon it was the only circumstance tending in the least degree to convey notice that there was any defect or infirmity in the title conveyed to Sibley & Co. This fact was not of itself sufficient to defeat the perfect legal title which the latter acquired, the more especially when inquiry on their part would have shown that Mr. Garrard occupied the land as the tenant of Lovick Pierce, recognized him as his landlord, and paid, or agreed to pay, him rent for the land. Pierce's title was therefore perfectly consistent with Garrard's tenancy; but that tenancy was entirely inconsistent with his wife's alleged equity. The general rule is well settled in this state that when husband and wife live together upon land, and the husband exercises control of the same, the possession is presumptively in him, as the head of the family, and such joint residence would not alone be sufficient to give notice of any claim of interest in the land by the wife.

*Primrose v. Browning*, 59 Ga. 69; *Neal v. Perkerson*, 61 Ga. 346. These cases have been followed by later adjudications in this court, which need not now be cited. There is nothing in the facts of the present case to take it out of the general rule above stated. We have not stated nor discussed the facts relied upon by Mrs. Garrard in support of her equitable claim to the land. It is not necessary to do so, because, even if it be true that, as against Pierce, Little & Co., or any of the members of that firm, her equity would be perfect, we are satisfied that, under the undisputed facts presented by the record, it could not, for the reasons stated, be sustained as against the plaintiffs in execution. The evidence demanded a finding by the jury that the property was subject to the execution, and a verdict to the contrary cannot stand.

3. The court, over the objection of counsel for the plaintiffs in execution, allowed Beverly Amos to testify that when he made the deed to Pierce, Little & Co., in 1882, he thought it was a mortgage given to secure a debt for \$400. The deed was absolute on its face, and expressed a consideration of \$2,500. The evidence of Amos in this regard, if admissible in any event, certainly was not so as against Hull & Tobin, successors in title to Sibley & Co., who were, as has been shown, bona fide purchasers for value of the land covered by the deed. This deed had been recorded nearly three years before the land was conveyed to Sibley & Co., and they had a right, in the absence of notice to the contrary, to rely upon the deed as an absolute conveyance of the land. In the motion for a new trial, error was assigned upon the admission of other evidence, but it does not appear what, if any, objections were made to the same when offered, and therefore the alleged error cannot be considered.

4. The court below was doubtless satisfied that the verdict was contrary to law and the evidence, in which opinion we concur, and the granting of a new trial is fully approved. Judgment affirmed.

(94 Ga. 480)

#### RADCLIFFE v. BILES et al.

(Supreme Court of Georgia. April 9, 1894.)

ACTION ON NOTE—DEFENSES—FRAUD—NEGLECT.

1. In an action by the payee upon a promissory note in any court, whether of law or equity, it is a good defense that the note was without consideration, and procured by fraud.

2. One who executes and delivers a promissory note without reading or knowing its contents cannot avoid liability thereon because he acted ignorantly, without showing some justification of his ignorance, either by reason of his inability to read, or by some misleading device or contrivance amounting to fraud on the part of the person with whom he was dealing.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Petition by George W. Radcliffe against James S. Radcliffe and others. There was a judgment dismissing the petition, and petitioner brings error. Affirmed.

The following is the official report:

George W. Radcliffe presented his petition against James S. Radcliffe and J. B. Biles & Bro., to the judge below, and asked for the usual order nisi as in cases for injunction. The judge refused to entertain the petition, or sanction it; holding that there was no equity in it, and that the facts alleged therein could avail petitioner as well at law as in equity. To this, petitioner excepted. The petition alleged: On the — day of —, 1890, Biles & Bro. left with James S. Radcliffe 16 mules, with some agreement or understanding, as petitioner has been informed and believes, to the effect that James S. should sell the mules on credit, and all over \$100 each, received from the sale, should be divided equally between him and them, they paying for feed and attention to the mules. About a year afterwards, J. B. Biles came to petitioner, with James S., and stated to petitioner that he wished to sell to James S. all the mules which had not been sold,—some six or seven,—and all the notes for those which had been sold, and asked petitioner if he would stand security of James S. on a note for the same, amounting to some \$2,000. Petitioner flatly refused to do so, and thereupon agreed with Biles that he would stand the security, and guaranty that James S. would fully comply with the contract before set out; that is, that James S. should fully account with Biles and Bro. respecting any mules he had sold on their account, or turn over to them any rates or mortgages for which the mules might have been sold. Thereupon, Biles, representing Biles & Bro., agreed to this arrangement, and it was then and there agreed that James S. and Biles should draw up a paper to carry out this agreement. Thereupon, Biles and James S. left petitioner, in order to do so, and soon returned, presenting a paper signed by James S., stating that the matter had been fixed up. Believing the paper contained the agreement he had made with J. S. and Biles, petitioner signed it, whereas it did not contain the agreement, but, as he afterwards learned, was two promissory notes for \$1,000 each. This was a fraud upon him, as defendants well knew. He believed, when he signed, he was only signing an agreement that J. S. should turn over the unsold mules, and all notes and mortgages he took for mules sold, and account for all money he received from sale of mules. Notwithstanding the facts aforesaid, Biles & Bro. have sued him upon the notes, in the city court of Columbus, which suit is still pending, and, unless he can have the equitable interference of the superior court, will obtain judgment against him. Inasmuch as he cannot have adequate relief in a court of law, and particularly as said city court of Columbus

has no equity power, and as he can only have full and adequate relief in the superior court, which alone can exercise equity jurisdiction, he prays that the notes be reformed, and the agreement made, as alleged, between him, James S. and Biles & Bro. be set up as the true contract between the parties. He offers fully to comply with the same. He further prays that said action be perpetually enjoined; for general relief and process; waiving discovery. With this petition was the affidavit of petitioner that the facts set forth, so far as they concerned his acts, were true, of his own knowledge, and so far as they concerned the acts of others he believed them to be true.

Blandford & Grimes, for plaintiff in error.  
Little & Wimblish, for defendants in error.

PER CURIAM. Judgment affirmed.

(34 Ga. 479.)

MAUND et al. v. MAUND et al.  
(Supreme Court of Georgia. April 9, 1894.)  
SALE OF LAND BY EXECUTORS—PETITION—ANSWER OF HEIRS.

Where a will was proved in common form, and the executors thereafter filed in the superior court a petition for leave to sell certain lands of the testator for the purpose of paying his indebtedness, there was no error in sustaining a demurrer to an answer to the executors' petition filed by certain heirs of the testator; the answer alleging, in substance, that the deceased had died intestate, and that the paper alleged to be his will had never been admitted to probate in solemn form. The executors had the right to proceed, after the probate in common form, with the due administration of the estate, and the issue of devisavit vel non could not be thus collaterally raised.

(Syllabus by the Court.)

Error from superior court, Talbot county; W. B. Butt, Judge.

Petition by R. D. Maund and another, executors, against Wesley W. Maund and others, for leave to sell land belonging to testator's estate. There was a decree for plaintiffs, and defendants bring error. Affirmed.

The following is the substance of the official report:

The answer of defendants was demurred to by the plaintiffs, and the demurrer was sustained. The petition alleged: By his will, testator appointed petitioners executor and executrix. He made a codicil, and died, leaving the will and codicil unrevoked. Afterwards, on February 2, 1891, on their petition, the will and codicil were duly probated and admitted to record in the court of ordinary of the county of testator's residence at death, and they then qualified as executor and executrix. Testator left a large estate of lands in Georgia and Florida, but left no cash and no personality with which to pay his indebtedness. He owed about \$2,800. The will provides that none of the lands are to be sold, unless for the support of Ida J. Maund, or until her marriage or

death. At the time the will was made, testator intended to sell enough land before his death to have paid said indebtedness, and had given power of attorney to one Rutherford to sell some, and thought it had been sold before his death, but it had not. There are no assets save the lands to pay the indebtedness, and, if petitioners are compelled to await suit and have payment enforced by judgment, it will cause great loss to the estate; and for the purpose of saving this loss, and to pay the debts, petitioners prayed for an order to sell. The defendants named are the legatees under the will, most of them the children and grandchildren of testator. Attached as an exhibit were copies of the will and codicil, and an affidavit made before the ordinary, on February 2, 1891, by the executor and executrix, that the writing contained the true last will of John C. Maund, and that they will well and truly execute the same in accordance with the laws of the state. The answer of defendants consisted simply of a denial that John C. Maund died testate; that the exhibit was his last will; and that it had ever been probated in solemn form as the last will of said Maund. What the grounds of demurrer were does not appear.

J. H. Worrill and Thornton & McMichael, for plaintiffs in error. Willis & Persons, for defendants in error.

**PER CURIAM.** Judgment affirmed.

(90 Va. 795)

**WEISIGER et al. v. RICHMOND ICE-MACH. CO. et al.<sup>1</sup>**

(Supreme Court of Appeals of Virginia. Nov. 8, 1894.)

**WITHDRAWAL OF ANSWER—DISCRETION OF COURT—BILL TO CANCEL STOCK SUBSCRIPTION—SUFFICIENCY—ESTOPPEL—ACQUIESCENCE.**

1. It is within the discretion of the court to allow the defendant to withdraw his answer, and demur to the bill, there having been no unreasonable delay in making the motion.

2. A bill to cancel a subscription for stock alleged that it was induced by fraudulent representations as to the financial condition of the company; that a large liability was concealed; that, when the officers were asked to explain this fact, they "pulled wool over plaintiff's eyes" by the representation that the company had earned, and would forthwith declare, a dividend of 40 per cent., and "the matter was then allowed to proceed"; that no dividend was ever paid, although one was demanded by plaintiff; that each subsequent statement of the company showed a less prosperous condition, and contained false representations; and that the company is now insolvent. *Held*, that the bill was bad on demurrer.

3. One who is induced to subscribe for stock by a fraudulent representation cannot, after discovering the fraud, retain the stock in hopes that it will rise in value, or continue to act as a stockholder, and then disaffirm his subscription.

Appeal from chancery court of Richmond. Suit in equity, wherein E. W. Weisiger and others were plaintiffs, and the Richmond Ice-Machine Company and others were defendants. Decree for defendants, and complainants appeal. Affirmed.

Wm. I. Clopton and J. H. Webb Peploe, for appellants. Wm. P. De Saussure and Robt. Stiles, for appellees.

LEWIS, P. The bill was filed by the appellants for a rescission of their subscriptions to the stock of the defendant company, and to recover back the money paid on account thereof, on the ground that they had been severally induced to subscribe by fraudulent representations. The chief ground of the charge of fraud was a written statement, put forth and signed by the secretary and treasurer of the company, purporting to have been taken from the books of the company, which represented the company to be in a prosperous condition, with a net surplus (i. e. an excess of resources over liabilities) of \$27,933.67. The subscriptions were made in September, 1890, and the suit was commenced about a year thereafter. The bill states that, "some months" after they had subscribed, the complainants, for the first time, learned that they had been deceived, by reason of the omission from the said written statement of the fact (which was studiously concealed from them) that there was a liability on the company to one Johnson for paid-up stock to the amount of \$27,000, and that, upon their asking an explanation, the officers of the company "again succeeded in pulling the wool over complainants' eyes," by the representation that the company had earned, and would forthwith declare, a dividend of 40 per cent. "The matter was then allowed to proceed." The bill further states: "Without, however, any dividend having been declared," although the complainants some time afterwards demanded a dividend. The bill then goes on to aver that various subsequent statements were made, each in its turn showing the company to be in a less flourishing condition than its predecessors, and all containing misleading and fraudulent representations; and, further, that the company is in fact in a state of hopeless insolvency. The company and several of its officers were made defendants, all of whom answered. Afterwards, and before any further proceedings were had in the cause, the defendants asked and obtained leave, over the objection of the plaintiffs, to withdraw their respective answers, and to demur, which was done; whereupon the demurrers were sustained, and the bill dismissed by the decree complained of. The objections that have been urged to this decree are (1) that the court erred in allowing the defendants to demur after they had answered; and (2) that, independent of this consideration, the demurrers ought to have been overruled.

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

As to the first point, it is enough to say that it was within the discretion of the court to allow the defendants to withdraw their answers, and to demur; and, as there was no unreasonable delay in moving for leave to do so, we are of opinion that the objection is not well founded.

Then the question is, does the case stated in the bill entitle the complainants to the relief sought? We think not, and this is so apart from any merely technical objections to the bill, for vagueness or otherwise. A contract to purchase stock, induced by fraudulent representations, is not void, but only voidable, at the option of the purchaser. If, as was said in *Bosher v. Land Co.*, 89 Va. 459, 16 S. E. 360, the representations are made by promoters or by a prospectus, the innocent subscriber may rely upon them without investigation. Ordinarily, however, where the rights of creditors are concerned, he must exercise reasonable care and vigilance in discovering fraud; and in any case he must, upon discovery of the fraud, promptly repudiate the purchase. He has no right to hold on to the stock in the hope or expectation of realizing a profit therefrom, and, failing in this, to disaffirm the contract. Hence, if, after discovering the fraud, he demands or receives a dividend, or continues to act as a stockholder, or does any act inconsistent with an intention to disaffirm the contract, he will be held to have waived the fraud. As was said by the masters of the rolls in *Ashley's Case*, L. R. 9 Eq. 263: "The leading principle in all these cases is this: A man must not play fast and loose. He must not say, 'I will abide by the company if successful, and I will leave the company if it fails.' And therefore, whenever a misrepresentation is made of which any one of the shareholders has notice, and can take advantage to avoid his contract with the company, it is his duty to determine at once whether he will depart from the company, or whether he will remain a member." The same principle has been recognized in numerous cases, English and American. Indeed, it is fundamental, and rests upon a twofold reason, viz.: (1) Because the subscriber's remaining in the company may induce others, upon the credit of his name, to become members; and (2) because it may likewise induce others to give credit to the company, for the same reason. *Ogilvie v. Insurance Co.*, 22 How. 380; *Upton v. Tribilcock*, 91 U. S. 45; *Upton v. Englehart*, 3 Dill. 496, Fed. Cas. No. 16,800; 1 Cook, Stock, Stockh. & Corp. Law (3d Ed.) §§ 151, 160, 165, and cases cited.

Tried by this test, the decree in the present case must be affirmed. The bill admits that, after the complainants discovered the fraud by which they were induced to subscribe for the shares in question, they "allowed the matter to proceed"—or, in other words, they waived the fraud, and elected to remain in the company—upon being told,

when an explanation was demanded, that a large dividend would soon be declared; and although they afterwards unsuccessfully demanded a dividend, and although the condition of the company was shown in a less favorable light by each successive statement that was subsequently made, one of which, at least, was furnished not later than March 9, 1891, yet it was not until some time in the ensuing September, and after the company had become "hopelessly insolvent," that the bill was filed. In the meantime, rights of creditors had intervened, and the application to rescind the contracts in question was consequently too late. *Barnett v. Barnett*, 83 Va. 504, 510, 2 S. E. 733; 2 Pom. Eq. Jur. § 897. Decree affirmed.

FAUNTLEROY, J., absent.

ROBERTSON v. COMMONWEALTH.<sup>1</sup>  
(Supreme Court of Appeals of Virginia. Nov. 8, 1894.)

HOMICIDE—INCONSISTENCY IN INDICTMENT—INSTRUCTIONS—DEGREE OF CRIME—ATTEMPTED ROBBERY.

1. An indictment for murder, which describes the wound in one place as above the nipple of the left breast, and subsequently as below the nipple of the left breast, is not void for repugnancy and inconsistency, as the latter recitation is surplusage, and covered by section 3999, Code, which provides that indictments shall not be void for the omission or insertion of "words of mere form and surplusage."

2. Section 3978, Code, does not require a special grand jury to be selected from a list of 48 men, prepared by the judge of the county court, in August of each year, to serve for the ensuing year.

3. On an indictment for murder simply, one may be convicted of murder in the commission of, or attempt to commit, robbery.

4. Murder is the unlawful killing of another with malice.

5. Every homicide is presumed to be murder in the second degree, and it is for the state to show that it was murder in the first degree, and for defendant to show that it was manslaughter.

6. One who kills another in the attempt to commit, or commission of, robbery, is guilty of murder in the first degree.

7. Where the evidence, and not the facts proved, is certified in the record, the case on appeal stands as upon a demurrer to evidence, under Acts 1889-90, p. 36.

Error to circuit court, Franklin county; S. G. Whittle, Judge.

William Robertson was convicted of murder, and brings error. Affirmed.

Anderson & Hairston, for plaintiff in error. R. F. Scott, Atty. Gen., for the Commonwealth.

FAUNTLEROY, J. William Robertson, the plaintiff in error, was indicted at the February term of the county court of Franklin county of the murder of Jerry Barbour,

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

and he was tried upon the said indictment at the December term, 1892, of the said court, and was found guilty by the jury of murder in the first degree; and on the 19th day of December, 1892, he was sentenced by the said court to be hanged by the neck until he is dead. To this judgment he petitioned the circuit court of Franklin county for a writ of error, upon the exhibition, as a part of his said petition, of a transcript of the record of the said trial in the said county court, and errors assigned. The writ of error prayed for was denied by the judge of the circuit court of Franklin county, whereupon a writ of error was allowed by one of the judges of this court. In refusing the petition for a writ of error, the judge of the circuit court of Franklin county (Judge S. G. WHITTLE) delivered an elaborate and carefully considered opinion, upon the record and errors assigned and points raised and discussed in the petition and argument by counsel, in which said opinion this court fully concurs in all points, and adopts the same as the opinion of this court for affirming the judgment of the county court aforesaid, and the denial of the writ of error by the said circuit court of Franklin county.

The opinion of WHITTLE, J., refusing the appeal, was as follows:

"I have carefully considered the record in this case, and the points raised and discussed by counsel in the petition for a writ of error, and will comment on them very briefly, in the order in which they are presented.

"First. It is contended that the demurrer to the indictment should have been sustained because of a repugnancy and inconsistency of averment in the description of the wound which caused the death of the deceased, Jerry Barbour,—the charge being, in one part of the indictment, that the wound was above the nipple of the left breast, and, in another part, that it was below the nipple of the left breast; and *Dias v. State*, 39 Am. Dec. 448, is relied on to sustain this contention. The general rule is conceded that pleading must not be insensible, inconsistent with itself, or repugnant. But there is this exception: that if the allegation which creates the repugnancy is merely superfluous or redundant, so that it may be rejected without altering the general sense and effect, it should be rejected, the maxim being '*Utile per inutile non vitiatur*'; and this principle has been incorporated in our statute law. Code, § 3999, in designating what defects in indictments shall not vitiate them, concludes: 'Or for the omission or insertion of any other words of mere form and surplusage.' In *Sledd's Case*, 19 Grat. 819, Judge Joynes, in delivering the opinion of the court, in commenting on this statute, says: 'The provisions of this section were designed to get rid of cumbrous and useless technicalities, and ought to receive a liberal construction.' In pleading, surplusage is the allegation of unnecessary mat-

ter. The foundation of the rule requiring the place of the wound to be alleged in an indictment was to enable the court to see that it was of such a nature that death might have ensued from it. In this case the first part of the count charges the manner and location of the wound. It was inflicted with a deadly weapon in a vital part of the body, 'just above the nipple of the left breast,' and it was unnecessary to repeat in the same count the location of the wound. The averment that the shot gave the deceased a mortal wound, of which he then and there died, etc., was sufficient; and the words, 'just below the nipple of the left breast,' were unnecessary, and might have been omitted without impairing the general sense and effect of the charge, and should therefore, under the statute, be rejected as surplusage. The propriety of this view is the more apparent, because, previous to said words, only one shot, penetration, or wound upon the body of the deceased had been alleged, and the location of that particularly described. The repugnant words could only refer to that, and evidently meant the same wound, and, whichever be taken, the wound was inflicted in a vital part of the body. See *Lazler's Case*, 10 Grat. 708, and also *State v. Freeman*, 74 Am. Dec. 819.

"Second. The second error assigned was to the rejection by the county court of the plea of the prisoner averring that the members of the special grand jury which found the indictment against him were not taken from the list of forty-eight men required by statute to be selected by the judge of the county court in August of each year to serve as grand jurors for the twelve months thence ensuing. A careful examination of the sections in regard to regular and special grand juries will show that there was no error in the ruling of the county court in rejecting said plea. A regular grand jury is made up by the clerk from the forty-eight men selected as aforesaid. But a special grand jury, under section 3978, is to be summoned from a list furnished by the judge,—evidently, from a list made at the time the special grand jury is ordered. There is not only nothing in the statute to indicate that the special grand jury is to be taken from the forty-eight names; but, if so construed, it would thwart the manifest object of the statute in providing for a special grand jury, which is, I take it, to empower the court or judge, when the exigencies of the business of the court require it, to order a special grand jury, and obviate the expense and delay of summoning a regular grand jury. But, be the reason of the law what it may, there is nothing in section 3978 which requires the special grand jury to be selected from the forty-eight named, but just the contrary. *Lyles' Case*, 88 Va. 396, 13 S. E. 802, decides that an indictment for murder may be found by a special grand jury as well as by a regular grand jury.

"Third. The third error complained of is that the county court overruled the motion of the prisoner to exclude all evidence tending to show that he robbed the deceased; the contention being that inasmuch as the indictment was in the ordinary form, and did not charge that it was done in the commission of robbery, etc., it was not competent to prove the robbery in order to elevate the offense to murder in the first degree. Thompson's Case, 20 Grat. 724, and several other Virginia cases, show that whatever may be the rule elsewhere, in this state, at least, it is competent, under an indictment for murder, simply to try and convict one of murder in the commission of, or attempt to commit, robbery, etc. The question is not an open one here.

"Fourth. Nor do I find any error in the refusal of the court to give instruction No. 1 asked for by the prisoner, and in giving instructions 1, 2, and 3 asked for by the commonwealth. The vice of the instruction offered by prisoner was 'that, under the indictment in this case, no evidence of robbery can be considered for the purpose of elevating the crime to murder in the first degree.' Thompson's Case, supra, fully sustains the county court in rejecting this instruction. Those given by the court, and excepted to, were as follows: '(1) Murder is the unlawful killing of another with malice, and in Virginia is designated as murder in the first degree, and murder in the second degree. (2) Every homicide, in Virginia, is presumed to be murder in the second degree; and to elevate the offense to murder in the first degree devolves upon the commonwealth, and to reduce murder in the second degree to manslaughter devolves upon the prisoner. (3) To constitute murder in the first degree, the prisoner must have been incited to the killing by malice, and the killing must have been willful, deliberate, and premeditated killing on the part of the prisoner; but if the jury believe from the evidence, beyond a reasonable doubt, that the prisoner killed the deceased in the attempt or commission of robbery by prisoner on deceased, then they must find the prisoner guilty of murder in the first degree.' The first instruction gives the general definition of murder; the second accurately enunciates what the law presumes in every case of homicide, and what burden of proof devolves on the commonwealth, and what on the accused; the third defines what constitutes murder in the first degree generally, in the first instance, and then adds that if the killing is done in the attempt to commit, or in the commission of, robbery, the killing is murder in the first degree; and that is what the statute prescribes. If the killing is shown to have been done in any of the specially enumerated or exceptional cases, it is not necessary to offer proof to establish the fact that a homicide was intended. Jones' Case, 1 Leigh, 598.

"Fourth. I do not think the alleged separa-

tion of the jury in this case a ground for a new trial. In fact, there was, in legal contemplation, no separation. And this brings us to the consideration of the last error assigned, to wit:

"Fifth. That it was error in the county court to refuse to set aside the verdict of the jury, as contrary to the law and the evidence. On this point, under our statute, the evidence, not the facts proved, having been certified, the case is to be considered as upon a demurrer to the evidence. Acts 1889-90, p. 36. But it is not necessary to apply this rule of law to sustain the action of the county court in overruling the prisoner's motion for a new trial. The judgment was plainly right. I do not intend to discuss the evidence in detail. I have arisen from a careful second reading of it, satisfied that it establishes the guilt of the prisoner beyond a reasonable doubt. As was said in Finchim's Case, 83 Va. 689, 3 S. E. 343: 'The record discloses concurrent circumstances of time, place, means, motive, and subsequent conduct pointing to the prisoner as the perpetrator of the crime for which he stands indicted, that fully warranted the jury, acting with that utmost caution with which circumstantial evidence should always be acted on, in arriving at their verdict of murder in the first degree.' It presents a case of the dastardly assassination of an inoffensive, harmless old man, while in a state of intoxication, for the purpose of robbery. I find no error in the record, and a writ of error is denied."

The judgment of the county court of Franklin county, appealed from, and under review, is without error, and the same is affirmed. Affirmed.

(30 Va. 790)

COMMONWEALTH v. CHARLOTTESVILLE PERPETUAL BLDG. & LOAN CO.<sup>1</sup>

(Supreme Court of Appeals of Virginia. Nov. 8, 1894.)

DOUBLE TAXATION—WHAT CONSTITUTES—CAPITAL AND SHARES OF STOCK—CONSTRUCTION OF REVENUE LAW.

1. Revenue Law 1890, § 8, subsec. 2, provides for the taxation of "capital including monies, credits or other thing remaining invested whether said investment was made originally in this state or country, and the value of all capital loaned, used or employed in business out of this state." Section 8, subsec. 3, provides for taxation of "the value of all capital of incorporated joint stock companies not otherwise taxed." *Held*, that the taxation of shares of an incorporated company in the hands of the stockholders does not prohibit the taxation of the capital of the company, the latter not being otherwise taxed.

2. Section 17 of the revenue law of 1890 recognizes the distinction, for the purpose of taxation, between the capital of a company and its shares of stock, in that capital of banking associations is exempted from taxation, but shares of stock are listed for taxation.

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.



3. The word "capital," in the second subsection of section 8 of the act, signifies money or other thing invested, and includes shares of stock in stockholders' hands; while in the third subsection of section 8 it means the capital stock of the company paid in to conduct the business of the concern.

4. The phrase "capital not otherwise taxed," as in the third subsection of section 8, is not limited to the holdings of nonresident or otherwise inaccessible stockholders.

Error to corporation court of Charlottesville.

Motion by the Charlottesville Perpetual Building & Loan Company for the correction of certain alleged erroneous assessments of taxes, and for the refunding of certain taxes alleged to have been illegally exacted of the plaintiff on its capital stock. The judgment being in favor of the plaintiff, the commonwealth obtained a writ of error from one of the judges of this court. Reversed.

R. Taylor Scott, Atty. Gen., for the Commonwealth. Geo. Perkins, for defendant in error.

LEWIS, P. The question to be determined is whether the capital stock of the appellee, the Charlottesville Perpetual Building & Loan Company, an incorporated joint-stock company, is taxed by the third subsection of the eighth section of the revenue law of 1890; or whether, if it is taxed at all, the tax thereon is included in the tax imposed on the shares in the hands of the stockholders by the second subsection of the same section. These subsections, on the construction of which the case turns, are as follows, to wit: "Second. He [the commissioner] shall ascertain from each person in his district, city, or town the value of capital, including monies, credits, or other thing remaining invested, whether said investment was made originally in this or any other state or country, and the value of all capital loaned, used, or employed in business out of this state by himself, his agent or other person for him. Third. He shall ascertain the value of all capital of incorporated joint-stock companies not otherwise taxed; but real estate belonging to such company shall not be held to be capital, but shall be listed and taxed as property, and not as capital." Acts 1889-90, p. 201. The court below held that subsection 2 taxes the shares of the joint-stock company in the hands of the stockholders, because they are investments, within the meaning of the statute; and, further, that, as the aggregate of the shares represents the corporate assets of every description, the capital of the company is not to be listed under the third subsection, because it is "otherwise taxed," viz. by the preceding subsection. We are unable to concur in this view. We agree that, while shares are not taxed *eo nomine*, yet that they are embraced in the second subsection, for the reason given by the corporation court. But a tax on the shares is not a tax on the capital. The two are very different

things. The capital or capital stock belongs to the corporation, the shares to individuals; and being different property interests, and consequently distinct subjects of taxation, the better opinion is that taxing both is not double taxation. *Burroughs, Tax'n*, p. 170; *State Bank v. City of Richmond*, 79 Va. 118; *Farrington v. Tennessee*, 95 U. S. 679. That a tax on the shares is not a tax on the capital stock is well illustrated by a number of cases in the supreme court of the United States, holding that, while the shares of national banks are taxable by the states, their capital, invested in United States securities, is not. *Van Allen v. Assessors*, 3 Wall. 573; *First Nat. Bank v. Commonwealth*, 9 Wall. 353; *Tennessee v. Whitworth*, 117 U. S. 129, 6 Sup. Ct. 645, and cases cited.

Now, it is not only to be presumed that the difference between capital and shares, as recognized in these decisions and in all the authorities on the subject, was known to the legislature; but the fact appears affirmatively from the seventeenth section of the statute which exempts from taxation the capital of banking associations, and taxes the shares of stock to the stockholders. Stress, however, was laid in the argument at the bar on the fact that the term "capital" is used as well in the second as in the third subsection, above quoted; but it is a mistake to suppose that it is used synonymously in both. In the second, it signifies money or other thing invested, and therefore includes, as we have said, shares of stock in the hands of the stockholders; whereas, in the third, it signifies the capital stock of the company, —that is, the aggregate of the mutual subscriptions of the stockholders paid in as a basis of the business of the concern, and which belongs to the company. This is apparent from the language of the statute. Moreover, had the legislature intended to tax the capital of joint-stock companies to the stockholders, its intention surely would have been unmistakably expressed; and, if such was the intention in enacting the second subsection, why, so far as the question involved in the present case is concerned, was the third enacted at all? The appellee's answer to this is rather fanciful than sound. The argument is that, as the latter subsection speaks of capital "not otherwise taxed," its purpose is to tax the capital merely to the extent that the holdings of nonresident or otherwise inaccessible stockholders cannot be reached. But there is no just ground for this contention. The statute, if it were susceptible of such a construction, would, indeed, be an anomaly. It would, moreover, be unconstitutional, since to collect of A. and B. the tax on the shares held by them, respectively, and to make up for what cannot be collected of C., a nonresident stockholder, by a tax on the capital of the company, would be in violation of the constitutional requirement that taxation shall be equal and uniform.

It is contended, also, that in no other way can effect be given to the words "not otherwise taxed" than by holding that the capital stock of joint-stock companies was intended to be embraced in the second subsection, as there is no other law taxing it. It may be, however, that there are some companies in the state whose capital stock, by their charters or other special provision, is taxed differently, though we are not advised that there are any such. The provision, moreover, of the third subsection, is a general one, which would adapt itself to any future legislation on the subject; but, be that as it may, the point is not a controlling one in the case, because only by ignoring the distinction between capital stock and capital invested in shares of stock, which was evidently in the mind of the legislature when the statute was passed, can the case be brought within the second subsection, or taken out of the operation of the third.

The judgment of the corporation court must therefore be reversed, and such order entered here as that court ought to have entered.

**HINTON and RICHARDSON, JJ., absent.**

(116 N. C. 148)

**ANTIETAM PAPER CO. et al. v. CHRONICLE PUB. CO. et al.** (Nos. 147, 149.)  
(Supreme Court of North Carolina. Nov. 13, 1894.)

#### CORPORATIONS—VALIDITY OF MORTGAGE.

1. A mortgage by a corporation, though not authorized by a majority of the stockholders at a "regular general meeting," as required by its charter, is valid as against an attack by corporate creditors not stockholders.

2. Paper, ink, and cuts sold to a publishing corporation are not "materials" furnished (Code, § 1255), so as to render a mortgage on the property invalid as against persons selling the same.

Appeal from superior court, Wake county; Hoke, Judge.

Action by the Antietam Paper Company and others against the Chronicle Publishing Company and others. From the judgment, plaintiffs, and the Raleigh Paper Company and Sadler, defendants, appeal. Affirmed.

J. W. Hinsdale and Armistead Jones, for appellants. Haywood & Haywood and C. M. Busbee, for appellee Holt. Strong & Strong, for appellee Raleigh Paper Company. R. O. Burton and W. N. Jones, for appellee Daniels.

**SHEPHERD, C. J.** This is a creditors' bill brought for the purpose of collecting the assets of the Chronicle Publishing Company, and applying the same to the claims of its various creditors. The receivers appointed by the court having sold the property of the said defendant, and there now being in their hands the proceeds of such sale, it becomes necessary to determine the claims of the several creditors to the said fund.

1. We are clearly of the opinion that the mortgage to Josephus Daniels was properly executed under the act of 1893, c. 95; and the only point made against the validity of the said mortgage, which seems to be seriously insisted upon, is that it was not authorized by a regular general meeting of the stockholders. The mortgage was made pursuant to a resolution of a majority of the stockholders at a meeting held by them on the 19th of March, 1892, which was not "a regular general meeting." It is well settled that corporations other than railroad corporations have a general power to mortgage their property, unless there is some provision in their charters expressly prohibiting or regulating this right. "The right to mortgage is a natural result of the right to incur an indebtedness." Cook, Stock & S. 760-779. Even where the charter provides as to how the assent of the stockholders is to be given, and this is not strictly followed, "such a provision is regarded as intended for the protection and security of the stockholders, and, in the absence of fraud and objection upon their part, defects in the proceeding by which the assent is given cannot be made to invalidate the mortgage, unless they are of such a substantial character that the giving of the assent cannot be inferred. \* \* \* Other corporate creditors cannot raise this objection to the mortgage." Id. note 2, and the authorities cited. In the case before us, there is no objection on the part of any stockholder, and, according to the principles above stated, we must hold that the mortgage in question is valid, so far as this action is concerned.

2. Several of the creditors claimed priority over the above-mentioned mortgagee under section 1255 of the Code. They insist that the articles in question (paper, ink, gas, a cut of Santa Claus, and the like) are "materials furnished," within the above provision. Without discussing the various authorities cited on the argument, we are content to adopt the construction placed upon the statute by this court in *Traders' Nat. Bank v. Lawrence Manuf'g Co.*, 96 N. C. 298, 3 S. E. 363. The court said: "We are disposed to concur in the view of counsel for the appellant, Hall, that the section, so far as it relates to claims for labor performed or material furnished, pursuing very nearly the words used in section 1781, was designed, by its disabling effect, to more effectually secure the liens given by the constitution to the laborer (article 10, § 4), and the statute extending the lien to materials furnished; but the lien is further extended to torts, and compensation is provided against any alienation attempted to defeat the claim." After holding that, under the circumstances of that case, machinery or other articles purchased abroad, and used in putting up a mill "or facilitating its working afterwards," was not within the act, Smith, C. J., remarked that "the consequences would be pernicious

and destructive of all fair and safe dealings with corporations, if a secret lien founded upon a sale by a distant creditor, of which a person had no information or means of information provided by law, could be set up as paramount to his demand; and, unless imperatively demanded, such a construction ought not to be put upon an enactment as will lead to this result." We have examined the numerous authorities to which we have been referred by counsel, but they do not, in our opinion, sustain the contention that the articles furnished by the appellants are embraced by the statute. We do not deem it necessary to enter into a general discussion of the subject. It is sufficient to say that these articles, which in no sense are attached to or enhance the value of the property, cannot be considered as within the spirit or letter of the act. The order as to the costs was in this case within the discretion of the court. Affirmed.

Appeal of defendant Sadler in same case: For the reasons given in the opinion in the foregoing appeal, the judgment is affirmed.

(115 N. C. 147)

ANTIETAM PAPER CO. et al. v. CHRONICLE PUB. CO. et al. (No. 148.)

(Supreme Court of North Carolina. Nov. 13, 1894.)

TRIAL—ISSUES FOR JURY—EXCEPTIONS TO CHARGE—STATEMENT OF JUDGE.

1. Error in refusing to submit to the jury an issue in the form requested is not prejudicial, where the issues as presented enable counsel to embody in special instructions such material views of the law, arising out of the testimony, as are pertinent.

2. An exception "to the charge as given" is too general to be considered on appeal.

3. The statements of the trial judge as to what he charged are conclusive.

Appeal from superior court, Wake county; Hoke, Judge.

Action by the Antietam Paper Company and others against the Chronicle Publishing Company and others. From the judgment, defendant Holt appeals.

On the issues material to this controversy, the court charged the jury as follows: "That all the parties to the controversies agreed that \$1,066.89 was passed from Jernigan to Daniels at the time specified, same being the amount of the \$1,000 note, with the interest then accrued, and on the evidence, if believed, the jury should answer the fourth issue, 'Yes'; that by the evidence of neither party was the absolute payment and discharge of the note established, and on the evidence, if believed, the jury should answer the fifth issue, 'No.'" On the sixth issue, which was as follows: "(6) Was the money given by Jernigan to Daniels with the intention and agreement that the \$1,000 note should be paid as to Daniels, and so postponed in right to the \$1,600 claim?"—the

court charged the jury as follows: "That the burden of this issue was on the defendant Josephus Daniels; that he claimed that the money was passed under circumstances that made the transaction a payment as to him, and postponed the \$1,000 note to the \$1,600 note, being the other note secured by the mortgage; and the law put upon him the burden of proof as to such allegation, and required him to establish this (his claim) by the greater weight of the evidence; and the question for the jury to decide on this issue and on the evidence was whether this money was passed to Daniels in payment of this \$1,000 note, or was there a purchase of the note by Jernigan, or was the money passed, and the note left, without any definite arrangement between them? That the matter of payment was a question of intent and agreement between the parties. In order to make the giving of the money a payment, there must be an agreement to that effect. This may be established by words or conduct, or by both, but there must have been an agreement of both parties. That if, at the time the money was passed, it was the intent and agreement of the parties that the money should be as to Daniels a payment of the note, and Jernigan presented and passed the money as his own, and Daniels, in ignorance of any agency, accepted the money, and forebore his right then to sell, and so put himself to pecuniary disadvantage, then the passing of the money would be a payment of the note as to Daniels, and the jury should answer the issue, 'Yes'; or if Daniels, at the time the money was passed, made the proposition that, on the payment of the note as to him, the same should be left with the bank, to enable Jernigan to procure a second mortgage, and Jernigan, having heard the proposition, paid the money and acquiesced by his silence, and Daniels used the money in ignorance of any agency, and forebore his right then to sell, and put himself at a pecuniary disadvantage, issue should be answered, 'Yes.' That if there was no agreement that the note should be paid, and the money was passed by way of purchase between them, jury should answer issue, 'No'; or if Jernigan did not agree there should be a payment, but gave the money and left the note without definite agreement, leaving the question to be afterwards determined, jury should answer the issue, 'No'; or if Jernigan made it known he was acting for another, and exceeded his authority as agent by making payment instead of purchase, jury should answer issue, 'No.'" The court then recited all the evidence pertinent to the issue, together with the arguments and suggestion of counsel for both parties predicated upon it, and closed charge on this issue by restating to the jury the different positions of the parties: "That if Jernigan, professing to act for himself and in his own name, gave the money, agreeing it should be in payment, and Daniels, in ignorance of any agency,

took the money on that agreement, and forebore his right then to foreclose his mortgage, jury should answer the issue, 'Yes'; or if Daniels made the proposition that Jernigan should pay off note, and same should be left to enable him to obtain a second mortgage, and Jernigan, having heard the proposition, paid the money, and Daniels was in ignorance of his acting as agent, and took money, and forebore to sell, etc., jury should answer issue, 'Yes'; but if the money was passed by way of purchase, issue should be answered, 'No'; or if money was passed, and matter was left indefinite, issue should be answered, 'No'; or if Jernigan disclosed his agency, and exceeded his authority, issue should be answered, 'No.' "

Haywood & Haywood and C. M. Busbee, for appellant. John W. Hinsdale and Armistead Jones, for appellees.

BURWELL, J. This appeal brings up for our consideration the exceptions taken on the trial by the defendant Holt alone. His controversy in this action was with his codefendant Josephus Daniels, to whom the defendant the Chronicle Publishing Company had executed a mortgage on March 24, 1892, to secure a debt of \$2,000, evidenced by two bonds of that date,—one for \$1,000, due February 1, 1893, and the other for \$1,600, due February 1, 1894. We have adjudged that that mortgage and those bonds were valid acts of that corporation, and that by virtue thereof the owners of those bonds had a lien on the property described in that mortgage. See this case at this term on the plaintiffs' appeal. 20 S. E. 366. The validity of this mortgage was averred by each of these defendants, and in his answer the defendant Holt alleged that he was the owner of the note for \$1,000, described therein, by purchase from defendant Daniels on February 1, 1893, the day of its maturity. To this allegation the defendant Daniels answered, averring that on the said date the amount due to him on account of this note or bond was paid to him; and he expressly denied that the defendant Holt had on that day purchased that note or bond from him. The issue between these two defendants, as shown by the pleadings alone, was: "Did T. M. Holt, on February 1, 1893, purchase of Josephus Daniels the \$1,000 note described in the mortgage of the Chronicle Publishing Company, or was the said note on that day paid and discharged?" Notwithstanding the fact that this single issue was raised between these two defendants by their pleadings, the counsel of the defendant Holt tendered the following four issues: "Was T. M. Holt the purchaser, and is he the owner, of the note for \$1,000, mentioned in section 7 of his answer? Did Thomas R. Jernigan act as the agent of Holt in the purchase of the note for \$1,000, secured in the mortgage to Daniels

set out in the pleadings? Did Jernigan, as such agent, have authority to agree that the second note secured in the mortgage should have priority over the note for \$1,000? Was the note for \$1,000 left in the possession of B. S. Jerman until the point as to which of the notes described in the mortgage should have priority of payment could be determined?"—and excepted because the court refused to submit them to the jury. The court submitted the following issues to the jury, in lieu of those tendered: "(1) Did the Chronicle Publishing Company execute to Daniels a valid mortgage on its property, of date March 24, 1892, to secure two notes for \$1,000 and \$1,600, and was the same duly proved and registered? (2) What property of the company was conveyed by such mortgage to the grantees therein? (3) What was the value of the property sold by the receiver, and which did not pass by mortgage? (4) Was there a payment on February 1, 1893, to Daniels, of \$1,066.89,—the amount of the \$1,000 note, with accrued interest? (5) Was such payment in discharge and satisfaction of such note? (6) Was the money given by T. R. Jernigan to Daniels with the intention and agreement that the \$1,000 note should be paid as to Daniels, and so postponed in right to the \$1,600 claim?" And to the sixth issue the defendant Holt excepted.

These two exceptions—the one to the refusal to submit the four issues tendered by him, and the other to the submitting of the sixth issue—may be considered together. In *Davidson v. Gifford*, 100 N. C. 18, 6 S. E. 718, it is held that "the material issues of fact raised by the pleadings must be submitted unless it appears to the court that this right is waived by the parties." But the form in which issues are submitted is of little consequence if the material facts in controversy are clearly presented by them. *Cuthbertson v. Insurance Co.*, 96 N. C. 490, 2 S. E. 258. And "the only restriction upon the power of the trial judge to settle the issues for a jury is that they shall be such as arise out of the pleadings, such that the court upon their verdict may proceed to judgment, and such as will allow the parties to present to the jury any material view of the law, arising out of the testimony, which counsel may request the court to embody in the instruction to the jury." *Vaughan v. Parker*, 112 N. C. 96, 16 S. E. 908. While the first issue tendered by the defendant Holt was distinctly "raised by the pleadings," it seems evident from the other issues which he himself submitted, and from the issues that were submitted, and from the evidence set out in the statement of the case on appeal and the charge to the jury, that it was conceded on the trial that he was the purchaser and owner of the note mentioned in that issue. So evident was it that there was really no controversy at the trial upon this particular matter that his honor, without objection or exception taken, told the jury

that, if they believed the evidence, they should answer the third issue "Yes," and the fourth issue "No," and thus find that on February 1, 1893, there was paid to defendant Daniels the amount due on said note, but that that payment was not "in discharge and satisfaction" of it. These two issues, thus answered, established the fact that while Daniels, on the day named, received the amount due him on this note, it was not, strictly speaking, a payment, for it did not discharge and satisfy the note, but left it, as both conceded, a valid and subsisting claim against the Chronicle Publishing Company in the hands of the defendant B. S. Jerman, who held it for the use and benefit of the defendant Holt, as was also conceded. Thus it is apparent that at the trial there was an elimination of some disputed matter, and there was left between Holt and Daniels only this issue: Was the former, who was admittedly the real owner of the note (\$1,000) held by Jerman, entitled to share pro rata with the latter (who was admitted to be the holder and owner of the other mortgage note, \$1,600) in the proceeds of the sale of the mortgaged property, or was Daniels' part of the mortgaged debt to be paid in full out of these proceeds before Holt was to be allowed any part thereof as a credit on the note he had purchased? It was conceded that the money given for this note by Holt was actually handed to Daniels by Jernigan, the only dispute about that being as to Daniels' notice or knowledge that Jernigan was not acting for himself in the transaction, but for Holt or some other person. This material fact in controversy seems to us to have been presented by the sixth issue, with sufficient clearness, to the jury. It is to be read and considered in connection with the testimony and the charge, as the jury considered it. Under it the counsel might have embodied in special instructions such "material views of the law arising out of the testimony" as they thought pertinent. The first and second exceptions of the appellant cannot, therefore, be sustained.

Exceptions to the charge: (1) It is stated that there was an exception "to the charge as given." This general exception cannot be considered. It was not urged before us. (2) It is also stated that the appellant in this case on appeal excepts to the above charge as follows: "That the court charged the jury that defendant Holt would be bound by whatever his agent, Jernigan, did in his dealings with Daniels, unless he made known to him (Daniels) that he was acting for a principal." Upon an examination of his honor's charge, which is set out in full, we do not find that he so told the jury. His honor's statement of what he said is conclusive, and puts this exception out of the case.

We find no error of which the defendant Holt can justly complain, and as to him the judgment must be affirmed.

(115 N. C. 202)

# HEATH et al. v. BIG FALLS COTTON MILLS et al.

(Supreme Court of North Carolina. Nov. 18, 1894.)

CORPORATE DEED — EXECUTION — REGISTRATION — CERTIFICATE OF CLERK — OMISSION OF SEAL FROM RECORD.

1. Where a corporate deed is signed in the corporate name by its president, vice president, secretary, and treasurer, who constitute all the stockholders, directors, and officers of the corporation, and the corporate seal is affixed, it is properly executed as a common-law deed.

2. A certificate by the clerk to "the due execution" of a corporate deed is sufficient to warrant registration thereof.

3. Where a corporate deed is duly sealed, and is in all respects correctly recorded, except that the record does not show a copy of the seal, or any device representing it, such record is valid, and sufficient as notice, if it represents on its face, in any other way, that the deed was sealed.

Appeal from superior court, Alamance county; Hoke, Judge.

Action by Heath, Springs & Co., Merchants' & Farmers' Bank of Charlotte, James E. Mitchell & Co., and others, against Big Falls Cotton Mills, J. L. Scott, and J. A. Long, trustees, in the nature of a creditors' action. Judgment for plaintiffs, and, from that part of the decree which declares the mortgage of James E. Mitchell & Co. on defendant's property a valid first lien, the other plaintiffs appeal. Affirmed.

It appeared that the clerk, in certifying to the probate of the deed, adjudged "the due execution" thereof.

Haywood & Haywood, for appellants. L. M. Scott and W. P. Bynum, Jr., for appellees.

SHEPHERD, C. J. The question presented in the exception of the appellants is whether the mortgage deed to J. E. Mitchell & Co. has been properly executed, probated, and registered, so as to give the note secured therein priority over the claims of the excepting creditors. The deed is signed in the name of the corporation, by its president, vice president, secretary, and treasurer, who constituted all the stockholders, directors, and officers of the corporation; and the corporate seal is affixed to it, as appears by the profert of the original deed on the trial, as well as from the facts agreed. We are of the opinion that it is properly executed as a common-law deed. *Bason v. Mining Co.*, 90 N. C. 417. We are also of the opinion that the certificate of the clerk was sufficient to warrant the registration of the same. *Quinnerly v. Quinnerly*, 114 N. C. 145, 19 S. E. 99.

It is earnestly insisted however that the omission of the register to copy the seal on his book destroys the efficacy of the registration as constructive notice of the said mortgage. Very respectable authorities, which accord with our conception of the true principle, sustain the position that, if the attestation clause recites that the deed was signed

and sealed, it will be presumed that the original deed was sealed. "Where an instrument which the law requires to be sealed is in all respects correctly recorded, except that the record does not show a copy of the seal, or any device representing it, the record will nevertheless be valid, and sufficient as notice, provided the record represents on its face, in any other way, as by recitals or otherwise, that the instrument was sealed, and it was in fact duly sealed." *Beardsley v. Day* (Minn.) 55 N. W. 46. To the same effect is *1 Jones, Mortg.* 493. This view is fully supported by the case of *Aycock v. Railroad*, 89 N. C. 323. A similar objection was made to the introduction of certain grants, but, as it appeared from the attestation clause that the seal was affixed, the objection was overruled. The court said: "It thus affirmatively appears that the grants were issued under the great seal, and this is shown in the registration. As the purpose of requiring registration is to give notice of the terms of the deed, and this is fully accomplished in the registry, we can see no reason why some scroll, or attempted imitation of the form of the seal, should be required, in addition to the words spoken in the grant. The registry furnishes all the information that could be derived from an examination of the original, as both utter one and the same language."

His honor was also correct in his ruling that the debts of the plaintiffs and others, arising from cotton and flour sold and delivered to the defendants, are not entitled to priority over the said mortgage. *Antietam Paper Co. v. Chronicle Pub. Co.* (at this term) 20 S. E. 368.

Upon a careful inspection of the whole record, we are unable to find any reason to disturb the judgment of the court below. Affirmed.

**BURWELL, J.**, did not sit on the hearing of this case.

(115 N. C. 212)

**LINDSAY v. HAMBURG-BREMEN INS. CO.**

(Supreme Court of North Carolina. Nov. 13, 1894.)

**CONSTRUCTION OF WRITTEN CONTRACT.**

Where the letters between the parties constitute a written contract, it is for the court to ascertain their intention, and declare their rights thereunder.

Appeal from superior court, Greene county; Brown, Judge.

Action by George M. Lindsay against Hamburg-Bremen Insurance Company for services rendered. Judgment for defendant, and plaintiff appeals. Affirmed.

G. M. Lindsay, in pro. per.

**PER CURIAM.** The letters of the defendant's agent to the plaintiff, and his replies thereto, constitute a written contract be-

tween the parties. It was for the court, therefore, to ascertain the intention of the parties, and to declare their rights thereunder. *Simpson v. Pegram*, 112 N. C. 541, 17 S. E. 430. The services to be rendered and their value were fixed by that written contract, upon which we think his honor put the proper construction. Affirmed.

(115 N. C. 209)

**JONES et al. v. JONES.**

(Supreme Court of North Carolina. Nov. 13, 1894.)

**INJUNCTION—PRESERVATION OF PROPERTY IN SUIT.**

Where the ownership of a certain fund is in controversy, it is proper to preserve such fund by a restraining order until the rights of the contestants can be determined.

Appeal from superior court, Greene county; Battle, Judge.

Action by James B. Jones and others against Samuel Jones for the possession of a certain fund. From an order continuing a restraining order until the hearing, defendant appeals. Affirmed.

George M. Lindsay, for appellant. Swift Galloway and J. B. Batchelor, for appellees.

**PER CURIAM.** The fund here in dispute stands in the place of certain crops which the plaintiff insists belonged to him, because he was the landlord of the defendant, by whom they were raised. There being a serious controversy as to the true ownership of these crops, and therefore of this fund, it is proper to have it preserved till the rights of the contestants can be determined. We see no error in the order appealed from. Affirmed.

(115 N. C. 226)

**COMMERCIAL & FARMERS' NAT. BANK OF BALTIMORE v. DAVIS et al.**

(Supreme Court of North Carolina. Nov. 13, 1894.)

**INSOLVENT BANK — DEPOSITS FOR COLLECTION — PREFERENCES.**

Where an insolvent bank makes collections for a depositor, but fails to remit before making a general assignment, though the account was kept separate from other accounts of the bank, and the funds turned over to the receiver were sufficient to pay it, and the depositor was ignorant of the bank's condition when he made the deposit, he is not entitled to preference over the general creditors.

Appeal from superior court, New Hanover county; Brown, Judge.

Action by the Commercial & Farmers' National Bank of Baltimore against Junius Davis and James A. Leak, receivers of the Bank of New Hanover, to establish preference claims. It was admitted that the New Hanover Bank, while insolvent, and before making the assignment, had made collections for plaintiff, and had failed to remit. It was also admitted that plaintiff was ignorant of such insolvency; that the account was kept separate from other accounts of the bank; and that the funds turned over to the re-

ceivers were sufficient to pay plaintiff's claim. The court decided that plaintiff was not entitled to preference. Plaintiff appeals. **Affirmed.**

J. O. Bellamy, Jr., for appellant. Geo. Rountree and Geo. Davis, for appellees.

**BURWELL, J.** We find no error in the ruling of his honor, and hold that his judgment must be affirmed. It is sufficient, we think, to cite the case of *Bank v. Dowd*, 38 Fed. 172, where Judge Seymour has fully set out the reasons and authorities that led him to the conclusion he reached in a controversy about the assets of an insolvent national bank. Both because it is important that there shall be accord between the rules laid down by the federal court in regard to the assets of insolvent national banks in the hands of receivers and those rules which are to govern the distribution of the assets of an insolvent state bank, and because the conclusions there reached are those to which we have come after a careful consideration of the authorities, we content ourselves with referring to the elaborate opinion filed in that case. Later decisions sustain what is there said. *Slater v. Oriental Mills*, 27 Atl. 443 (a Rhode Island case); *Friberg v. Stoddard*, 28 Atl. 1111 (a Pennsylvania case); *Nonotuck Silk Co. v. Flanders*, 58 N. W. 383 (a Wisconsin case).

**Affirmed.**

(115 N. C. 238)

**MERCHANTS' NAT. BANK OF NEW YORK v. DAVIS et al.**

(Supreme Court of North Carolina. Nov. 13, 1894.)

Appeal from superior court, New Hanover county; Brown, Judge.

Action by the Merchants' National Bank of New York against Junius Davis and J. A. Leak, receivers of the Bank of New Hanover, to establish preference claims. It was admitted that the Bank of New Hanover, while insolvent, received plaintiff's drafts, etc., for collection, and collected them, but failed to remit before making the assignment. It was also admitted that plaintiff was ignorant of the insolvency; that the account was kept separate from other accounts of the bank; and that the funds turned over to the receiver were sufficient to pay the claim. The court decided that plaintiff was not entitled to preference, and plaintiff appeals. **Affirmed.**

T. W. Strange, for appellant. Geo. Rountree and Geo. Davis, for appellees.

**BURWELL, J.** For reasons stated in the opinion in *Bank v. Davis* (at this term) 20 S. E. 370, the judgment in this cause is affirmed.

(115 N. C. 657)

**GILMORE v. CAPE FEAR & Y. V. R. CO.**

(Supreme Court of North Carolina. Nov. 13, 1894.)

**ACTION AGAINST RAILROAD COMPANY — ACCIDENT AT CROSSING — CONTRIBUTORY NEGLIGENCE.**

In an action against a railroad company for injuries caused by the frightening of plain-

tiff's mule at a railroad crossing by an approaching train which failed to give any signal, plaintiff testified that he first saw the train when about 60 steps from the crossing, and immediately got out of his wagon, and caught the mule by the bridle, but that it became unmanageable through a sudden exhaust of steam from the engine. Defendant's witness testified that the slope of the approach to the railroad was considerable, and that there were deep gullies on each side of the road, which prevented a team from turning out. Plaintiff's testimony showed that the approach was not so dangerous, but he admitted that he was driving a "scary" mule. **Held**, that it was a question for the jury whether plaintiff was negligent in not having sooner stopped and listened for the train. *Shepherd, C. J., and Burwell, J., dissenting.*

Appeal from superior court, Chatham county; Hoke, Judge.

Action by B. N. Gilmore against the Cape Fear & Yadkin Valley Railroad Company. There was a judgment for defendant, and plaintiff appeals. **Reversed.**

H. A. London, for appellant. Geo. M. Rose, for appellee.

**MacRAE, J.** There can be no question, upon the uncontradicted testimony, that the failure to blow for the crossing was negligence on the part of the defendant. *Randall v. Railroad Co.*, 104 N. C. 410, 10 S. E. 691; *Hinkle v. Railroad Co.*, 109 N. C. 472, 13 S. E. 884. The defendant, however, contends that plaintiff failed to "stop, look, and listen" when he reached the point from which, to the crossing, it would be dangerous for the plaintiff to drive when a train was approaching. The principles here involved have been so clearly discussed and settled in recent cases in this court—those named above and others there cited—that nothing is left for us but to apply known rules to the present circumstances. Did the evidence offered by the plaintiff clearly show that the part of the road upon which the plaintiff had entered after passing the "eminence," as it is called, and started down grade to the crossing, was so dangerous to travelers, in case of the approach of a train, that it was incumbent upon the plaintiff to have looked and listened for a train before proceeding further? The law is plain. "Where a person in charge of a wagon and team approaches a public crossing, it is his duty to look and listen, and take every prudent precaution to avoid a collision, even though the approach be made at an hour when no regular train is expected to pass. The same degree of care and caution should be exercised by one who is about to drive into such a narrow and dangerous pass as is described by the witnesses, if he would avoid the responsibility for any injury that may result from his carelessness." *Randall's Case*, supra. According to the plaintiff's testimony, he was within about 60 steps of the railroad when he heard the train and saw it coming, and he immediately jumped out and caught the young mule by the bridle. It was then that the noise was made by the

exhaust of steam, or, as the witness said, "steam puffed out," and the team, in consequence, became unmanageable. The witness Hall testified that the slope of ground where the accident occurred was considerable, and to the left of the wagon, where it occurred, were woods and deep gullies, so that the wagon could not turn out. Whether the witness intended to be understood to mean the whole extent of the road from the top of the hill to the crossing, or simply that portion of the road at and near the place where the catastrophe happened, is left in doubt. The plaintiff himself, the principal witness, describes the approach to the railroad, but not in such terms as would warrant the conclusion that it was so dangerous; and he admits that he was driving a young and "scary" mule, and he tells of his action and conduct on the occasion referred to. Was this testimony so clear that only one inference could be drawn from it? If so, it was the duty of the judge to decide whether there was such contributory negligence as relieved the defendant from ordinary care, and amounted, in itself, to the proximate cause of the damage received by plaintiff. The province of the judge and that of the jury is explained in *Deans v. Railroad Co.*, 107 N. C. 686, 12 S. E. 77. "Men of fair and reasonable minds might have drawn different conclusions from the evidence in this case." Was the place where the team became unmanageable so near to the crossing or to the track of the railroad that the plaintiff had reasonable ground to anticipate danger unless he took the prescribed precautions for one approaching the crossing? or was that portion of the county road on which the plaintiff was then driving of such a dangerous character that it would not have been prudent for him to drive upon it at a distance of some 60 steps from the crossing? And, in the solution of these inquiries, was the jury satisfied that from this point, all the way to the crossing, the plaintiff could not ordinarily have stopped that particular team, or turned it away from the railroad? There are possibly other questions involved,—facts to be found by the jury under proper instructions from his honor,—and which were not so clear that he was authorized to pass upon them himself. New trial.

**SHEPHERD, C. J., and BURWELL, J.,**  
dissent.

(115 N. C. 210)

**SPENCE v. WILMINGTON COTTON MILLS.**

(Supreme Court of North Carolina. Nov. 12, 1894.)

**VOID CONTRACT OF CORPORATION — RATIFICATION.**

A contract with a corporation which was void, because not in writing, or sealed or signed by the corporate officers, as required by Code, § 683, cannot be ratified, though such section has been repealed.

Appeal from superior court, New Hanover county; Brown, Judge.

Action by W. D. Spence against the Wilmington Cotton Mills on a contract for services. Judgment for defendant, and plaintiff appeals. Affirmed.

J. D. Bellamy, Jr., for appellant. Iredell Meares, for appellee.

**MacRAE, J.** The plaintiff had full benefit, on cross-examination, of the testimony objected to and ruled out upon the direct examination. So it appears that plaintiff made a contract with defendant's superintendent, to begin on April 6, 1891, and agreed to work for the 12 months at \$1,200 per annum; that he did work for defendant without further agreement until he was discharged, on May 10, 1893; and that nothing was said between the parties after February, 1893, as to a contract. It is admitted that under section 683 of the Code<sup>1</sup> the alleged contract of 1891 was invalid, because it was not in writing and accompanied by the other formalities in said statute required; but this statute having been repealed on the 11th of February, 1893 (see chapter 84 of the Acts of Assembly of that year), the plaintiff contends that this was evidence to go to the jury to enable them to determine whether there was such contract between the parties to run for 12 months from April 6, 1893. Upon the principle that where parties have entered into a contract of service for a certain period, as, for instance, 12 months, and, after the expiration of that period, the service continues for another 12 months upon the same terms, the contract will be presumed to have been renewed if the service continue longer without a new agreement. We have seen, however, that this alleged contract was void under the statute; and, if void, it was incapable of ratification, as a simply voidable one, like the contract of an infant, would have been. A new agreement after the repeal of the statute would have been an independent contract to pay for services already performed, if anything were due therefor, and for future employment there was no further bar of the statute to its operation. It could not operate to ratify an attempted contract, executory in its nature. "The act to be ratified must be voidable merely, and not absolutely void. A principal cannot ratify an act which he could not have authorized in the first instance." 1 Am. & Eng. Enc. Law, p. 430, note 1, where many authorities are cited. We think that, under the Code system, the complaint in this action, not being in writing, but noted on the docket of the justice of the peace, was broad enough to en-

<sup>1</sup> Code, § 683, provides that "every contract of every corporation, by which a liability may be incurred by the company exceeding one hundred dollars, shall be in writing, and either under the common seal of the corporation or signed by some officer of the company authorized thereto."



able the plaintiff to recover on a quantum meruit for work and labor done, if anything were due therefor. *Stokes v. Taylor*, 104 N. C. 394, 10 S. E. 566. But in this case the plaintiff was notified on April 22, 1893, to close the dyehouse (that in which his services were rendered) for some time, and he would be notified when defendant wanted him again. His services were not required again, and he was paid up to the 10th of May, and discharged. There was no work done by him for which he has not been paid, and no special contract for the breach of which he can recover damages. No error.

(115 N. C. 231)

**HALL v. CITY OF FAYETTEVILLE et al.**  
(Supreme Court of North Carolina. Nov. 13, 1894.)

**TAXATION—NONRESIDENTS—TRUST FUNDS—REMEDIES AGAINST ILLEGAL TAX.**

1. In the absence of constitutional restrictions, the legislature may authorize personal property to be taxed either at the domicile of the owner or where the property is situated.

2. Priv. Laws 1885, p. 975, taxing nonresidents doing business in the tax district comprising the city of Fayetteville, on their business, stock in trade, and solvent credits growing out of such business, does not apply to trust funds held in that city by a nonresident administrator, though he has a business office in the city.

3. An injunction will not be granted to restrain the collection of taxes on the ground that they are invalid or excessive, since an adequate remedy is given by Laws 1887, c. 137, § 84, for their recovery after payment.

Appeal from superior court, Cumberland county; Bryan, Judge.

Proceeding by H. L. Hall, administrator, against the city of Fayetteville and S. W. Tillinghast, tax collector, to determine whether plaintiff is entitled to an injunction to restrain defendant from collecting a certain tax. The case was submitted on an agreed statement of facts, without other pleadings and without action. From a judgment denying an injunction, plaintiff appeals. Affirmed.

Saml. H. MacRae, for appellant. H. McD. Robinson, for appellees.

**AVERY, J.** As a general rule, personal property is taxable at the domicile of the owner, "*mobilia sequantur personam*" being usually the governing maxim. 25 Am. & Eng. Enc. Law, p. 133; Cooley, Tax'n, 322, 369. The legislature, in the absence of constitutional restrictions upon its powers, is authorized to regulate taxation by imposing its burdens upon bank stock, money, or solvent credits, either at the domicile of the owner, which is the constructive situs, or where such property is actually situated. *Moore v. Com'rs*, 80 N. C. 154; *Winston v. Taylor*, 99 N. C. 210, 6 S. E. 114; 25 Am. & Eng. Enc. Law, 133. For the purpose of fixing the locality in which personal property is liable to taxation, the holder of the legal title thereto is deemed the owner. 25 Am. & Eng. Enc.

Law, 120. Hence, unless the statute cited, in express terms, subjects the money held by the administrator, Hall, in his fiduciary capacity, at the place where it is actually deposited or where the decedent resided, it is liable only at the place of his residence in Black River township. The material provisions of the statute which came before the court for construction in *Moore v. Com'rs*, supra, remain unaltered. Priv. Laws, p. 83, c. 112, § 6; Priv. Laws 1885, p. 975; Priv. Laws 1893, c. 153, §§ 1, 54. The act of 1885 applies, by its express terms, only to nonresidents "doing business within the limits" of the city, "upon their respective avocations and business, their stock in trade, bank stock, solvent credits, growing out of their business located as above, just as though they were actual residents." The statute cannot be construed as applying to money held by the defendant in the capacity of administrator of the decedent, McDonald, either because he was, at the time of his death, a resident of the city of Fayetteville, or because, as register of deeds, the defendant had an office in the city. Money held by him in his fiduciary capacity was not within the meaning and intent of the law subjecting his own property, even if we concede that the language of the act is broad enough to include money held by him in his individual right. It was admitted by counsel for the plaintiff that the plaintiff was not entitled to a restraining order, but must pursue the remedy prescribed by statute. *Richmond & D. R. Co. v. Town of Reidsville*, 109 N. C. 494, 13 S. E. 865; Laws 1887, c. 137, § 84.<sup>1</sup> We have, however, passed upon the question discussed by counsel, because it seemed to be important that it should be settled. The plaintiff may still pay the tax, and pursue his remedy before a justice of the peace, if he has not already paid it. There is no error.

MacRAE, J., did not sit on the hearing of this case.

(115 N. C. 238)

**McPHAIL et al. v. JOHNSON.**

(Supreme Court of North Carolina. Nov. 13, 1894.)

**JURISDICTION OF JUSTICE—AMENDMENT OF SUMMONS—AMOUNT OF CLAIM—FILING OF ACCOUNT IN SUIT—CONDUCT OF TRIAL.**

1. Where a summons issued by a justice failed to show the amount claimed, the insertion of such amount was properly permitted upon appeal to the superior court, and such amendment was retroactive.

2. Where the amount of plaintiff's claim was not stated in the summons issued by a justice, but the complaint demanded over \$200, a remittitur before the justice of any excess

<sup>1</sup> Laws 1887, c. 137, § 84, provides that if any person claiming that any tax is illegal or excessive pays the same, and, within 30 days after payment, makes a written demand for a repayment thereof, and the same is not refunded within 90 days thereafter, he may sue to recover it.

over \$200 sufficiently showed the justice's jurisdiction.

3. Code, § 591, providing for the filing of the account sued upon, applies only to actions brought under the "book-debt law," and not to an action on a contract for the sawing of timber.

4. Where counsel persists in repeating questions, and asking questions entirely foreign to the matter in hand, so as to needlessly protract the trial, the court may, after frequently cautioning him, order the witness to stand aside.

Appeal from superior court, Cumberland county; Shuford, Judge.

Action by D. A. McPhall and J. H. McPhall, parties trading as McPhall Bros., against James H. Johnson, on a contract. Judgment for plaintiffs, and defendant appeals. Affirmed.

This was an action on a contract to saw certain timber. The summons issued by the justice failed to state the amount demanded, but the complaint showed a claim of over \$400. A remittitur was had for the excess over \$200. On appeal the superior court permitted an amendment of the summons by inserting the amount claimed, viz. \$200. An account of the work done under said contract was not filed by plaintiffs.

G. M. Rose, for appellant. T. H. Sutton, for appellees.

CLARK, J. The amendment permitting the blank in the summons to be filled was not to confer, but to show jurisdiction. *Cox v. Grisham*, 113 N. C. 279, 18 S. E. 212; *Manufacturing Co. v. Barrett*, 95 N. C. 36; *Leathers v. Morris*, 101 N. C. 184, 7 S. E. 783; *Allen v. Jackson*, 86 N. C. 321. It was properly allowed. Code, § 908; *Henderson v. Graham*, 84 N. C. 496; *State v. Norman*, 110 N. C. 484, 14 S. E. 968. In fact the remittitur before the justice of the excess over \$200 sufficiently showed jurisdiction. *Noville v. Dew*, 94 N. C. 43; *Dalton v. Webster*, 82 N. C. 279; Code, § 835. Had the summons, as issued, stated the amount, that would have settled the jurisdiction. *Starke v. Cotten* (at this term) 20 S. E. 184. The amendment was retroactive nunc pro tunc. The second and third exceptions were without merit and need no discussion. Nor was it requisite that the items should be set out in the pleadings. Code, § 259. A bill of particulars could have been ordered by the court if demanded. Code, § 840, rule 10. The Code, § 591, only applies to actions brought under the "book-debt law," and has no bearing in a case like this.

The conduct of counsel in repeating questions and asking questions entirely foreign to the matter in hand, after repeated caution by the court, so as to needlessly protract the trial, amply justified the standing aside of the witness. The judge is charged with the duty of having the trial properly conducted. He should take care that the time of the court is not wasted. Courts are very expensive. While a judge should see that matters are not so hurried that any lit-

igant is abridged of his rights, he should also see that the public time is not uselessly consumed. He is not a mere moderator, but the court itself, and owes duties to the public as well as to litigants. No error.

(115 N. C. 294)

MONGER v. KELLY et al.

(Supreme Court of North Carolina. Nov. 12, 1894.)

REVIEW ON APPEAL — ERRORS NOT APPARENT ON RECORD — SALE OF DECEDENT'S LAND — SUFFICIENCY OF PETITION.

1. Where the record shows that a complaint was amended, the appellate court will conclude that it was regularly amended, and will not consider an oral statement of counsel to the contrary.

2. A petition by an administrator de bonis non for the sale of land for the payment of debts need not allege that petitioner has exhausted his remedy on the bond of the former administrator.

Appeal from superior court, Moore county; Brown, Judge.

Action by J. M. Monger, administrator de bonis non of the estate of A. F. Harrington, against J. M. Kelly and others, for the sale of decedent's land for the payment of debts. A demurrer to the petition was overruled, and defendants appeal. Affirmed.

The following is the third ground of demurrer, referred to in the opinion: "The defendants, further answering the complaint of plaintiff, demur thereto, and, for causes of demurrer, assign: 'For that it does not appear on the face of the complaint, as it should, and as defendants allege it is necessary, that action has been had on the bond of the former administrator by the administrator d. b. n., and nothing realized therefrom.'"

Thos. B. Womack, for appellants. Black & Adams, for appellee.

CLARK, J. The first and second grounds of demurrer have been removed by the amendment of the summons and complaint. The oral suggestion of counsel here that one of these amendments was made without his knowledge, and that no order for it appears in the record, cannot avail him. We are bound by the record, and upon the maxim "omnia praesumuntur rite acta" we must take it that the amendment was regularly made below; but, if there was any inadvertence in that regard, the court could allow the amendment to be made here. Code, § 965; *Grant v. Rogers*, 94 N. C. 753; *Hodge v. Railroad*, 108 N. C. 24, 12 S. E. 1041.

The third ground of demurrer is without merit. It is not requisite to show that the bond of the first administrator had been sued and exhausted. This would be to unconscionably delay the creditors of the estate who are entitled to be paid. The petition is sufficient in law. *Shields v. McDowell*, 82 N. C. 137; *Brittain v. Dickson*, 104 N. C. 547, 10 S. E. 701.

No error.

(115 N. C. 287)

**RODDEY v. TALBOT.**

(Supreme Court of North Carolina. Nov. 13, 1894.)

**ESTOPPEL—PAYMENT OF INSURANCE PREMIUM.**

1. Where a father, who has given his note in payment of the first premium on a life policy, taken out by his minor son, in consideration that the policy be made payable to him and his heirs, with knowledge that the policy was made payable to him, and after his death to the son, makes no objection until after the maturity of the note, he cannot defend an action on the note by showing that the policy was not made payable as agreed.

2. The fact that the note was made payable to the agent of the insurance company is immaterial.

Appeal from superior court, Cumberland county; Bryan, Judge.

Action on a note by W. J. Roddey against J. N. Talbot. There was a judgment for defendant, and plaintiff appeals. Reversed.

The note sued on was executed by defendant in payment of the first premiums on a life insurance policy taken out by his minor son, in consideration that the policy be made payable to him and his heirs, instead of which it was made payable to him, and after his death to his son. Defendant contended that, on account of the policy being so made, there was an entire failure of consideration for the note.

J. W. Hinsdale and Saml. H. MacRae, for appellant. Geo. M. Rose and Thos. H. Sutton, for appellee.

**EVERY, J.** The benefit of the policy for the year, with the privilege of continuing it in force for the defendant's lifetime, constituted a partial consideration for the note. The acceptance of this benefit until the maturity of the note, with full notice of the modification of the original agreement, was a waiver of objection to the policy in the form in which it was issued. To lend our sanction to the contention of the defendant would give him all of the advantage of a beneficiary under the policy held by the assured for him, even though his purpose may have been, by apparent acquiescence, to place himself in a position to recover in case of the death of the assured, while he entertained the purpose during the interval to repudiate the contract in case his son should survive the maturity of the note. If defendant's conduct did not estop him, it was at least a waiver of the right to object, when he failed to give notice of such objection within a reasonable time after acquiring knowledge of the precise terms of the policy delivered to the assured. That the note was given to the agent as an individual, instead of to the company, does not affect the principle. If the plaintiff's money paid for the benefit that he silently accepted, it was not less a fraud to repudiate it than one payable to the insurer. The delivery to the assured was sufficient, and the failure to object must be construed as an acceptance of its benefits.

There was error in the charge given and in the refusal of instruction asked, for which a new trial must be granted. New trial.

MacRAE, J., did not sit on the hearing of this case.

(115 N. C. 223)

**KENNEDY v. FIRST NAT. BANK OF WILSON.**

(Supreme Court of North Carolina. Nov. 13, 1894.)

**CORPORATE STOCK—SURRENDER OF LIFE INTEREST—TRANSFER OF CERTIFICATE.**

Where one to whom the dividends on certain stock were bequeathed during her life or widowhood, after which the stock was to go to her daughter, consented to the transfer of the certificate of the stock to her daughter, she waived all claim to the dividends thereon.

Appeal from superior court, Greene county; Boykin, Judge.

Action by Thomas S. Kennedy, executor, against First National Bank of Wilson, to recover the amount of certain dividends. Judgment for defendant, and plaintiff appeals. Affirmed.

Geo. M. Lindsay, for appellant.

**PER CURIAM.** By the terms of the will of S. P. Cox, the dividends on the shares of the stock of the defendant bank were given to his widow during her life or widowhood. The certificate represented this stock. When she who was entitled to the dividends thereon consented that this certificate should be transferred to her who was to have it in the event of her death or marriage, she thereby assented, as it seems to us, to the bank's paying the dividends accruing on said stock to the assignee. After such assignment was made with her assent, she ceased, so far as the bank was concerned, to have any claim upon it. No error.

(115 N. C. 57)

**In re SULTAN.**

(Supreme Court of North Carolina. Nov. 13, 1894.)

**INTERSTATE EXTRADITION.**

1. A resident of North Carolina, who, while in Pennsylvania, procures, by false representations, a contract for the shipment of goods from that place to his residence, and then returns there, and receives the goods, and is indicted in Pennsylvania for false representations, is a fugitive from justice, and may be extradited.

2. Where a warrant of extradition is granted by the governor, the courts will not inquire into the motive and purpose of the extradition proceedings, to ascertain whether the object thereof is to punish crime or collect a debt.

Appeal from superior court, Craven county; Hoke, Judge.

On a requisition from the governor of Pennsylvania, the governor of this state issued a warrant for the arrest of William Sultan, as a fugitive from justice. On habeas corpus,

he was discharged by the superior court. Relator asked for and obtained a writ of certiorari to review the order of the superior court. Order reversed.

C. R. Thomas and P. H. Pelletier, for appellant. W. W. Clark and O. H. Gulon, for appellee.

**BURWELL, J.** The record shows that the governor of the state of Pennsylvania made a requisition on the governor of this state for the arrest of the petitioner, William Sultan, who had been indicted in the former state for obtaining goods under false pretenses from the firm of Morris Newberger & Son, of the city of Philadelphia. His excellency, the governor, upon an examination of the requisition and the accompanying papers, issued his warrant in due form for the arrest of the alleged fugitive, and his delivery to the agent of the state of Pennsylvania. Thereupon, a writ of habeas corpus was sued out in his behalf, and upon hearing the matter his honor discharged the petitioner from custody, assigning two causes for his action: First, his finding as a fact that the petitioner was not a fugitive from justice; and, second, that the process was instituted and procured for the purpose of enforcing and collecting a debt due to Morris Newberger & Son.

1. The indictment found against the petitioner in the city and county of Philadelphia charges the petitioner with having obtained from Morris Newberger & Son, on the 17th day of September, 1892, certain goods, by certain false and fraudulent pretenses. It is in proper form, and it is duly certified that the offense therein charged is a crime under the laws of the state of Pennsylvania. The guilt or innocence of the petitioner cannot be inquired of in this proceeding. It is not pretended that the petitioner was not in the city of Philadelphia on the 17th day of September, 1892, the date when it is charged in the indictment that he made the false pretense and thereby obtained the goods. If, therefore, we consider only the allegation of the indictment, and the fact that the person therein charged with a crime against the laws of Pennsylvania is now in this state, we must conclude that, being within this jurisdiction, he is here to be considered a fugitive from justice. This seems to be conceded.

But it appears from the affidavit of Morris Newberger, which constitutes a part of the document upon which the governor issued his warrant, and from the affidavit of the petitioner, that the goods, which in the indictment are said to have been obtained by the petitioner on the 17th day of September, 1892, the date of the alleged false representation, were not in fact delivered to him on that day, but were on the 6th day of October, 1892, delivered by Morris Newberger & Son to a common carrier in the city of Philadelphia, consigned to the petitioner at Newbern, in

this state, where the petitioner resided, and whither he had gone after making a contract on the 17th of September for the shipment of the goods to him at his home, in this state. Assuming, therefore, that the petitioner, being in the city of Philadelphia on September 17, 1892, made, then and there, to citizens of Pennsylvania, false and fraudulent pretenses, contriving and intending by means thereof to induce them to deliver on October 6, 1892, certain goods to a common carrier in said city for shipment to him in this state, and thereafter, but prior to October 6th, left that state, and returned to his home here, we think he is a "fugitive from justice." As we have said, the truth or falsity of the charge that he made the false pretenses cannot be inquired into. If the delivery to the common carrier be considered a delivery to him (and we see no reason why it should not be so considered), the whole crime, if there was one, was committed within the jurisdiction of the court where the indictment has been found.

But it does not seem to us to be essential that we should hold the delivery to the carrier equivalent to a delivery to the petitioner, before we can adjudge that the crime charged was committed within the jurisdiction of the Pennsylvania court, for, if the false pretense was used in that state by the petitioner, there present, to induce a citizen of that state to part with his property by sending it to the petitioner in this state, and the petitioner then fraudulently obtained here the possession of the goods, the court of that state has jurisdiction of the offense, and the court of this state has jurisdiction also. It is said: "Where a false pretense is uttered in A., and the money obtained in B., the venue may be laid either in A. or B. This, in England, is finally settled by statute, which, however, is in this respect affirmatory of the common law. In several instances it has been held that the forum that first takes cognizance of the offense, whether it be the forum of the uttering of the pretense, or that of the forwarding of the goods, attaches to itself jurisdiction." Whart. Cr. Law, § 1206. This is quoted with approval in 2 Moore, Extrad. p. 942, and that author adds: "This rule does not apply to false pretenses only, but obtains in regard to various other kinds, to the commission of which several facts, which may occur at different times and places, are essential. In such a case it may be held that a man may be regarded as a fugitive from the justice of the state where, being corporally present, he commits any of the criminal acts that respectively give jurisdiction to punish the offense. \* \* \* As the law does not separate the elements so as to destroy jurisdiction of the offense, we should not divide them so as to defeat the recovery of jurisdiction over the offender."

It seems that if a person, being beyond the limits of the state, by means of a false pretense communicated in some way—as by let-

ter—to a person in this state, obtains goods from that person, he may be indicted here, though he has never actually come within the state, and, if afterwards found within the jurisdiction of our courts, may be arrested and tried. 1 Blsh. Cr. Law (7th Ed.) § 109; *State v. Hall*, 114 N. C. 909, 19 S. E. 602. It may be that he could not be brought by extradition proceedings into the state, for in such case he might not be considered “a fugitive from justice,” but if he voluntarily comes within the jurisdiction he may be punished. As is said in *People v. Adams*, 3 Denio, 190, “Impotent, indeed, must our laws be, if the contriver of the mischief, by whose efforts alone the cheat was effected, can escape punishment on the ground that he was out of the state when his fraudulent machinations were concocted, and when they took effect within it.” A fortiori should he be punishable here, if he was actually present in the state when he concocted his fraudulent machinations, and only retired from the state after he had put them in operation. If, therefore, the petitioner did go to the city of Philadelphia, and there make to Morris Newberger & Son false and fraudulent pretenses, and thereby induced them to sell him goods to be shipped to him at his home, in this state, and the goods were so sent, he is amenable to the laws of the state of Pennsylvania. He was actually in that state when the crime charged against him was begun. Now, when he is sought by extradition process, the crime is completed. After beginning the perpetration of the crime, he left that state. The purpose he had in view in leaving the state is immaterial. *Kingsbury's Case*, 106 Mass. 223; *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. 291. He is found here, and must be deemed a fugitive from the justice of that state within whose borders he, being actually present, put in operation an offense against her laws. *In re Cook*, 49 Fed. 833. Upon this subject, in the last-cited case, *Jenkins, J.*, said: “The purpose of the constitutional provision was that criminals should find no asylum within any state of the Union; that ‘the law might everywhere, and in all cases, be vindicated.’ It will not do to refine too curiously upon such enactments, so that the very design of the law shall prove abortive; so that that shall become a shield and a protection which was designed as a weapon of offense. Can it be that one may not be regarded as a fugitive from justice, who, within a state, hires another to kill and murder, but, before the killing, departs the jurisdiction, to avoid the consequences of the murder he has designed? Can it be that if one within a state makes false representations to procure the goods of another, and departs that state before that other actually parts with his property on the faith of these representations, he may not be deemed a fugitive from justice? Or, to use the forcible illustration of counsel at the argument, if one places a dynamite bomb, with

clock attachment, on the premises of another, that will explode only after the lapse of a certain time, and death results, so that the act is murder, but departs the state before the explosion, to avoid the consequences of his act, is he not to be regarded as a fugitive from justice? To put the question is to answer it. The subsequent event was the consequence of the act, naturally resulting from it. The subsequent event was designed to happen from and by reason of the act done. The event, when it occurs as the consequence of the act, gives quality to the act, rendering it criminal. The result was the foreseen and designed consequence of the act, stamping it as a crime. It is immaterial whether the agency employed be an inanimate object or a sentient being. The result was designed by, and naturally flowed from, his original act, which, by reason of the result and the foreseen and intended result, is criminal. Departure from the jurisdiction after the commission of the act, in furtherance of the crime subsequently consummated, is a flight from justice, within the meaning of the law.”

2. We think that his honor also erred when he undertook to inquire into the motive and purpose of this extradition proceeding. In such matters the judiciary may review and control the action of the governor in regard to points of law, but cannot interfere with such action in regard to any matter within the discretion of the governor. *Hughes' Case*, Phil. Law, 57. The executive and judicial are co-ordinate departments of the government. The judiciary will control and correct the acts of the executive officers only when they are acting contrary to law, or without its sanction. In this matter, as we have said, the governor was authorized by the law, upon the document laid before him, to issue his warrant for the arrest and delivery of the petitioner. The law which clothes him with the power to issue that warrant invests him with a discretion not to issue it, or, if he has issued it, to revoke it, if in his opinion his warrant is sought, not to aid in bringing the alleged criminal to trial for his offense, but for some other ulterior purpose. It has been well said: “In our polity the judiciary have a power and are clothed with a duty unique in the history of the governments, viz. the power and duty to declare legislative enactments and executive acts which are in conflict with our written constitutions to be, for that reason, void, and of no effect. In this, America has taught the world the greatest lesson in government and law it has ever learned, namely, that law is not binding alone upon the subject, and that the conception of law never reaches its full development until it attains complete supremacy, in the form of written constitutions, which are the supreme law of the land, since their provisions are obligatory both upon the state and upon those subjected to its rule, and equally enforceable against both, and therefore law, in the strictest sense of the

term." As, in the performance of its "unique duty," the judiciary will declare no enactment of the legislative department void because unconstitutional, unless it is plainly so, likewise it will, with equal solicitude, abstain from encroachment on the province of the executive department, and will never declare the acts of its officers illegal unless clearly so, and not within the scope of that discretion with which the law itself has clothed them. The judiciary cannot review or control the executive in its exercise of that discretion. Reversed.

(42 S. C. 488)

**COLUMBIA WATER-POWER CO. v. COLUMBIA LAND & INV. CO.<sup>1</sup>**

(Supreme Court of South Carolina. Nov. 9, 1894.)

**SUIT FOR REAL ESTATE—RIGHT TO BRING SECOND ACTION—CONDITIONS—PAYMENT OF COSTS.**

1. Under Act 1879, § 1, limiting plaintiff's right of action to recover possession of real property to two actions, "provided that the costs of the first action be first paid and the second action be brought within two years of the rendition of judgment in the first action, or from the granting of a non-suit or discontinuance therein," where a first action is discontinued on plaintiff's motion, the time within which a second action may be brought begins to run from the granting of the order allowing the discontinuance.

2. Where defendant has pleaded the non-payment of the costs of the first action, he need not, in order to invoke the protection of the statute, move that the second action be stayed because of the nonpayment of such costs.

3. Nor is he estopped to invoke its protection because he failed to tax the costs or make any demand therefor.

4. Nor is he so estopped by insisting on going to trial, knowing the costs had not been paid.

5. A provision in the order of discontinuance that plaintiff desired to let fail its action, "for the purpose of bringing a new action," does not dispense with the statutory requirements.

6. Where plaintiff, on the second trial, under an order of court, and without objection, paid into court the amount stated by the clerk to be due for the costs of the first trial, he is estopped to claim on appeal that, as the costs were never taxed, there never had been any legal costs.

Appeal from common pleas circuit court of Richland county; J. H. Hudson, Judge.

Action of ejectment by the Columbia Water-Power Company against the Columbia Land & Investment Company. Judgment was rendered for plaintiff, and defendant appeals. Reversed.

Lyles & Muller and Allen J. Green, for appellant. Abney & Thomas and Bachman & Yeumans, for respondent.

**McIVER, O. J.** This is an action brought by the plaintiff to recover possession of two parcels of land, one on the east and the other on the west side of the Columbia canal, now in the possession of the defendant company. The plaintiff alleges in the complaint that its title is derived from one B. F. Taylor, who,

while seised and possessed of the land in dispute, conveyed the same in fee simple to the state of South Carolina on the 14th of October, 1824, and that by subsequent conveyances the same became vested in plaintiff. It is also alleged in the complaint that defendant claims as its source of title the said B. F. Taylor, "who went into possession of said two tracts of land under the authority and permission contained in section 5 of the act of the general assembly of the state of South Carolina entitled, 'An act to vest the Columbia Canal in Frederick William Green for the term of twenty-one years,' approved the 19th day of December, 1843," and that on the 8th day of April, 1853, the executors of the last will and testament of said Taylor "conveyed, or attempted to convey, all the right, title, and interest of the said Taylor to one Wm. Glaze to the said two tracts of land," and that said Glaze went into possession of the said land under the permission contained in said act of the general assembly, and, while still recognizing the title of the state to the lands in dispute, on the 5th of January, 1855, conveyed all his right, title, and interest in and to the same to John S. Green and H. P. Green, who went into possession and continued in possession under the permission of the said act, recognizing the paramount title of the state thereto; that on the 27th of September, 1867, by a conveyance of that date from the said H. P. Green, the said John S. Green became possessed of all the interest that the said Taylor held under the permission contained in said act; and that the said John S. Green is the grantor and predecessor of defendant, under whom it claims. The defendant answered, denying plaintiff's title, and, while admitting that said B. F. Taylor is one source of its title, denies that such is its only source of title; and denies that the said Taylor, or the executors of his will, or Glaze, or the Greens, or either of them, at any time ever entered into possession of the land in dispute, under the authority or permission alleged to be contained in the aforesaid act of the general assembly, or that they ever, in any way, recognized any title in the said state to the premises in dispute, or in any person or body corporate whatever, and denies that the several conveyances mentioned in the complaint were in the form alleged. For a second defense it alleges that the defendant, its predecessors and grantors, have been in continuous occupation and possession of said premises, holding the same under claim of title in fee simple, exclusive of all other right, adversely to the pretended title of the plaintiff, for more than 20 years last past before the commencement of this suit. For a third defense it alleges that neither the plaintiff nor its predecessors or grantors were seised or possessed of the land in dispute, or any part thereof, within 10 years before the commencement of this action, but that Miss Lucy Green, the defendant's grantor, held the said premises

<sup>1</sup> For opinion on rehearing, see 20 S. E. 540.

adversely to the pretended title of plaintiff for 10 years before the commencement of this action, and that J. S. Green, the predecessor of Miss Lucy Green, held the said premises adversely to plaintiff's pretended title for another period of 10 years before the commencement of this action. For a fourth defense it alleges that defendant is in possession of the premises in dispute under a claim of title thereto by virtue of a written instrument, and that neither the plaintiff nor his predecessors or grantors were actually in possession of said premises, or any part thereof, within 40 years before the commencement of this action, and that the possession of this defendant, connected with the possession of its grantor and grantors, has been continuous for the whole of said period of 40 years. For a fifth defense it pleads purchase for valuable consideration without notice. For a sixth defense it alleges that heretofore, to wit, on the 5th day of September, 1892, the plaintiff commenced an action against this defendant for the recovery of the same land now in dispute, and that on the 11th day of July, 1893, the plaintiff took an order from the court of common pleas discontinuing said action, and requiring the plaintiff to pay to the defendant the costs thereof, but that said costs have not been paid.

At the close of plaintiff's testimony set out in the case, defendant moved for a nonsuit, apparently upon the ground that it appears from certain public acts, of which the court is bound to take judicial cognizance, that the state had parted with its title to the land in dispute by its conveyance to Samuel A. Pearce, trustee of William Sprague, before the plaintiff acquired its title from the state. The motion was overruled, without stating any reasons, and defendant excepted. The defendant then offered its testimony as set out in the case. The first witness was E. B. Arthur, clerk of the court of common pleas, who produced a record, summons, and complaint in which the plaintiff herein sought to recover from the defendant herein certain real estate, which was admitted to be the same land sued for in the present action. The clerk testified that he had taxed the costs in the former action, informally, and that they had not been paid. The order of discontinuance of the former action, bearing date 11th July, 1893, which was also introduced, reads as follows: "The plaintiff in the above-stated action desiring to let fall the same for the purpose of bringing a new action, on motion of its attorneys, it is ordered that the above-stated action be discontinued, with costs." The clerk on his cross-examination testified that none of the parties appeared before him when he taxed the costs; that no notice was served on plaintiff for the taxation of costs; and that he had never notified plaintiff of any taxation of costs. At this stage of the proceedings one of the counsel for plaintiff stated that they

stood ready to pay the costs of the former action when properly taxed; to which counsel for defendant replied that the costs should have been paid before the commencement of the present action, which the case shows was commenced on the 15th of August, 1893, and the trial came on at October term, 1893. It was made to appear to the court that the defendant, without notice to plaintiff, carried a copy of the summons and complaint into the clerk's office, seven days before the convening of the court, and filed the same, and indorsed the following: "Issue of fact to be tried by the jury. Please docket on cal. 1. Lyles and Muller, Defendant's Attorneys. Abney and Thomas, Plaintiff's Attorneys. Sept. 29th, 1893,"—and the same was marked by the clerk as follows: "Cal. 1, Case 88. Filed 29th Sept., 1893." Which said paper was exhibited to the court, and upon which, as the record, the verdict was written subsequently. It was furthermore made to appear that, when the members of the bar met for the purpose of making a roster of cases for trial, Mr. Lyles, attorney for defendant, without any action on the part of the plaintiff, announced that the case would be tried, and had the same placed upon the roster; and that, when the roster of cases was called over by the presiding judge, Mr. Lyles stated that they would insist upon a trial, and when the case was finally called peremptorily, he immediately announced that defendant was ready and would insist upon a trial, to which the plaintiff's counsel, after consultation, acceded, and the trial commenced. During all this time nothing was said with reference to the payment of the costs of the former action, and it was not until after defendant had entered upon its defense that the question of the nonpayment of costs was brought up. At this stage the court made the following inquiry: "Was judgment upon the order of dismissal regularly entered up and judgment roll formed, and a claim by defendant for costs?" To which counsel for defendant responded as follows: "No, because the statutes do not say anything of the kind." The court then ruled that the case must go on, but the plaintiff must pay the costs. To this counsel for defense said: "We submit it is too late to pay it. The plaintiff has no right now to pay the costs of the former case." To which the court responded as follows: "You should not have suffered the trial to commence." We also find the following statement in the case: "After the court had determined that the case should proceed, and it had been ordered on, and had been proceeded with, then, late at night, Judge Hudson said to Mr. Abney, plaintiff's attorney, that the costs should be paid, and inquired what was the amount. Whereupon Mr. Abney stated that he could not tell what the amount was; there was no taxation of costs, and what the clerk had added up was \$14.70. Thereupon the clerk, standing with-

in his railing, stated that there were costs for the surveyors. Whereupon Mr. Abney stated that they had been paid,—some \$90,—and that the other would have been paid if presented or taxed, or any suggestion had been made about it; that he did not know what the costs were, and could not tell until taxed, or until a demand for them in some way was made; but that he was ready, at any time, and had always been, to pay the same. Thereupon the court said that plaintiff's attorneys should deposit the amount of costs before the opening of the court on the succeeding morning. Mr. Lyles was then asked by Mr. Abney to state the costs demanded. Mr. Lyles stated that he would not receive any costs, and would not tax any. Thereupon, next morning, before the opening of the court, the clerk was paid the amount he stated would be a proper estimate of the costs, but no taxation was ever made of the amount. The next morning Mr. Arthur, clerk of the court, announced that he had received the costs of the former case, whereupon counsel for defendant again gave the court to understand that they still objected;" to which the court replied that their exception would be noted. At the conclusion of the testimony, both parties submitted sundry requests to charge, which are set out in the case, and the circuit judge proceeded to charge the jury as is set forth in the case. The jury having rendered a verdict in favor of the plaintiff for the land in dispute, and judgment having been entered thereon, defendant appeals upon numerous grounds set out in the record.

We propose to consider first the point raised by the second and twenty-eighth exceptions, as to the effect of the nonpayment of the costs of the former action before the commencement of the present action. The fact of the nonpayment of the costs of the former action before the commencement of the present action having been proved beyond dispute,—in fact, having been practically conceded,—the question becomes a pure question of law. The act of 1879, now incorporated in the Code as section 98, is the law upon the subject, and it is couched in such plain and unmistakable terms as to leave no doubt upon the question. The second subdivision of that section, corresponding with the first section of the act of 1879, reads as follows: "The plaintiff, in all actions for recovery of real property, or the recovery of possession thereof, is hereby limited to two actions for the same, and no more: provided that the costs of the first action be first paid, and the second action be brought within two years of the rendition of the verdict or judgment in the first action, or from the granting of a non-suit or discontinuance therein." So that, before a second action can be brought for the recovery of real property, two conditions must be complied with: (1) The costs of the previous action must "be first paid"; and (2) the sec-

ond action must be brought within two years from the termination of the first action, either by the "rendition of the verdict or judgment in the first action" or "the granting of a non-suit or discontinuance therein." If either or both of these conditions be not first complied with, then there is no authority for the bringing of a second action, and it must, therefore, necessarily fail. *Ita lex scripta est.*" Now in this case, while the second condition was complied with, inasmuch as the present action was commenced within two years from the granting of the order discontinuing the first action, the second condition was not, inasmuch as it is conceded that the costs of the previous action had not been paid before the commencement of the present action, and hence this action must fail.

Counsel for respondent have earnestly urged several grounds upon which they claim that the plaintiff should be excused for its failure to comply with this condition, which we will proceed to consider.

1. It is urged that there was no judgment entered upon the order of discontinuance, and therefore no legal termination of the former action. Without laying any stress upon the fact that this view would have the former action still pending, which would be fatal to the present action, we think that the more conclusive answer is that the statute which gives this special privilege to the plaintiff, of bringing a second upon compliance with certain conditions, does not contemplate or require that a judgment of discontinuance shall be entered. On the contrary, the explicit language of the statute, "from the granting of a non-suit or discontinuance," shows that a judgment entered was not regarded as necessary to the termination of the former action. Indeed, since the Code, it is somewhat difficult to understand how any judgment could be entered upon an order of discontinuance, especially when, as in this case, it is granted on the motion of the plaintiff; for in section 266 of the Code a judgment is defined to be "the final determination of the rights of the parties in the action." Now, however it may be as to a nonsuit, we do not see how an order of discontinuance can be regarded as a final determination of the rights of the parties to the action. It determines no right whatever, but is simply a permission to plaintiff to drop his action. To show that the Code does not contemplate the entry of a judgment in a case of discontinuance, it is specially provided, in section 324, that "whenever a case may be discontinued by the plaintiff, the officers of court, or the clerk for them may issue an execution for the costs"; not that a judgment may be entered upon which an execution may be issued. It seems to us, therefore, that, however it may have been prior to the Code, it is not now necessary that a judgment should be entered upon an order of discontinuance, especially



when made on the motion of plaintiff. Hence the English cases, and our own cases decided before the Code, which have been cited by counsel for respondent to show that the entry of a judgment was necessary, do not apply.

2. It is contended that the object of the act of 1879 "was simply to restore the common-law practice and reaffirm the old law which had been superseded by the provisions of the Code of 1870." As we understand it, at common law a plaintiff, by making a new demise to another nominal lessee, might bring as many actions as he pleased for the same land, and under this law the practice sprung up of requiring a stay of proceedings in the second action until the costs of the former action were paid. This rule, as well as the practice thereunder, seems to have prevailed in this state until, by the act of 1712, a plaintiff in ejectment was limited to a single action. But by the act of 1744 this provision of the act of 1712 was repealed, and a plaintiff in ejectment was permitted to bring a second action, at any time within two years after "verdict and judgment shall pass against the plaintiff" in the first action, or after "he suffers a non-suit, or discontinue, or any other ways let fall the same"; and, if the second action shall terminate in the defeat of plaintiff, the same shall be final and conclusive against the plaintiff. It will be observed that the act of 1844 makes no provision in reference to the payment of the cost of the former action. But we suppose that, in accordance with long-established practice, the court would, while that act was in force, have granted a stay of proceedings in an action of ejectment, upon a proper application for that purpose, just as in an action for any other purpose, though no case has been cited directly to that point. *Miller v. Grice*, 2 Rich. Law, 27, was an action on the case; *Daniels v. Moses*, 12 S. C. 130, was an action for the foreclosure of a statutory lien on real estate; and *Tibbetts v. Langley*, 12 S. C. 466, was a proceeding for dower. But all these cases recognize that there was no inflexible rule upon the subject, but that it was a matter resting largely in the discretion of the court. Thus the law stood until the act of 1744 was repealed by the Revised Statutes of 1872; and the Code, as originally adopted in 1870, made no provision whereby a plaintiff who had failed in his first action for the recovery of real property, which had been substituted for the old action of trespass to try title, which had been made the substitute of the action of ejectment by the act of 1791 (*Geiger v. Kalgier*, 15 S. C. 262), could bring a second action for the recovery of the same land; though we see no reason why, in the interval between the repeal of the act of 1744 and the passage of the act of 1879, a plaintiff who had been nonsuited in an action of trespass to try titles, or for the recovery of real property, or had voluntarily discontinued

such action, might not have brought another action, just as he could do if he were nonsuited in an action to recover an ordinary money demand, or had discontinued such action. But in 1879 the legislature saw fit to pass an act not only limiting the plaintiff to two actions, but also expressly prescribing the conditions upon which alone the second action could be brought. It will thus be seen that while, under the previous law, the requirement of the payment of the costs before the second action could be proceeded with was a matter resting in the discretion of the court, it is now made, by statute, a condition precedent to the right to bring the second action, and the court has no right to dispense with or modify such statutory requirement. It is very obvious, therefore, that a motion to stay proceedings in this action until the costs of the former action were paid was not only entirely unnecessary, but would have been wholly out of place. Rule 60 of the circuit court, which has been invoked, cannot apply to this case, for two reasons: (1) It was adopted in 1878, prior to the passage of the act of 1879; (2) no rule of court can override a statute.

3. It is contended that the provision of the act of 1879 (Code, § 98) requiring the repayment of the costs of the former action was intended only for the benefit of the defendant, and that he may, and has, in this case, waived his right to insist upon that requirement, (a) by failing to have the costs regularly taxed; (b) by failing to make any claim or demand on the plaintiff for the payment of the costs; (c) by urging and insisting upon the trial of this case, with full knowledge of the fact that the costs of the former action had not been paid. It was in view of these positions taken and earnestly urged in the argument here by the counsel for respondent that we deemed it due to them to set out fully, and at much greater length than we thought really necessary, all that occurred in the court below in reference to this matter. In the first place, we do not see by what authority it can properly be said that the provision in the act of 1879 requiring the prepayment of the costs of the former action was intended only for the benefit of the defendant. We find this provision in the act, as one of the conditions upon which the plaintiff may enjoy a privilege there accorded to him, and it certainly was not to the interest of the defendant to remove one of the obstacles in the way of having another action brought against it, either by waiver or otherwise. But, in the second place, we do not think that there was anything in the conduct of the defendant which amounted to a waiver of its right to insist upon the plaintiff complying with both of the statutory requirements. It was not the duty of the defendant, nor was it to its interest, to have the cost of the former action regularly taxed, or to make any claim or demand for the payment of the same, and

thus facilitate and suggest plaintiff's compliance with a condition precedent to its right to bring the present action. On the contrary, it was the duty of the plaintiff, as well as to its interest, to ascertain and pay these costs which it had unnecessarily incurred, as shown by its voluntary discontinuance of the former action. When the defendant, by its answer, formally set up as one of its defenses the fact that the plaintiff had not first paid the costs of the former action before commencing the present action, we do not see what more could be required or expected of the defendant; and the fact that the defendant urged and insisted upon a speedy trial, as it had a perfect right to do, certainly cannot be regarded as a waiver of a right which it had distinctly set up in its answer as a bar to plaintiff's right to maintain this action.

Again, it is urged that the form of the order of discontinuance is significant, inasmuch as the order states that the plaintiff desires to let fall its action, "for the purpose of bringing a new action," which, it is argued, reserves the plaintiff's right to bring a second action. In the first place, we do not think that the order can properly bear any such construction; and we have no idea that his honor, Judge Gary, in granting the order, either intended or supposed that he could reserve to the plaintiff any such right without complying with the statutory requirements. But even if he had so intended, and had declared such intention in express terms, it is quite certain that he had no power to dispense with an express statutory provision.

Finally, it is argued that until the costs of the previous action had been taxed according to law the court could not assume that there were any such costs. In view of the fact that the court not only did assume that there were such costs due and unpaid, but also required the payment thereof before the trial could be allowed to proceed,—to which action of the court the plaintiff not only did not except, but also acquiesced therein, and paid without protest the costs reported by the clerk to be due, to which report no exception was taken,—we do not see how such a position can be sustained. It is too late now to take the position that there were no costs of the former action, as plaintiff is effectually estopped from taking such ground,—even if otherwise any such view could be sustained, which we do not think is the case; or after the fact was made to appear to the court, by the production of the record, that a former action had been commenced, and had been discontinued on the motion of the plaintiff, it followed, as a matter of law, that costs had been incurred which the plaintiff was liable to pay, and which the statute expressly declares must be first paid before a second action could be maintained.

Inasmuch as the views which we have presented are conclusive, not only of this appeal, but also of the case, the other questions pre-

sented need not be considered. While it may seem somewhat harsh to enforce this stringent statutory requirement, we are the less reluctant to do so in this case, where the object of the action is to recover the possession of lands which have been in the continuous, undisputed, and unchallenged possession of the defendant and those under whom it claims ever since the 8th of April, 1853,—a period of more than 40 years before the commencement of this action; especially when we see that the circuit judge took from the jury the question of fact as to the character of such possession. The judgment of this court is that the judgment of the circuit court be reversed, and that the complaint be dismissed.

POPE, J., concurs.

(95 Ga. 564)

### WILCOX et al. v. MIMS.

(Supreme Court of Georgia. Oct. 22, 1894.)

CONTINUANCE—WANT OF DILIGENCE—INSTRUCTIONS—TRESPASS.

The exercise of due diligence would have enabled the party and his counsel to know before announcing ready for trial whether interrogatories taken in the cause were in the clerk's office or not, and hence the discovery, while the trial was in progress, that they were not there, was not such cause for continuance as would render erroneous a refusal to grant it by the presiding judge in the exercise of his discretion. The request to charge, being partly correct and partly incorrect, was properly refused. The verdict was warranted by the evidence, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Coffee county; J. L. Sweat, Judge.

Action by Henry Mims against John L. Wilcox and others to recover damages for trespass, and for an injunction. There was a judgment for plaintiff, and defendants bring error. Affirmed.

The following is the official report:

Mims, by his petition, alleged that he was the owner of lot of land No. 70 in the Second district of Appling county, containing 490 acres, and that on or about April 7, 1890, Wilcox and Dent entered upon the lot, and cut down and hauled away a number of pine trees growing thereon, to his damage \$100, and continue to cut and haul away the pine trees and timber without his consent. He prayed for damages and injunction. Defendants denied that they had cut or hauled away any timber from the lot mentioned in the petition, and alleged that within the last 90 days before their answer was made plaintiff had had his lot resurveyed by Gillis, and the lines marked out, and new corners set up, and well knew that the allegations in his petition that defendants were cutting the timber on the lot named were false. The jury found for plaintiff, and \$100 damages.

Defendants moved for a new trial. Their motion was overruled, and they excepted. The motion contained the general grounds that the verdict is contrary to law, evidence, etc. Also, because the court erred in refusing to grant a continuance on the motion of defendants after the case had been announced ready, and part of the evidence was introduced, when it was ascertained that a set of interrogatories for Gillis, which defendants "considered" had been previously sued out by them, and which their counsel claimed had been received in open court at a previous term, and by which they could show by Gillis that he had been county surveyor of Coffee county, and had run out lot No. 70 in the Second district of Appling county at the instance of plaintiff, for which service plaintiff paid him, and that there are two original land lines dividing lots No. 70 in the Second and 70 in the First districts, leaving a fraction between them, which is No. 211, and leaving 490 acres in each of the other lots, could not at that time be found in the office of the clerk of the superior court or elsewhere. Error in not charging, as requested by defendants in writing: That if they believed from the evidence that the defendant cut the timber in question on lot of land No. 211, and not on lot No. 70, as alleged, their verdict should be for the defendant; and if they believed from the evidence that there are two distinct land lines between the First district and the Second district of originally Appling county, that they are original lines, and leave 490 acres of land in each lot, then the plaintiff could not recover; that if the jury believed from the evidence that the plaintiff, Mims, had recognized for years that there was a fractional lot of land lying between the two lots of land, to wit, lot No. 70 in the Second district and lot No. 70 in the First district, and had so advised his neighbors, and had so advised them that they could buy the fractional lot of land, that he did not claim that portion, and recognized it as a different lot of land, the plaintiff could not recover.

G. J. Holton & Son, for plaintiffs in error.  
E. D. Graham, for defendant in error.

**PER CURIAM.** Judgment affirmed.

(94 Ga. 453)

# BROWN v. GRIFFITH.

McGARKITY et al. v. SAME.

(Supreme Court of Georgia. March 26, 1894.)

APPEAL FROM JUSTICE — NECESSITY OF BOND —  
TIME OF FILING — EXECUTION — VALIDITY.

1. An appeal from a justice's court to the superior court does not exist, and therefore cannot be transmitted, until after the law has been complied with by making an affidavit in forma pauperis, or giving security; and if the magistrate transmits the papers before one or the other has been done, expecting the appellant to

give security afterwards, not before him, but before the clerk of the superior court, and no security is in fact given until the time for appealing has expired, there is an attempted evasion of the law, and the appeal should be dismissed upon these facts being made to appear to the superior court by parol or any other evidence. The entry of the clerk on the appeal bond as to the date of filing the same in his office will not preclude an inquiry into the real facts, whether the entry be traversed or not. Unless the bond was complete when the clerk received it, he had no legal power to file it.

2. There being no appeal, there was no supersedeas or suspension of the prior judgment by the pretended appeal, and consequently an execution issued by the magistrate on the judgment rendered in his court was legal, and an affidavit of illegality thereto was properly overruled.

(Syllabus by the Court.)

Error from superior court, Haralson county; C. G. Jones, Judge.

Action by G. D. Griffith, receiver, against W. J. Brown, on an open account. The action was originally brought in a justice court, where judgment was rendered for plaintiff. Defendant appealed to the superior court, and after the appeal the justice issued a *fi. fa.* because appellant did not file his appeal bond in time. Defendant interposed an illegality to arrest the *fi. fa.*, which illegality the justice overruled, and defendant appealed to the superior court from the order of the justice. Both appeals were heard together, and the judgment and order were affirmed, and defendant brings error. Affirmed.

The following is the official report:

The ground of illegality was because, after the judgment in the suit on account was rendered, defendant paid all costs and gave bond as the law required, and the case was appealed to the superior court, which operated as a supersedeas. In the superior court Griffith offered evidence to show that the security on the appeal bond in the first case did not sign within four days of the date of the judgment. Appellant objected to this evidence, on the grounds that the entry of the clerk of the superior court, marking the appeal filed within four days, was not traversed, and could not now be traversed, a term of the court having intervened (the appeal bond appears marked filed in office September 8, 1892, and the cases were heard at the July term, 1893, of the superior court); and further, because the appeal bond appears good and regular on its face, and appellee sought to except to the security on appeal on the ground that the security did not sign in time, as appeared from the bond, which exceptions could not be taken after the first term of the appeal. Griffith did not traverse the clerk's entry of filing, nor offer to do so. The court overruled the objections, and admitted the testimony, which was, in brief: The judgment was rendered late in the evening, and Brown was anxious to get off home, presented an appeal bond, signed it for appellant,

and paid the cost. The magistrate then agreed that Brown might take it out to the security, have the security to sign, and leave the paper with the clerk of the superior court. Brown went to the clerk's house, and he was not at home, and Brown left the paper with the clerk's wife, with instructions to have Hutcheson sign it as surety, and file it. Brown saw Hutcheson that evening, and Hutcheson agreed to go to the clerk and sign it (according to Brown's evidence). Brown went home, in good faith thinking the matter was fully arranged, and heard nothing to the contrary until the levy was made, when he went to the clerk, who then assured him that the bond was signed by the surety and filed in time. According to the magistrate's evidence, when the four days expired the magistrate asked the clerk about it, who said the security had not signed, and witness issued the *f. fa.* Hutcheson said he agreed to sign the appeal bond, but did not do so within four days from the judgment. The clerk testified that he made the entry of filing on the appeal bond, but thought it was signed by the security after filing. On cross-examination he testified that he thought the signing and filing were done the same day. The bond bears date the same day as the entry of filing, and there is nothing on its face to indicate that the surety did not sign on that date, unless it be the fact that the name of the surety does not appear in the body of the bond. The court dismissed the appeal in the first case, and overruled the illegality in the other, to which rulings Brown excepts, and alleges that the court erred, because the court should not have heard evidence as to when the security signed the appeal, when there was no traverse of the clerk's entry of filing. The court should have heard no exception to the security on appeal, taken after the last day of the first term of the appeal. Appellant had in good faith made an honest effort to appeal; had done all the law required, except have security to sign. He agreed and intended to sign, and afterwards did sign, and appellee was in no way prejudiced in right or interest if he did not sign in four days; and the appeal ought not to have been dismissed. It was error to overrule the illegality, because at the time it was filed there was an appeal in the superior court, good on its face, and entered filed by the clerk in the case in which the *f. fa.* issued, and filed before the *f. fa.* issued. Whether the appeal was good or bad was for the superior court alone to determine, and, pending that appeal, whether defective or not, it was illegal to issue and levy the *f. fa.*

S. L. Craven and Adamson & Jackson, for plaintiffs in error. E. S. Griffith and Edwards & Edwards, for defendant in error.

PER CURIAM. Judgment affirmed.

(115 N. C. 742;  
STATE v. CARSON et al.

(Supreme Court of North Carolina. Nov. 20, 1894.)

CRIMINAL LAW—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

Where the evidence against the defendants in a criminal case was circumstantial, it was not error to refuse to instruct the jury as a rule of law "that the strength of circumstantial evidence must be equal to the strength of the testimony of one credible eyewitness."

Appeal from superior court, Yadkin county; Battle, Judge.

Tom Carson and others were convicted of a crime, and appeal. Affirmed.

The Attorney General, for the State.

SHEPHERD, C. J. The evidence in this case was circumstantial, and the defendants except to the instructions of his honor on the ground that he failed "to lay down to the jury as a rule of law that the strength of circumstantial evidence must be equal to the strength of the testimony of one credible eyewitness." This very point was raised in *State v. Norwood*, 74 N. C. 247, and overruled by the court. This ruling is referred to and approved in *State v. Gee*, 92 N. C. 761, and cannot be regarded as an open question in this state. His honor's charge as to the intensity of proof is well sustained by the foregoing authorities. Affirmed.

(115 N. C. 173)

COWLES v. STATE.

(Supreme Court of North Carolina. Nov. 20, 1894.)

LIMITATION OF ACTIONS—CLAIMS AGAINST STATE.

The statute of limitations applies to claims against the state.

Action by Calvin J. Cowles against the state of North Carolina on state bonds. Petition dismissed.

John W. Hinsdale, for plaintiff. F. H. Busbee and the Attorney General, for the State.

BURWELL, J. The state, through its proper officer, interposes the plea of the statute of limitations against the prayer of the petitioner for the recommendatory decision of this court on the claim which, in his petition, he sets up as the basis of this action, and it appears on the face of his petition that more than 10 years have elapsed since his alleged cause of action accrued. It was intended by the provision of the constitution (article 4, § 9) and the statute (Code, §§ 947, 948) that persons who asserted that they held legal claims against the sovereign state should here find a tribunal before which they might have, in proper cases, the legality of their claims adjudicated; a tribunal before which the sovereign state would, for a certain purpose, abdicate the privilege of exemption

from liability to be sued, and appear as any other litigant, to the end that its liability to the petitioner might be determined by the law. We can see no good reason why, in such proceedings as this, we should not be required to determine the rights of the petitioner and the liability of the state by the same laws that would govern those rights and that liability if the action was against an individual debtor. While it may be true that the statute of limitations would not bar the prosecution by the state of its claims against the citizen, except for the provisions of the Code (section 159), it does not follow from this that the state may not herself plead that statute, and interpose its bar to prevent our recommendatory decision against her. It is not for us here to say whether or not there is a moral obligation resting upon the commonwealth to pay the petitioner a certain sum of money, but whether, under the law that controls such a controversy when waged between two citizens, the state is indebted to this petitioning citizen. "Considerations of honor or magnanimity can have no bearing in determining what the law is. The state has referred its rights to judicial tribunals, to be decided by the law. If by it the claim is barred, they must so declare, though it might be just and honorable for the state to pay it, if it has never been paid, notwithstanding the bar." *Baxter v. State*, 10 Wis. 454. This tribunal to which the petitioner now comes to have his alleged right against the state adjudicated was open to him for that purpose when his right accrued, more than 10 years ago. The remedy, such as it is, given him by the constitution and the law for the alleged wrong done to him by the state, was then exactly what it is now. He has seen fit to delay to prosecute his supposed right in the only tribunal open to him for its adjudication. Because of the length of that delay, the law has barred his claim, and we cannot declare that the state is now legally indebted to him. Moreover, we do not think that the claim against the state set out in the petition is one that calls for the exercise by us of our recommendatory decision. If, in any sense, it may be called a claim against the commonwealth, it is a part of that mass of bonded indebtedness which was outstanding when the constitution of 1868 was adopted. It is well known that the legislative department of the government, to which our recommendation would be made, if made at all, has done what it has thought best to do in the settlement of those liabilities. The act of 1879 and the several acts amendatory thereof express the will of the legislature in regard thereto. The refusal or failure of the general assembly, in each of these acts, to recognize and provide for the class of claims to which those of the petitioner belong, is tantamount to a declaration by that department that they constitute no valid obligation of the state. The facts which are set out in the petition are such that, if true, they

are well known to the proper officers. A legislative committee can as easily inquire into them as can a court. Not only are the facts pertaining to the matter well known, or readily ascertainable, but it does not seem to us that there are here any "grave questions of law" that must be decided by us in order that the legislative department of the government may be informed as to its duty under the law. It was intended, as it seems to us, by this provision of the constitution, that the opinion of this court upon important questions of law in certain cases might be had, in order that the general assembly might be thereby aided in the discharge of its duties under the law (*Reynolds v. State*, 64 N. C. 460), and not that this tribunal should be the censor of the legislative department in such matters, and authorized and required to sit in judgment upon the acts of a co-ordinate department of the government in a matter about which it is necessarily as well advised as we can be. The petition must be dismissed.

(115 N. C. 181)

**MARCOM v. STATE.**

(Supreme Court of North Carolina. Nov. 20, 1894.)

J. C. Marcom, administrator, against the state of North Carolina, on state bonds. Petition dismissed.

J. W. Hinsdale, for plaintiff. The Attorney General and F. H. Busbee, for the State.

BURWELL, J. For the reasons stated in *Cowles v. State* (at this term) 20 S. E. 384, this petition must also be dismissed.

(115 N. C. 182)

**DOWNS v. CITY OF HIGH POINT.**

(Supreme Court of North Carolina. Nov. 20, 1894.)

**ACTION AGAINST CITY—MAINTENANCE OF PUBLIC NUISANCE—RECOVERY OF DAMAGES.**

1. In an action against a city for damages for the maintenance of a public nuisance, which caused sickness in plaintiff's family, the court submitted to the jury the issues whether the city carelessly suffered a public nuisance to be created by failure to keep a ditch in repair, and, if so, what damage has the plaintiff sustained "thereby," and also instructed that, to entitle plaintiff to recover, the sickness must have been directly caused by the condition of the ditch. *Held*, that it was proper to refuse to submit, at defendant's request, the issue whether the sickness was "the result of the condition of the ditch alone," as such issue was necessarily embodied in those given.

2. Damages may be recovered from a city for sickness in plaintiff's family caused by a drain maintained by the city, amounting to a public nuisance.

Appeal from superior court, Guilford county; Brown, Judge.

Action by J. R. Downs against the city of High Point. There was a judgment for plaintiff, and defendant appeals. Affirmed.

L. M. Scott and Dillard & King, for appellant. Jas. E. Boyd, for appellee.

**AVERY, J.** The first issue submitted involved the question whether the defendant negligently failed to keep the ditch in good condition, or, in other words, carelessly suffered a public nuisance to be created by want of care in attending to it. The additional issue passed upon was as follows: "If so, what damage has the plaintiff sustained thereby, if any, up to the date of his demand, July 14, 1892?" The affirmative finding that the nuisance was caused by the defendant's want of care, and the assessment of the damage sustained by the plaintiff "thereby," was necessarily an ascertainment of the damage due for the private nuisance suffered peculiarly by the plaintiff. In order to enable the jury to comprehend that such was the end in view in passing upon the inquiries, the judge told them that the damage must be assessed, if at all, for an injury differing in kind, not simply in degree, from that suffered by the public generally. The defendant tendered the issue: "Was the sickness of the plaintiff and that of his family, complained of, the result of the condition of the ditch alone?" Precisely the same inquiry was answered when the jury found the amount of damage resulting peculiarly to plaintiff and his family from neglect to keep the ditch in good condition,—"thereby." That issue was not a simple inquiry as to damage, but was so framed that no damage could be assessed in response to it except such as arose from some injury peculiar to the plaintiff. There was no danger, therefore, that the defendant would be mulcted for any injury done by the filth emanating from the hogpen mentioned by the witness. In fact, the best evidence that the court did not abuse its discretionary power in framing issues is found in the fact that the very legal question suggested by the issue tendered was raised by the prayer for instruction offered. If the defendant's counsel had the opportunity to present such views of the law, arising out of the evidence, as were pertinent in support of their contention, they have not been deprived of any legal right. *McAdoo v. Railroad Co.*, 105 N. C. 140, 11 S. E. 316; *Emery v. Railroad Co.*, 102 N. C. 209, 9 S. E. 139.

This case differs from that of *Denmark v. Railroad Co.*, 107 N. C. 185, 12 S. E. 54, in that here the inquiry involves the question of proximate cause, as well as damage, while in *Denmark's Case* the jury were not required to pass upon or find anything but the amount of damage, without ascertaining on what account. The addition to the instruction asked was in strict accord with the very principle for which the defendant contended. The jury were told, in effect, that unless it was clearly established that the injury would not have resulted from any other cause than the odors arising from the nuisance at the ditch, and that, unless the injury was directly traceable to the nuisance,

they would assess no damage at all. We think that there was no error in refusing to instruct the jury upon the evidence that plaintiff could not recover. The instruction given was warranted by the evidence, and embodied the principle laid down by leading text writers. *Wood. Nuis. §§ 561-574*. There was no error in the ruling of the judge refusing to submit the issue, nor in the charge given as a substitute for that asked. The judgment is affirmed.

(115 N. C. 190)

**STATE ex rel. TROTTER v. MITCHELL.**  
(Supreme Court of North Carolina. Nov. 20, 1894.)

**REMOVAL OF PUBLIC ADMINISTRATOR.**

The clerk of the superior court cannot, without notice, remove a public administrator for failure to renew his bond.

Appeal from superior court, Guilford county; Winston, Judge.

Quo warranto by state, on relation of W. D. Trotter, against Samuel S. Mitchell, to try the title to the office of public administrator. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

Dillard & King, for appellant. L. M. Scott, for appellee.

**PER CURIAM.** We think that the order of removal, on the ground that the relator had failed to renew his bond, was, under the circumstances of this case, not only irregular, but void. The relator's office of public administrator was a property right, and it is well settled that he cannot be deprived thereof but by the law of the land. In *Vann v. Pipkin*, 77 N. C. 408, it was held that although the statute declared that the failure of a sheriff to renew his bond and produce receipts, etc., should create a vacancy, such vacancy was not in fact created until so declared by a competent tribunal, and that no such vacancy "can be declared until the alleged delinquent shall have had due notice and a day in court, if in reach of its process." See, also, *Hoke v. Henderson*, 4 Dev. 1. The judgment of the clerk, without any pretense of notice, was not only irregular, but absolutely void. *Jennings v. Stafford*, 1 Ired. 404. There was therefore no error in the ruling of the court. The judgment of the court, as we construe it, did not deprive the clerk of the right to require a renewal of the bond, or to remove the relator for any other proper cause, and the objection upon this ground is untenable. Affirmed.

(115 N. C. 76)

**BARNES v. CRAWFORD.**  
(Supreme Court of North Carolina. Nov. 18, 1894.)

**SLANDER—FORGERY—AMENDMENT OF COMPLAINT.**

1. A statement that a person is a "forger" is not slander, actionable per se, where such

word is coupled with a charge of some specific act, which of itself does not constitute forgery.

2. To sign without authority the name of a candidate for a public office, to a statement as to his future legislative action if elected, is not forgery.

3. It is not an abuse of discretion to refuse to allow plaintiff to amend his complaint after the time for answering has expired, on a demurrer thereto being sustained.

Appeal from superior court, Wake county; W. A. Hoke, Judge.

Action by W. S. Barnes against W. T. Crawford. There was a judgment for defendant, and plaintiff appeals. Affirmed.

W. J. Peele and W. A. Montgomery, for appellant. F. H. Busbee, for appellee.

MacRAE, J. The slanderous words alleged to have been spoken by defendant are: "I did not sign the demand numbered six on the said card. My name has been forged to it by Barnes" (meaning the plaintiff) "Otho Wilson, and others got it" (meaning the card) up, and they are forgers, frauds and liars. They (meaning the plaintiff and others) have forged my name to the card." We give this sentence with the punctuation as appears in the record. It might, in some case, be necessary to send down for the original, but we do not deem it to be so here.

Without entering into a consideration of the nice distinctions which have been made as to the grade of the offense of forgery at common law and by statute, we take it that to call a man a forger, in this state, is an actionable slander. *McKee v. Wilson*, 87 N. C. 300, and cases there cited. But if these words were so coupled with others in explanation that they must, of necessity, apply only to a further charge of some specific act, it would be necessary to pursue the inquiry as to whether the act so charged to constitute him a forger would, if true, amount to such offense. "An action of slander cannot be maintained for words which impute a crime, where, from all that was said at the time the words were spoken, it appears that the words had relation to a transaction that was not criminal, and that they must have been so understood by the hearers." *Brown v. Myers*, 40 Ohio St. 99; 13 Am. & Eng. Enc. Law, 387. To constitute actionable slander, the words must impute the commission of an infamous offense. It is true that this offense need not be punishable in this state, as was held in *Shipp v. M'Craw*, 3 Murph. 463. By reference to the opinion of Chief Justice Taylor in that case, it will be found that every instance cited by him was that of the charge of an infamous crime, punishable where it was alleged to have been committed. Judge Henderson said in his concurring opinion: "The gravamen in an action of slander is social degradation. The risk of punishment, and the rule to test the question whether the words be or be not actionable,

to wit, does the charge impute an infamous crime, is resorted to, to ascertain the fact whether it be a social degradation, and not whether the risk of punishment be incurred. And this rule is the test of that; for those who are punished for infamous crimes are degraded from their rank as citizens; they lose their privileges as freemen, their *liberam legem*, and are no longer *boni et legales homines*. No other degradation will give an action," etc.

Is it, then, an infamous offense, under the law of North Carolina, to falsely sign the name of another to the paper known as the "Sixth Demand," which reads as follows:

"(6) That congress issue a sufficient amount of fractional paper currency to facilitate exchange through the medium of the United States mail." I approve of the above demand, and, if elected, will endeavor to have it enacted into a law. I also approve of the purpose of the bill introduced into the United States senate by Senator Vance, and known as the 'Subtreasury Bill'; and if it is not shown to be unconstitutional I will vote for it, and advocate its passage, and, in the event it is shown to be unconstitutional, then I will introduce and advocate a bill to abolish bonded warehouses for whisky, &c., and also a bill to abolish national banks, in accordance with the first demand on this card. Witness: ———.

[Signed] ———." "Forgery" is defined to be the signing by one without authority, and falsely and with intent to defraud, the name of another, to an instrument which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability. 8 Rice, Ev. 487. An instrument in writing, of which forgery can be predicated, is one which, if genuine, could operate as the foundation of another man's liability, or the evidence of his rights, such as a letter of recommendation of a person as a man of property and pecuniary responsibility, an order for the delivery of goods, a receipt, or a railroad pass, as well as a bill of exchange, or other express contract. 8 Greenl. Ev. 106. But, to constitute an indictable forgery, it is not alone sufficient that there be a writing, and that the writing be false. It must also be such as, if true, would be of some legal efficacy, real or apparent, since otherwise it has no legal tendency to defraud. 2 Blash. Cr. Law, § 533. So, whether the word "instrument" or "document" or "writing" be used, it will always be found coupled—as in *Newell, Defam.* p. 141—with the intent to defraud. Now, we all know that it is impossible to give an exact definition of the word "fraud" or "defraud," but Webster gives as good a definition of "fraud," as understood in law, as can be found: "An intentional perversion of truth, for the purpose of obtaining some valuable thing or promise from another"; the controlling idea always being that the instrument, if true, would be the foundation of some legal Ma-

bility. We are of the opinion that the false signing of this paper would not be forgery, because the defendant could not be made liable to any legal proceeding for a breach of the same if his signature had been genuine.

2. After the demurrer was sustained, and judgment rendered, the plaintiff moved to be allowed to amend his complaint, so as to allege injury to him in his office by the words spoken as set out in Exhibit A. Motion overruled, and the plaintiff excepted. This was a matter within the discretion of the judge below, and with which we are not permitted to interfere. Section 272 of the Code has been often construed to give to the defendant, after a demurrer interposed by him in good faith has been overruled, the right to answer over, but it has never been extended to the plaintiff as a right to amend his complaint. See Clark's Code, and cases there cited under this section. In *Netherton v. Candler*, 78 N. C. 83, his honor overruled the defendant's demurrer, and allowed the plaintiff to amend his complaint. The court held it error, and said he ought to have sustained the demurrer, and required the plaintiff to pay the costs, and then, instead of dismissing the case, he might, in his discretion, have allowed the plaintiff to amend. "Any pleading may be once amended of course, without cost and without prejudice to the proceedings already had, at any time before the period for answering it expires." Code, § 272. "The defendant shall appear and demur or answer at the same term to which the summons shall be returnable, otherwise the plaintiff may have judgment by default." *Id.* § 207. The summons was returnable to October term, 1893, at which term the defendant's time to answer was extended 30 days, within which extended time he demurred, instead of filing an answer. The amendment of course of the complaint could have been made of right at any time before the expiration of the 30 days. An amendment could not have been made after that time without prejudice to the proceedings already had, for the defendant had a right to have his demurrer heard; and, as we have said, it was entirely within the discretion of the presiding judge to permit an amendment to the complaint after the demurrer was sustained. There is no error, and the judgment is affirmed.

(115 N. C. 127)

**COLGATE et al. v. LATTA et al.**

(Supreme Court of North Carolina. Nov. 13, 1894.)

**ORAL EVIDENCE—TO EXPLAIN WRITTEN CONTRACT.**

1. An order was sent to plaintiff by its agent to ship to defendant 100 boxes of soap, but the order did not state that a sale of the soap to defendant was made, and a place for the name of the purchaser was left blank. On

the order was written, "Accepted," followed by defendant's name. *Held*, that parol evidence was admissible to show that the agreement was not for a sale to defendant, but for a delivery of the goods, to be turned over to another. *Clark, J.*, dissenting.

2. In an action on a contract for the shipment to defendant of 100 boxes of soap, plaintiff, after introducing extrinsic evidence that defendant had agreed to buy that number of boxes, cannot complain that defendant in order to meet this evidence, introduced evidence of a similar kind.

Appeal from superior court, Wake county; Hoke, Judge.

Action by Colgate & Co. against Latta & Myatt on a contract, which was introduced in evidence as Exhibit A. Judgment for defendants, and plaintiffs appeal. **Affirmed.**

Exhibit A was as follows:

Order No. \_\_\_\_\_ 11—12, 1894.  
Colgate & Co., New York,  
Ship to Latta & Myatt,  
Raleigh, N. C.  
Through direct.  
Time 30 days.

| No. Boxes. | Description.                  | Size. | Price.    |
|------------|-------------------------------|-------|-----------|
| 100        | Octagon .....                 |       | 1.00.     |
|            | Less 2% box; less 3 per cent. |       |           |
| 1          | Gro. Turkish Bath .....       |       | Full      |
| 1          | " W. Castle, 4 oz. ....       |       | Discount. |

Large glass sign. O. K.

No other condition of sale.

Purchaser, \_\_\_\_\_  
Salesman, B. F. Bogart.  
Accepted, Latta & Myatt.

**Strong & Strong, for appellants. Battle & Mordecai, for appellees.**

**BURWELL, J.** In *Cumming v. Barber*, 90 N. C. 332, 5 S. E. 903, it is said that: "If it appear that the entire agreement was not reduced to writing, or if the writing itself leaves it doubtful or uncertain as to what the agreement was, parol evidence is competent, not to contradict, but to show and make certain what was the real agreement of the parties; and, in such case, what was meant is for the jury, under proper instructions from the court." Mr. Abbott, in his work on Trial Evidence (page 294), says: "In the present state of the law, the rule excluding parol to vary a writing, in its application to commercial sales, amounts to little more than this principle, viz. that, where the parties or their agent have embodied the terms of their agreement in writing, neither can, in an action between themselves (unless impeaching the instrument), give oral evidence that they did not mean that which the instrument, when properly read, expresses or legally implies, or that they meant something inconsistent therewith. In more detail, the rule and its established exception may be stated thus: A written instrument, although it be a contract within the meaning of the rule on this point, does not exclude oral evidence tending to show the actual transaction in the following cases. \* \* \*

(5) Where the language of the instrument



leaves its meaning doubtful, or extrinsic facts in evidence raise a doubt as to its application. (6) Where it appears that the instrument was not intended to be a complete and final statement of the whole transaction, and the object of the evidence is simply to establish a separate, oral agreement, in a matter as to which the instrument is silent, and which is not contrary to its terms, nor to their legal effect."

The plaintiffs insist that there was a contract between them and the defendants by which the latter agreed to purchase from them 100 boxes of soap at \$3.40 per box, and the plaintiffs agreed to sell to them such a lot of soap at that price. They contend that the writing, Exhibit A, contains the entire agreement between the parties here, and that its meaning is free from doubt and ambiguity, and that the only evidence needed to maintain this action was proof that the defendants signed their names on said writing after the word "Accepted," and that the plaintiffs thereafter shipped to them 100 boxes of Octagon soap. There is not about this instrument that absolute certitude of meaning which is required to enable a court to declare exactly what the agreement of the parties actually was, by a bare inspection of the writing. It is, of course, true that it is of the utmost importance that where contracts have been thus evidenced the parties should be held bound by their written statement of what their agreement was. This principle has always been considered "one of the greatest barriers against fraud and perjury," and its abrogation or impairment would produce very great evils. It should not be construed away, or the exceptions to it multiplied, to avoid the seeming hardships of particular cases. But, while this is true, it must also be conceded that the writing to which such importance is to be attached must be explicit and complete. Wherever there is no uncertainty in the written words, their meaning is to be determined, as a matter of law, by the court, and the legal consequence of the execution of the writing is to be adjudged as soon as the execution of it is admitted or proved. Wherever there is uncertainty in the written words, either because of ambiguity or incompleteness, it is for the jury to determine what was the agreement of the parties; and, in the trial of that issue, extrinsic evidence is proper, and indeed necessary. The writing upon which the plaintiffs rely in this action (Exhibit A) seems to us ambiguous and uncertain. We do not here have reference to the terms in which the price of the soap is expressed, which, the plaintiffs themselves seem to grant, clearly require explanation, but to the fact that in it there is no explicit statement, either that the plaintiffs have sold to the defendant 100 boxes of soap, or that the defendants have bought from the plaintiffs that quantity of goods. In it, their salesman directs Colgate & Co to ship to

Latta & Myatt certain goods. There is in the order a place for the name of the purchaser, which is left blank. At the bottom of the order is the word "Accepted," followed by the signature of the defendant firm. As soon as this document is attentively examined, there arises a doubt as to its meaning. The fact that such a doubt arises is an assurance that an explanation of it is necessary, that requires the introduction of extrinsic evidence, and makes an issue for the jury to decide.

While parties, by reducing their commercial contracts to writing, may make their obligations so binding that the law, upon mere proof of the execution of the instrument, will adjudge the rights of those who are thus careful to fix the memorials of their agreements, they must use skill in the composition of such writings, and must carefully avoid all uncertainty of expression; for, as we have said, such ambiguity in the writing necessarily lets in parol—or, to speak accurately, extrinsic—evidence to explain away the ambiguity, and by this means the good purpose of the writing is defeated, not by the fault of the law, but by the unskillfulness or carelessness of the parties themselves. Because of this ambiguity in this writing, we think it was proper to admit extrinsic evidence to show that the plaintiffs did not agree, by their agent, to sell to the defendants 100 boxes of soap, and that the defendants did not agree to purchase that quantity, but that, as the writing itself discloses, that number of boxes was to be shipped to the defendants, for some purpose not set out in that instrument, but which the extrinsic evidence shows, and the jury have found, was that they should turn over one-half of the lot to Norris & Bro.; this last-named firm and the defendants being the real purchasers under this contract, each buying one-half of the soap. The extrinsic evidence which his honor admitted over the objection of the plaintiffs did not, in our opinion, tend to contradict the writing, and was competent. This ruling disposes of all the exceptions.

The record shows that, when the plaintiffs opened their case, they themselves deemed it necessary to introduce evidence extrinsic to the written memorandum, in order to support their demand against the defendants, and to show that they had shipped the goods (100 boxes) to defendants because they had agreed orally to purchase that number of boxes. Having thus opened the way for such evidence, they should not be allowed to object to the defendants being permitted to meet that extrinsic evidence with evidence of like kind. However, we do not think the plaintiffs' able counsel committed an error on the trial of the case before the jury, but rather that the view they seem then to have taken of this writing was a correct one. No error.

OLARK, J. (dissenting). The paper, on its face, is an order by the agent on his principals, Colgate & Co., to ship to the defendants

100 boxes of soap, at \$3.60, less 2 per cent. discount. This was agreed to by defendants, who wrote their acceptance below the above specification of quantity and price. This made a contract. It was forwarded to Colgate & Co., who shipped to defendants the 100 boxes at the agreed price. That evidence was introduced to explain that the price was \$3.60 per box, and not per 100 boxes, does not authorize any evidence to contradict that the quantity was 100 boxes, which is unmistakably set out in the contract. Still less does the fact that evidence was necessarily admitted to show the shipment of the goods under the contract authorize oral testimony to contradict the written agreement accepting an order to ship 100 boxes. There are cases where the contract is partly in writing and partly oral. In such cases the additional oral agreement is admissible, provided it does not contradict or alter the part of the contract which is reduced to writing. *Nissen v. Mining Co.*, 104 N. C. 309, 10 S. E. 512. But here the written agreement being to accept 100 boxes, to be shipped at \$3.60, less 2 per cent., a contemporaneous verbal agreement to take and pay for only 50 boxes is a palpable contradiction of the plain, unequivocal written terms of the contract, and was inadmissible.

(115 N. C. 249)

#### DUNN v. JOHNSON.

(Supreme Court of North Carolina. Nov. 20, 1894.)

#### INSOLVENT CORPORATION — ACTION BY RECEIVER AGAINST CASHIER—CORPORATE FUNDS—DEMAND FOR ACCOUNTING.

1. In an action by the receiver of an insolvent banking association against its former cashier to recover a balance alleged to be in his hands, defendant may be required to submit an account, when this is necessary to ascertain the amount of said balance.

2. A complaint in an action by the receiver against the former cashier of an insolvent corporation, which alleges that defendant, in the course of his agency, received into his possession, of the funds of the corporation represented by the receiver, a certain amount, and that he accounted for and turned over to his successor a less amount, and that demand has been made upon him for the balance which went into his hands, and he has failed to pay it over to the receiver, states a cause of action.

Appeal from superior court, Sampson county; Brown, Judge.

Action by W. A. Dunn, receiver of the insolvent Clinton Loan Association (incorporated), against A. F. Johnson, its former cashier, to recover a balance alleged to be in his possession. From an order overruling his demurrer to the complaint, defendant appeals. Affirmed.

Geo. Rountree, for appellant. Robt. O. Burton, for appellee.

MacRAE, J. The defendant was cashier of a joint-stock company, a copartnership doing a banking business. *Faison v. Stewart*, 112 N. C. 382, 17 S. E. 157; *Bain v.*

*Association*, 112 N. C. 248, 17 S. E. 154; *Hanstein v. Johnson*, 112 N. C. 253, 17 S. E. 155. By its articles of agreement, styled the "Constitution of The Clinton Loan Association," the duties of defendant as cashier were defined. "The cashier shall receive and hold, subject to the order of the board of directors, all moneys, notes, mortgages, bonds, policies of insurance, deeds, and other valuables belonging to the association." And by a further provision "the board of directors, or any three of them, together with the cashier, shall constitute a finance committee, whose duty shall be to loan, invest, and collect the moneys and other securities of the association as defined in the constitution and by-laws." It will appear from the above quotations that the cashier, while he may not have been invested alone with all the powers generally delegated to cashiers of banks, was the custodian of all the funds, securities, and effects of the association, "subject to the order of the board of directors." He occupied the relation of a fiduciary while a member of the copartnership. He was also its servant and agent. The reception of its effects constituted him not simply a debtor. He had no separate authority to disburse, but was bound to pay over on request or order; and it was also provided that he should give bond for the faithful performance of his duties. It was not a case of deposit, like a bank and its depositor, where the bank could mingle the funds with its own, and use the same until drawn out; and it was in no sense a loan, as in *Hervey v. Devereux*, 72 N. C. 463. It was clearly akin to a pure trust. "The relation of trust between the bank and cashier gives equity jurisdiction to compel an account for money misappropriated, or other breach of trust." 1 Morse, Banks, § 173. The gravamen of the charge here is that the defendant, as cashier, received into his possession all the moneys, notes, etc., of the association, and failed and neglected to account for a part of the same, but converted and fraudulently misappropriated it. The necessity of an account is set out in order that the true liability may be ascertained. We have been impressed with the very interesting and ingenious argument of the learned counsel for defendant to the effect that the defendant was neither bailiff, guardian, nor receiver, and that consequently the old and now obsolete action of account would not lie against him. Without undertaking to decide whether this be so or not, we are entirely satisfied that a bill in equity for an account would be sustained, for where an agent is intrusted with money to be disbursed, his principal may sustain a bill against him for an account of his agency, and in some instances although no discovery is sought. *Adams*, Eq. 321, note; *McCaskill v. McBryde*, 2 Dev. 285. And we think it clear that under our present practice, in which legal and equitable relief may be de-

manded and obtained in the one form of action, this defendant may be held to account, the action being to recover a balance alleged to be in the hands of defendant, and an account being necessary to ascertain the amount of said balance if there be any. The old bill of discovery is dispensed with, but the law affords better facilities for reaching the desired end than were provided in the distinct equity system once in practice. Code, § 579 et seq. Old forms have been done away with, but principles of substantial justice ever remain. The association became incorporated. The corporation succeeded to its rights and liabilities, and, becoming insolvent, a receiver was appointed to take charge of and administer the assets. This action is not brought by a creditor, but it is the receiver who seeks through this means to secure the effects of the insolvent corporation for the benefit of all parties in interest, and have distribution according to law. Code, § 668 et seq. His allegation is, in substance, that those assets have been wasted by the defendant, who had them in charge. If the defendant failed to turn over the property intrusted to him, he might have been sued by the association, or its successor, the corporation. While one copartner had no action at law against another to recover the partnership property to which each had equal title, the equitable jurisdiction to compass a dissolution of the partnership and the administration of its effects has always existed. 1 Story, Eq. Jur. § 463; *Marvin v. Brooks*, 94 N. Y., at page 81. This corporation, having succeeded to the rights of the copartnership, is now in liquidation under our statute, and, being under the control of the court, no one else can collect its assets but the receiver. Among its assets is this claim against the cashier of the copartnership association. If said cashier has not fully accounted for the property which came into his hands, the only remedy left is an action by the receiver against the cashier. If there were an ascertained balance in his hands, there would be no necessity for an account; but the plaintiff, a receiver, alleges that a long account is necessary to enable the court to ascertain the sum for which judgment should be rendered against the defendant. Section 421 of the Code provides for a reference to state an account. If, upon the taking of such account before a referee, it should be found that defendant has had in his possession property of the association, and has not paid over the same to his successor, the opportunity is then offered the defendant to discharge himself of all liability by showing that such property has been disposed of by him by order of the directors, or has been dissipated in any way other than by his neglect or default.

It is further contended by the defendant that the complaint as amended is too vague and uncertain to require an answer. We

reiterate what has more than once been said, that the Code has by no means dispensed with that certainty and regularity in pleading which is essential to every system adopted for the administration of justice (*Rowland v. Windley*, 82 N. C. 131); and that now, as in the old equity practice, "there should be such certainty in the averment of the title upon which the bill is found that the defendant may be distinctly informed of the nature of the case which he is called upon to meet" (Story, Eq. Pl. § 241); that a charge of fraud in general terms is insufficient, and that to open a settled account specific errors should be pointed out. But if we should reject the charge of fraudulent misappropriation of the funds of the association, we still have the distinct allegation that defendant, in the course of his agency, received into his possession, of the funds of the association, now represented by the receiver, a certain amount, and that he accounted for and turned over to his successor a less amount; that a demand has been made upon him for the balance which went into his hands, and that he has failed to pay over the same to the receiver. Here is the foundation for an action in the nature of an *indebitatus assumpsit* upon an account stated, in which action it is not necessary to state the particular items constituting the debt. 1 Selw. Nisi Prius, 68. And the Code, as we have seen, provides the means for discovery and the statement of an account to ascertain the balance in the hands of the defendant, if any there be. *Marvin v. Brooks*, *supra*. Neither is there necessity in equitable proceedings of this character, if we look at it in the light of a bill for discovery and account, to state with precision each item of the balance claimed, for in such case there would be no necessity for a discovery or an accounting. It may be proper, however, to remark that every material fact to which the plaintiff means to offer evidence ought to be distinctly stated in the premises, for otherwise he will not be permitted to offer or require any evidence of such fact. A general charge or statement, however, of the matter of fact is sufficient, and it is not necessary to charge minutely all the circumstances which may conduce to prove the general charge, for these circumstances are properly matters of evidence, which need not be charged in order to let them in as proofs. Story, Eq. Pl. § 28. Affirmed.

(115 N. C. 233)

STATE ex rel. KOONOH v. PELLETIER et al.

(Supreme Court of North Carolina. Nov. 29, 1894.)

DISCONTINUANCE OF ACTION — FAILURE TO SERVE DEFENDANT — LIMITATIONS.

1. In an action begun in March, 1888, against several defendants, where the summons was not served on one of them until March,

1892, and where plaintiff had failed to keep up a chain of alias and pluries summonses as to such defendant in the meantime, as to her such failure constituted a discontinuance of the action, although the referee before whom the trial was had gave her notice in May, 1889, to appear before him at the hearing.

2. Where the complaint alleged a breach of a certain bond, and defendant pleaded the statute of limitations, it was for plaintiff to show that the breach occurred within the statutory limit.

Appeal from superior court, Onslow county; Bryan, Judge.

Action by the state of North Carolina, on the relation of F. D. Koonce, against J. J. Pelletier, A. A. Pelletier, and others, on an administrator's bond. Judgment for defendant A. A. Pelletier, and plaintiff appeals. Affirmed.

J. B. Batchelor, for appellant. P. H. Pelletier, for appellee.

CLARK, J. The administrators filed their final account on the 23d of August, 1883. An action was begun on the 5th of March, 1888, against them and the sureties on their bond for the nonpayment of a judgment in favor of the plaintiff (relator), which had been obtained against their intestate. The summons was not served on the appellee, one of the sureties on the bond, nor was there a chain of alias and pluries summonses kept up against her. On the 11th of February, 1891, a summons was again issued against her, and a succession of summonses was kept up until she was served, on the 15th of March, 1892. The failure to keep up the chain of summonses was a discontinuance of the action as to her. *Etheridge v. Woodley*, 63 N. C. 11; *Penniman v. Daniel*, 91 N. C. 431. This is therefore a new action as to her, or, at most, a notice, under section 223 of the Code, which was begun on the 11th of February, 1891. In either case the statute ran till that date. *Ruffy v. Claywell*, 93 N. C. 306.

The complaint alleged a breach of the bond by a demand and refusal to pay the debt. The defendant pleads the three-years statute of limitation. Code, § 155, (6). Being pleaded, it was incumbent upon the plaintiff to show that the breach of the bond was within less than three years before the institution of this action against the appellee. *Hussey v. Kirkman*, 95 N. C. 63; *Moore v. Garner*, 101 N. C. 374, 7 S. E. 732; *Hobbs v. Barefoot*, 104 N. C. 224, 10 S. E. 170; *Nunnery v. Averitt*, 111 N. C. 395, 16 S. E. 683. This was not done, and the surety is protected by the lapse of three years after demand and refusal. *Norman v. Walker*, 101 N. C. 24, 7 S. E. 468; *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294; *Kennedy v. Cromwell*, 108 N. C. 1; 13 S. E. 135; *Brawley v. Brawley*, 109 N. C. 524, 14 S. E. 73. In the original action against the administrators, in which this defendant was not served with summons, the referee nevertheless had a notice served upon her on the 25th of May, 1889, to appear

at the hearing before him. She did not appear, and this notice to one not brought into court by legal process was of no effect. It is true the referee had power to make additional parties. Code, § 422; *Perkins v. Berry*, 103 N. C. 131, 9 S. E. 621. But this was not an amendment making an additional party. It did not purport to be such. It was simply a notice, served on one who had not been served with process, to appear before the referee, without any order to make her a party. But, had it been otherwise, the making her a party on the 25th of May, 1889, would not affect the principle above laid down. It does not appear that the breach of the bond was within three years prior to that date. Affirmed.

(115 N. C. 246)

#### HARPER v. EDWARDS et al.

(Supreme Court of North Carolina. Nov. 20, 1894.)

#### MORTGAGE—DESCRIPTION OF DEBT — LIMITATIONS — PAYMENTS.

1. Where a mortgage describes the debt secured merely by references to a note of even date, and payable on a certain day, though the amount of the note is not given, the description is sufficiently definite.

2. Payments by a purchaser from a mortgagor, made with the knowledge and consent of both mortgagor and mortgagee, are effective to prevent the running of the statute of limitations against the right to foreclose.

Appeal from superior court, Greene county; Boykin, Judge.

Action by Martha A. Harper against Theophilus Edwards and wife to foreclose a mortgage. Judgment for plaintiff, and defendants appeal. Affirmed.

Geo. M. Lindsay, for appellants. J. B. Batchelor, for appellee.

MACRAE, J. It was objected by the defendants that the mortgage was void for uncertainty in description of the debt intended to be secured thereby. The condition of the deed is: "Whereas, the parties of the first part have executed to the party of the second part a certain promissory note, bearing even date with these presents, to be due and payable the first of January, 1877, and for which this mortgage is made to secure: Now, therefore, if the said parties of the first part shall pay, or cause to be paid, said note and the interest thereon when it shall become due," etc. The point has never to our knowledge been passed upon in this court, and the authorities in other states are conflicting. The general rule as laid down in 1 Jones, Mortg. § 70, is universally recognized: "Literal exactness in describing the indebtedness is not required. It is sufficient if the description be correct so far as it goes, and full enough to direct attention to the sources of correct and full information in regard to it, and the language used is not liable to deceive or

mislead as to the nature or amount of it." It is upon the application of the last clause cited above that the diversity of decision has arisen. While a general description of the debt secured is conceded to be ordinarily sufficient, it has been sometimes held that the amount of an ascertained debt should be stated, and that the failure to state the amount of the note secured renders the mortgage invalid as against subsequent incumbrances; and this is what is contended for in the present case. The ground of the above construction is that the failure to insert the amount of the note in its description in the mortgage leaves the matter in such uncertainty that there are large possibilities of fraud by the substitution of fictitious debts. The cases in support of this view are collected in 1 Jones, *Mortg.* § 344; 15 Am. & Eng. Enc. Law, 755, note; and 1 *Ping. Mortg.* § 454. By reference to the two text-books just cited, it will be seen in the same sections that each of the authors comes to the conclusion upon all the authorities that the view above contended for is not sustained by the weight of authority, and that, under the general rule, "a reference in a mortgage to a note secured by it, without specifying its contents, is sufficient to put subsequent purchasers upon inquiry, and to charge them with notice." And the authorities for this conclusion are also cited in the works and at the pages above named. It is so often in business impracticable to state the exact amount to be secured, as upon open accounts for future advances, and in many other instances which might be mentioned, where the facility for fraudulent substitution would be equal to that afforded in this instance, that we cannot hesitate to adopt the general rule as stated, and hold that the description under the maxim, "Id certum est," etc., is sufficient to put subsequent purchasers on notice. It is well established in this state that registration of a mortgage on proper probate is notice to the world of the existence thereof, and of the nature and extent of the charge created by it. *James v. Gaither*, 93 N. C. 358.

While many exceptions were taken before the referee, and not before the court, the only other point argued before us was that of the statute of limitations, the contention of defendant being that payments by J. K. Harper, the purchaser of the land from the mortgagor, would not prevent the statute from running in favor of the defendant mortgagee and maker of the note; and for this proposition the case of *Le Duc v. Butler*, 112 N. C. 458, 17 S. E. 428, is relied upon, it being insisted that the maker of the note and mortgage and the purchaser of the land were not debtors in the same class, there not being a community of interest between them. There was a reference by consent in this action, and the referee finds that there was notice to all parties of the

conveyance of the mortgaged property to J. K. Harper, and the assumption by him of the payment of the balance due upon the mortgage debt; and this was assented to by defendants, "the plaintiff retaining said note and mortgage security." The action is brought to foreclose the mortgage, and subject the land described therein to the payment of the debt. We are of opinion that the principles laid down in *Le Duc v. Butler* have no application to this case; that here J. K. Harper, by consent of all parties, undertook, either as a coprincipal or as the agent of the mortgagor, to pay the debt; and that payments by him inured, at least as to the right to foreclose the mortgage, against the running of the statute. *Williams v. Kerr*, 113 N. C. 309, 18 S. E. 501. No error.

(42 S. C. 272)

ADLER et al. v. CLOUD et al.

(Supreme Court of South Carolina. Nov. 26, 1894.)

OBJECTIONS TO EVIDENCE—ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY—EVIDENCE OF PARTNERSHIP.

1. Where testimony consists of 15 pages of printed matter, an exception that it was error not to sustain the objections thereto is too general to be considered.

2. A mercantile business was carried on under the name of the "McD. Clothing Co." C., who furnished all the goods, purchasing them on his own credit, his name alone appearing as the owner in the billheads, etc., testified that he was the sole owner thereof, and was corroborated therein by McD., who merely managed the business. *Held*, that a finding that no partnership existed would not be disturbed.

3. The mere fact that a person, on the same day in which he has sold property in one state to two creditors in settlement of their claims, makes a general assignment in the state of his domicile, does not necessarily make the two transfers one, so as to render the assignment void as in fraud of creditors.

4. The failure to fix a time within which preferred creditors must accept the benefits of an assignment does not invalidate it.

5. The fact that an assignor does not, in the inventory, attach any value to certain property, does not invalidate the assignment where such property has no present market value.

6. The fact that an assignor includes in the inventory notes taken in payment for property, the sale of which was invalid as against creditors, instead of the property, does not invalidate the assignment where the property itself was enumerated in the assignment.

7. An assignment providing that the assignee shall convert the property into money, and pay the assignor the amount of his exemption in personal property in "money," is not invalid.

8. The fact that an assignor in his assignment attempts to give the assignee discretionary power in certain matters, the control of which is given by statute to the creditors, does not invalidate the assignment.

9. Creditors who have not accepted the benefits of an assignment cannot urge that the assignee has exceeded his authority.

Appeal from common pleas circuit court of Spartanburg county; J. J. Norton, Judge.

Action by Solomon Adler and others against J. S. Cloud and others. There was a judgment for defendants, and plaintiffs appeal. Affirmed.

Carlisle & Hydrick, for appellants. Duncan & Sanders, for respondent Nicholls. A. R. Moore, for respondent Cloud.

POPE, J. Joseph S. Cloud, a merchant, who had been in business for nearly a quarter of a century, and who had a large clothing store at Spartanburg, in this state, and who also had a large clothing store in the city of Charlotte, N. C., having allowed one Dixon to obtain judgment against him for less than \$100 (which judgment had been incorrectly reported in a newspaper to be some \$8,000), on the 9th day of November, 1891, had his creditors to come upon him with inquiries after his financial ability to meet his paper soon to mature, and probably some that had already matured, and had at least one proposition from some one of his creditors to advance him money to pay off pressing creditors, provided the debt he already owed such creditor, and such advance offered to be made, should be secured by a mortgage on his stock of goods. This last proposition he declined. It should have been stated that the commercial business in Spartanburg was conducted by him in person, under the name of J. S. Cloud's Store, while that in Charlotte, N. C., was conducted for him by one J. A. McDowell as the McDowell Clothing Company, and that the goods at both places were purchased by J. S. Cloud, and his own notes given therefor. He had been negotiating for a loan of \$12,000. Of course, the excitement as to his ability to pay would affect this effort at a loan. On the morning of the 9th of November, 1891, he went by rail to Charlotte, N. C., and sought the advice of learned counsel as to the legality of his securing to his wife, Mrs. J. S. Cloud, the sum of \$3,500, that he owed her for money borrowed of her in the management of his commercial ventures, and also of his securing to his manager clerk, J. A. McDowell, some \$1,000 that he owed him on his wages, by a mortgage on the property of the McDowell Clothing Company in Charlotte, N. C. This course was advised against, but it was finally suggested that this stock of goods might be sold by J. S. Cloud to his wife and J. A. McDowell, their debts credited on the purchase, and notes given him by Mrs. Cloud and J. A. McDowell for the balance. The following arrangement was made, J. S. Cloud acting for his wife (she was in Spartanburg at that time), and J. A. McDowell agreed to purchase the business, paying 50 cents on the dollar for the whole stock in trade, stock to be taken immediately, the debts of Mrs. Cloud and Mr. McDowell to be deducted from the amount of the stock at 50 per cent. thereof, and the notes of Mrs. Cloud and Mr. McDowell to be given Cloud

for the balance of the 50 per cent. It was agreed that the stock on hand should be estimated at \$13,000, and the arrangement carried out on that day on that basis, with an agreement between the parties that stock should be taken at once, and if, when taken, the same should amount to more than \$13,000, additional notes should be given, so that the notes should run for proportionate amounts, to be made at the end of each month thereafter succeeding. The stock being estimated that day at \$13,000, the 50 per cent. thereof was \$6,500, and deducting the debts of the two (Mrs. Cloud and J. A. McDowell), \$4,500, left \$2,000 as due by them. Accordingly six notes, each for \$333.33%, due one, two, three, four, five, and six months thereafter, respectively, and subsequently five other notes, aggregating \$1,700, were executed, as the stock when taken amounted to \$17,000. With these notes J. S. Cloud hurried on his return, on that day, to Spartanburg, at which place, when he reached it, he freely disclosed what he had done to his creditors. That night he was aroused at about midnight by one of his counsel, Andrew R. Moore, Esq., of the Spartanburg bar, and told that said counsel had learned that some of his creditors proposed to attach said notes, and thereby get an advantage over his other creditors, and such counsel advised him that the only way to prevent such result was to make an assignment of his whole estate for the benefit of his creditors. This he very reluctantly, and after much persuasion by his lawyer, consented to do. The assignment was made that night by deed to George W. Nicholls, Esq. Such assignee at once entered into the possession of the assignor's whole estate, and on the 10th November, 1891, issued a notice of his assignment, and called on the creditors to meet in the city of Spartanburg on the 17th November, 1891, as required by statute in such cases made and provided, to elect an agent, etc. On the 13th day of November, 1891, Ambach, Burgunder & Co., Wyler, Ackerland & Co., suing in their own behalf and in behalf of such other creditors of J. S. Cloud as might elect to come in as plaintiffs, brought their action in the courts of North Carolina against J. A. McDowell, J. S. Cloud, and his wife, M. F. Cloud, as defendants, to set aside the sale of the assets of the McDowell Clothing Company by J. S. Cloud to the said Mary F. Cloud and J. A. McDowell, on the ground that such sale was void, having been made to hinder, delay, and defraud the creditors of the said J. S. Cloud, and that a receiver be appointed. At the hearing of the rule issued on the 13th day of November, 1891, which was on the 23d November, 1891, the court appointed a receiver, and continued its preliminary injunction until the cause should be heard on its merits. Such receiver sold the goods at 44 cents of their cost, and now has in bank \$9,481.90 as such receiver. To the suit the

assignee, George W. Nicholls, on his own motion, has been made a party defendant, claiming the funds as such assignee. On the 17th November, 1891, one-third in the amount of the creditors of J. S. Cloud met with the assignee in Spartanburg, and did not elect an agent or agents, but authorized the assignee to issue a notice to creditors as the judgment of the creditors there assembled that a compromise at 50 per cent. of their debts should be made by the creditors with J. S. Cloud. On the 18th day of November George W. Nicholls, as assignee, notified the creditors that on the 18th day of December, 1891, he would proceed to pay the creditors who would accept and release by that time such assets as were in his hands. On the 1st December, 1891, the said George W. Nicholls, as assignee, sold the stock of goods of J. S. Cloud at Spartanburg to Vorhees, Miller & Co. at 53 cents on the dollar, in cash. On the 5th December the present action was commenced in the court of common pleas for Spartanburg county, in the state of South Carolina, by Adler Bros. & Co. and the Empire Novelty Company as plaintiffs against J. S. Cloud and George W. Nicholls, as assignee of J. S. Cloud, as defendants, setting out in details the facts hereinbefore recited, and praying for judgment against Cloud for their respective demands; that the alleged assignment be adjudged fraudulent and void, and set aside; that the defendant Nicholls, as assignee, be enjoined from paying out any of the funds in his hands as assignee; that a receiver be appointed to take charge of the estate of J. S. Cloud; and that Nicholls, as assignee, accounts to such receiver for all property that has come into his hands; and for such other relief as may be just. Judge Wallace, on the 17th December, 1891, granted an order restraining the assignee from paying out the funds in his hands until the further order of court. On the 28th March, 1892, Ambach, Burgunder & Co., Wyler, Ackerland & Co., Heavenrich, Trownstine & Co., E. D. Latta, calling himself the Charlotte Clothing Manufacturing Company, and Lowman's Sons & Co., all of whom were plaintiffs in the action in North Carolina, on petition, by an order of Judge Fraser, were made parties plaintiff in this action, and Judge Wallace's order was continued of force.

The answers of J. S. Cloud and George W. Nicholls, as assignee, controverted every fact in the complaint necessary to the plaintiffs obtaining the relief prayed for. The testimony, under an order therefor, was taken before H. B. Carlisle, Esq., as master. The cause came on to be heard before his honor, Judge Norton, at the Spring term, 1893, of the court for Spartanburg, and on the 14th August, 1893, he filed the following decree: "This is a creditors' action to declare a sale made by J. S. Cloud in Charlotte, N. C., of his stock of goods there to his wife and clerk as part of an assignment for the benefit of his

creditors made by him afterwards on the same day in Spartanburg, S. C., and to declare the whole void; and, if they be not one assignment, that each be declared fraudulent and void. I am convinced that J. S. Cloud is honest, according to his conception of the term, and therefore I rely upon his direct statements of matters of fact, and the same may be said of all the witnesses, and any contradictions in testimony may be attributed to misapprehension at the time, or forgetfulness of the precise occurrences or language used, as the case may be. It seems to me, however, that J. S. Cloud conceived that he might honestly provide for his wife and children at the expense of creditors, or prefer creditors who had, or were likely to favor him, at the expense of other just creditors whenever he could do so and keep within the law. I conclude, also that J. S. Cloud had been for years struggling in his business, hampered by a load of debt, and that by his various expedients he had always been able to tide over the crisis until he thought he could do so indefinitely. With this thought uppermost in his mind, he went to Charlotte and consummated the sale of the stock of goods there to his wife and J. A. McDowell. Knowing himself to be insolvent, he incidentally thought proper to secure the debts due to the respective purchasers, lest this expedient might fail to tide him over. J. A. McDowell and Mary F. Cloud, his wife, had reasonable grounds to believe that J. S. Cloud was insolvent. At the time of making such sale J. S. Cloud thought he could, and intended to, continue business, and was not contemplating the making of an assignment for the benefit of his creditors. On his return to Spartanburg, on the advice of his attorney, he changed his mind, and made the assignment. The two transactions are therefore separate and distinct, not connected at all in J. S. Cloud's mind nor in fact, and cannot, therefore, together constitute an assignment under one statute; but the facts stated do render the sale obnoxious to section 2015 of our General Statutes. This view of the case leaves the validity of the assignment to be considered as a separate instrument. Every conveyance of property or agreement is made subject to law, and is to be read as if every provision of the law were incorporated in the conveyance itself. And it seems to me that our assignment act of 1828 was made to aid the creditors in promptly securing their own under an assignment without appealing to the court of equity. For instance, by providing that they [the creditors] may order a distribution of the funds. In the cases of *Tennant v. Stoney*, 1 Rich. Eq. 233; *Beall v. Lowndes*, 4 S. C. 258,—it is said that when no time is fixed for creditors to accept when in condition to be preferred, they may accept at any time before the distribution of the fund. I do not think the failure to fix a time for preferred creditors to accept vitiates the assignment. Again, I do not think the de-

scription of the property assigned is so vague, indefinite, and inaccurate that the creditors could not intelligently make their election whether to accept or reject the terms offered them. On the contrary, I think the description as full as it ought to be in an instrument of this character. It describes the property so that it may be treated and identified, and inquiry would have given all the information necessary to enable the creditors to form their judgment of its value. One of the chief complaints under this head relates to the assignment of the Charlotte store or its proceeds, but this seems to me full and explicit. J. S. Cloud, having counsel, must have known that the sale was voidable at the option of creditors, but not at his, so he provided that the assignee should have all he could convey. Plaintiffs also contend that the provision in regard to J. S. Cloud's homestead renders the assignment obnoxious to section 2014, Gen. St., because it directs the conversion of the estate into money, and its distribution when so converted [after setting apart whatever the assignor is entitled to under the homestead act], arguing that it requires the setting apart of money instead of property, to the detriment of creditors at least to the extent of the commissions, and the risk of depreciation in the value of property between the time the homestead would be set off in kind and the time required to effect its conversion into money. I do not think this the proper construction, but rather that the assignor, by the clause within the brackets, contemplated the setting apart of his homestead in kind. If he did not, but meant to have his homestead in kind sold, that would necessarily be at his own expense. I do not regard the risk of fluctuation in this small amount of property in the short time required for its conversion of sufficient consequence to avoid the assignment, but it is covered by the rule 'de minimis non curat lex.' I think the discretion of the assignor is not inconsistent with the provisions of the statute wherein it regulates his conduct, and that the statute is to be read as a part of the assignment, and makes a valid paper in this particular. Common sense, common law, and the statute require the assignee to take charge of and to exercise his business judgment in the conversion of it into money, and none of them restrict him to any particular time or mode of sale of tangible property, a collection of choses, but recognizing and controlling his discretion by the supervision of the creditors through their agent and committee, and in a certain contingency the judge, differing from the Arkansas statute, which required the performance of certain duties within a prescribed time. The objection that the deed does not convey all the property of the debtor is not a valid one, so far as I can see. It is adjudged that the complaint be dismissed."

The plaintiffs appeal from this decree upon

various grounds, and although we do not reproduce them just now, we propose to consider and pass upon each one before we close. The defendants give notice, under the practice recognized by this court, of additional grounds upon which the decree of the circuit judge may be bottomed, other than those submitted in the decree itself. If, after thorough consideration of the grounds of appeal, we should affirm the decree, it will not be necessary to consider these suggestions of the defendants (respondents); otherwise we must consider them. We have concluded to consider the grounds of appeal in this form: First, those that allege error in the admission of certain testimony at the trial; second, such as allege error in the findings of fact by the circuit judge; third, such as allege error in conclusions of law by the circuit judge.

1. When J. S. Cloud was examined as a witness, in his cross-examination by the appellants, he was asked if he had not made certain statements in his affidavit marked, which was first exhibited to him for his admission as to his signature thereto. He replied that he had. On his examination, in reply his counsel offered the affidavit itself. This was done not to make the statement in the affidavit testimony in the case, but to show what he had said in the matters which appellants had inquired of him. Restricted to this case, we do not see that it was inadmissible. This exception (being part of 2) is overruled.

J. S. Cloud was allowed to testify that at the date of his assignment he owned no real estate. When it is remembered that the appellants were assailing the assignment because it did not contain all of the assignor's estate, it will be perceived that this testimony was pertinent to that inquiry. There was no testimony to the contrary. No injury has come to appellants by its introduction. This exception (tenth exception) is overruled.

The other part of the eleventh exception, relating to the admission of Andrew E. Moore's testimony, is in these words: "In not sustaining the objections of the plaintiffs to the testimony of A. E. Moore, when it appears from the report of the testimony that objection was made thereto." The case shows that the examination of this witness covered about 15 pages of printed testimony. Thus the court is asked to sift all this testimony to see when plaintiffs objected, and to surmise the grounds upon which such objections were based. It was the design of the rules of this court on this subject to prevent such a result. The appellants are not entitled to be heard in this form. Such exception is overruled.

2. In the fourteenth exception appellants contend that the circuit judge should have found as a fact that J. A. McDowell and J. S. Cloud were partners in the clothing store, in Charlotte, N. C., known as the McDowell Clothing Company. An examination of the testimony shows that Cloud furnished all the



goods in that concern; that he alone contracted with the creditors for such goods so furnished; that his name alone appeared as the owner in billheads and letterheads used in connection therewith. Then the positive oath of J. S. Cloud that he alone was the owner. This is substantiated by J. A. McDowell. And the only testimony offered in contradiction is some loose expressions of Cloud and McDowell, but both either deny or explain such expressions. The circuit judge found that no such partnership existed. The finding of fact is not without testimony to support it, nor is it opposed by the overwhelming weight of the testimony. This exception is overruled.

In the first subdivision under the second ground of appeal it is suggested that the circuit judge erred when he held that the sale made by J. S. Cloud to J. A. McDowell and his wife, Mary F. Cloud, of his stock in trade in the McDowell Clothing Company, and the general assignment of his property to George W. Nicholls on the same day, were not in fact parts of one transaction. We have examined the testimony carefully relating to this branch of the cause. Ordinarily, no doubt, consecutive steps relating to the same subject-matter, occurring on the same day, in the conduct of the individual, may be said to belong to one and the same transaction as the component parts thereof, but the result is not necessarily true. Reflection will convince any one that no human creature is sufficiently master of himself or of events to lay out a plan sufficiently comprehensive as to cover all the occurrences of a day. This must be true when the conduct of others frequently enters in to alter or modify plans already made, or to suggest plans altogether new. It is perfectly consistent with truth to say that when J. S. Cloud went to Charlotte early on the morning of the 9th November, 1891, and consulted counsel there, he had in his mind the securing of the debts of his wife and confidential manager by a mortgage on his property, with no thought of afterwards making an assignment. Such a step is consistent with the purpose on his part, which is in proof here, and uncontradicted, that he had arranged to borrow \$12,000 in cash to carry on his business, for it had been the habit of Mrs. Cloud, his wife, to lend her credit and substance to him in his business; and no doubt, and it is reasonable to suppose that, he intended to obtain from her the use of this mortgage for \$3,500 on such stock in trade in Charlotte as the basis for the loan of money. The bank in Spartanburg was accustomed to take Mrs. Cloud's paper. She had property of her own. This debt of \$3,500 was actually due her by J. S. Cloud. When the counsel in Charlotte, by their knowledge of the laws of that state, showed Mr. Cloud that his mortgage could not be given to his wife and McDowell, it was suggested by them that a sale of the property would be valid. This was made, and the

debts of Mrs. Cloud and McDowell paid by this sale, and their notes for \$2,000 then made, and \$1,700 afterwards were made and placed in his hands. How unnatural it would have been for J. S. Cloud to have made this sale in Charlotte, and afterwards the assignment in Spartanburg, on the same day, as parts of one transaction, when, under the laws of this state concerning assignments, this sale, made to protect the debts of his wife and McDowell, would have been declared void. Under the testimony, the circuit judge found that the two acts were distinct one from the other. We are not disposed to differ as to this finding of fact, and the exception is accordingly overruled.

The third ground of appeal is that the circuit judge erred in finding that "J. S. Cloud is honest, according to his conception of the term, and therefore I rely upon his direct statements of matters of fact; and the same may be said of all the witnesses, and any contradiction in testimony may be attributed to misapprehension at the time, or forgetfulness of the precise occurrences or language used, as the case may be." A truthful man may commit offenses against the law either on its civil or its criminal side. This is about what the circuit judge meant to say. He had scanned the testimony of Cloud closely; he had made a comparison between his statements as to acknowledged facts with those of other witnesses as to the same facts; he had compared his verbal statements with his written statements relating to the same matters; he had noticed his entire candor in the disputed matters here involved; and all these matters convinced him that Cloud was telling the truth. Yet, while he was truthful, he did disregard what the law says a man must do in his business dealings with others. Therefore the circuit judge uses the moderated expression, "honest according to his conception of the term," intending thereby to affirm his truthfulness without committing himself to uphold his conduct towards others in business. And so far as this exception criticises the language of the circuit judge in his reference to the credit he attached to the other witnesses, explaining that the seeming contradiction, at a few points in their testimony, arose from a misconception at the time, or a failure afterwards to recall exactly what was said, we fail to agree with the appellants, for we think the testimony abundantly sustained the circuit judge in all these findings. This exception is overruled.

Appellants' fifth exception controverts the finding of the circuit judge that J. S. Cloud made the sale in Charlotte to his wife thinking that he could tide over the financial crisis then upon him, and that he incidentally thought proper to secure the debts due the purchasers (his wife and McDowell), lest his expedient might fail him. Now, so far as the finding of fact that Cloud made the sale to his wife of his Charlotte business think-

ing that he could tide over the financial crisis then upon him, we think the circuit judge was sustained by the testimony. The latter part of the proposition is not free from doubt. It looks to us that Cloud's purpose at first was to secure his wife's debt as well as that of McDowell, and therefore we are not prepared to go so far as to say that he incidentally thought proper to secure the debts due such purchasers. If this was his prime object, it cannot be said to rise incidentally. This last part of the finding is immaterial in this case, as will hereafter appear, and therefore we content ourselves with this qualified assent to the entire proposition of the circuit judge here complained of.

The sixth exception of appellants, so far as it relates to a finding of fact by the circuit judge, may be thus stated. Appellant alleges that it was an erroneous finding of fact by the judge when he held that at the time of making said sale (that at Charlotte) J. S. Cloud thought he could, and intended to, continue business, and was not contemplating the making of an assignment for the benefit of his creditors, and the transactions are separate and distinct. This finding of the circuit judge has plenty of testimony to support it, nor is it opposed by the manifest weight of the testimony. The finding is correct, or otherwise there has been willful and corrupt perjury by two witnesses in this cause, namely, J. S. Cloud and Andrew E. Moore. Both swear that Moore waked him up at the hour of midnight on the 9th November, 1891, when Moore for the first time told Cloud that he must make an assignment, the deed for which he (Moore) of his own accord had prepared and brought with him; that the motive to this haste was the anticipated attachment by some of Cloud's creditors of these notes that day given him by McDowell or his (Cloud's) wife, thereby giving such attaching creditors an advantage; that Cloud with great reluctance got out of his bed, and executed this deed of assignment. Where is there anything unnatural in this conduct of either party? They both swear that it occurred as detailed by them. As before stated, it is the truth, or it is false swearing. What is there in the cause to make the circuit judge hesitate to believe Cloud or Moore? Nothing. There is no profit to flow to either therefrom. The character of neither is impeached. They are both men of more than ordinary intelligence.

3. It is a fundamental principle in law that where one person receives the money, goods, or other property of another person by purchase on a credit, he thereby incurs an obligation to the former owner of such money, goods, or other property, which is not discharged until such obligation is fully paid. This is a relation of a debtor to a creditor. Hence it is that all the property owned by the debtor, or in which he has any interest, is made responsible for the payment of such obligation of indebtedness.

The tenderness of the law exonerates a certain part of a debtor's estate, real and personal, from liability under legal process, from liability to pay debts, provided such exemption is in existence at the time the debt is created. As long ago as 1828, in this state, when a debtor owed more than he could pay, he was allowed to assign his property for the payment of his debts. Instead of provoking opposition from his creditors by pursuing this course, a debtor, under such circumstances, is to be commended, for he thereby voluntarily does what the law would do for him. Under this old law and the amendments to it, it is required that a debtor shall in good faith surrender his whole estate. He is not allowed to reserve any benefit, secret or otherwise, to himself under his deed of assignment, except that he is allowed to stipulate that to creditors who shall accept under such assignment and execute a release of their respective demands a preference shall be given. The plan, under these laws, is that the whole estate of the assignor shall vest in the assignee freed from any interference or control of the assignor; that the assignee shall call on the creditors by his notice therefor within 10 days after the assignment, to meet and select an agent or agents to act in conjunction with the assignee or assignees; and in case the creditors refuse or neglect to appoint an agent or agents in 10 days after they have been called together, there the assignee or assignees may proceed to sell or otherwise dispose of the assigned effects without the concurrence of the creditors. By the provision of this law the creditors have it in their power to require, from time to time, full and exact reports from the assignee and agent "to direct and prescribe the time and mode of selling and the terms of sale, order a distribution of the assets on hand, and a final close of the concern." Then, too, in case the assignee shall dispose of any property belonging to the assigned estate before the creditors meet to appoint an agent, such sale is void. Thus it will be seen how careful the law has been made to protect every interest of the creditor by giving him full control of the management of the agencies employed under the law to carry out the assignment. In 1882 it was provided that if any person, being insolvent, within 90 days before making any assignment shall, with a view to give a preference to any creditor, procure or suffer any part of his property to be attached, sequestered, or seized on execution, or make any payment, pledge, assignment, transfer, or conveyance of his property, directly or indirectly, absolutely or conditionally, the person receiving such payment, etc., of his property, and having reasonable cause to believe such person to be insolvent, and that such attachment, sequestration, seizure, payment, pledge, assignment, or conveyance is made in fraud of this chapter (80, Gen. St.), the same shall be void, and the assignee

may recover the property, or the value of it. So much for a reference to the general provisions of our laws regulating assignments which may be found in sections 2137 to 2148, inclusive, of our General Statutes.

We will now undertake to examine the propositions involved in the grounds of appeal here wherein the conclusions of law of the circuit judge are impugned. In the first ground of appeal appellants allege several reasons why the assignment should have been held fraudulent and void by the circuit judge:

(a) Because no time was fixed therein within which these creditors who come in and accept the benefits thereof and release the debtor must do so, notwithstanding those who do so are given an advantage. It would be enough to say that the provisions of our laws regulating assignments do not require such time to be fixed in the deed of assignment. No doubt a reasonable time might have been fixed for this purpose by the assignor in the deed. The terms of the law of assignments put it in the power of the accepting creditors to "order a distribution of the assets on hand." The assigned property belongs to the accepting creditors to the extent of their debts, and the assignor should certainly not be held to have committed a fraud against the act because he trusted to that common-sense proposition that commercial creditors, with their money in the hands of another person as their agent, bearing no interest, and with the law giving them the power to order it paid to them, would attend to their own business. This exception is overruled.

(b) Because the description of the property assigned is so vague, indefinite, and inaccurate that the creditors cannot intelligently make their election whether they will accept or reject the terms of the assignment. We are not able to see any force in this proposition when applied to the facts of this case. No doubt appellants base this suggestion upon the fact that the assignor, Cloud, in his inventory of assets, attached to the deed referred to his interest in two patents, the Christopher grading machine and the fire-place heater, and also \$250 Converse College stock, and any interest in the Spartanburg Herald Company; and they complain that assignor did not attach a value to such of these. It was in proof that the Converse College stock was all that had any market rating. How Cloud could attach a value to things that had no value, if he acted honestly, we cannot see. He did all he was required to do when he surrendered them to his creditors, and named them specifically in his schedules. It sometimes happens that patents without present value, etc., afterwards acquire a value. If such should be so, Cloud put it in the power of his creditors to enjoy the fruits of such ventures. This exception is overruled.

(c) Because it provides that the assignee

must convert the assigned estate into money, and pay the assignor a sum equal to his exemption in personal property in money out of the proceeds. The language of the deed, in conveying to the assignee, reserves the conveyance property exempted from execution, "and requires the assignee to set apart whatever the party of the first part is entitled to under the exemption or homestead act"; and in construing this language the circuit judge held that the assignor contemplated that the exemption of \$500 to Cloud by the assignee should be in the property in kind, but that, even if the view of the appellants was correct, the matter of assignee's commissions alone would come out of the assigned estate, and that the maxim of the law, "*De minimis non curat lex*," would intervene. He also held, in this connection, that the matter of assignee's commissions was properly a charge upon such exemption itself. We see no error here.

(d) Because the unlimited power and discretion vested in the assignee by the terms of the deed as to the time, manner, and terms of the disposition of the assigned estate and the distribution of the proceeds thereof contravenes the policy of the law, as well as the positive provision of chapter 72 (now 80) of the General Statutes of this state. We have herein heretofore shown that under the assignment laws of this state creditors have a control over assignees in the management of their trust, especially on the very points referred to in this exception. We cannot see, therefore, that the exercise of a discretion by the assignor in his deed of assignment by prescribing terms for the government of his assignee necessarily interferes with the power conferred by law upon accepting creditors. It will be remembered that it was previously stated that if such creditors failed to elect an agent or agents, then the assignee could go forward and sell. Why may this exercise of power by the assignor be referred to this condition of things? Be this as it may, when the law gives creditors power to control in all the matters here complained of, it makes no difference if the assignee did speak in his deed otherwise. The law is supreme. Such an attempted exercise of power by an assignor would not vitiate his deed. This exception is overruled.

(e) Because it appears upon the face of the deed that all the property of the debtor is not thereby conveyed to the assignee. Appellants contend that real estate, and an interest in the Charlotte stock of goods, are mentioned in the body of the deed, but neither are mentioned in the schedule thereto attached. If the assignor had no real estate, how could he name it in the schedule? It is true, it may be said, why refer to it, then, in the body of the deed? An honest man wishes to convey his whole estate. To do this he frequently, in abundant caution, enumerates real as well as personal estate, when he only owns personal property. As to interest in the

Charlotte stock of goods, so far as Cloud was concerned, when he made a deed of sale of it to his wife and McDowell, it was no longer his; he had sold it for their 11 notes aggregating \$3,700. But no doubt his counsel told him that his creditors could elect to prevent this sale, and he therefore included it in his deed, but only set out the notes of McDowell and Mrs. Cloud in his schedule. If Cloud had included this solely, it would have been a fraud. Having revealed it, and, as far as he could, put it in the power of his creditors under his deed of assignment, it was not a fraud against the act. Let this exception be overruled.

Appellants next contend that the assignment is fraudulent and void for the following reasons de hors the deed:

(a) Because the sale of the stock of goods in Charlotte, N. C., to two creditors, and the assignment on the same day, are in law but parts of one transaction, and together tantamount to a general assignment with preferences. We were well aware of the importance attaching to the finding of fact touching the identity of this sale of goods and the assignment on the same day, and hence we bestowed unusual care in its consideration. We found as a fact that the two events were distinct from each other, and not parts of one whole. We know of no principle of law that makes these two distinct transactions one and the same. Nor do we see that (b) under this head: "Because the sale of the Charlotte stock was made to McDowell and Mrs. Cloud with intent to hinder, delay, and defraud other creditors, and with an intent to give them an unlawful preference over other creditors, and with intent to evade the laws of this state prohibiting preferences so made amongst his creditors by an insolvent debtor, and therefore the assignment made afterwards on the same day, whether made on account of or by reason of the previous transaction or in furtherance of the design thereof, is fraudulent or void,"—that it can be made to vitiate the assignment. By our concurrence with the circuit judge in the finding as a fact that the two transactions were separate and distinct, it becomes immaterial whether 89 days or 60 days or 30 days or 24 hours or 12 hours intervened. They are separate and distinct, the one from the other. The amendment to the law made in 1882, to which we have already referred, and to which reference is made by the circuit judge as section 2015 (now 2147) of the General Statutes, was designed to prevent preferences therein enumerated. Not that the debtor himself could set them aside, but through the intervention of creditors it could be done. It is true that where and when it is established that the two apparently distinct transactions in time to the extent of 90 days are yet in fact parts of one whole, the law declares the assignment void because fraudulent. It is perfectly consistent for an assignment to be declared valid, and the attempt at a prefer-

ence within the 90 days fraudulent, because contradictively fraudulent. In such a case the two transactions in fact must be distinct, separate. These exceptions are overruled.

The fourth ground of appeal is disposed of by the reasoning and conclusions on the foregoing ground of appeal. It is therefore overruled. The language of this exception is: "In not holding the assignment fraudulent and void after holding that J. S. Cloud conceived that he might honestly provide for his wife and children through the expense of his creditors, or prefer creditors who had or were likely to favor him at the expense of other just creditors, whenever he could do so, and keep within the law." It is evident that the appellants here seek to make the assignment and the sale of goods at Charlotte to his wife and McDowell one and the same transaction. The language here quoted from the circuit judge's decree had exclusive reference to the sale of the goods at Charlotte. We have held the transactions separate and distinct.

Again, in their seventh exception, appellants allege error in the circuit judge "in holding that every conveyance of property or agreement is to be read as if every provision of the law were incorporated in the law itself." By reference to the decree it will be seen that the circuit judge used the language quoted in this exception when he was discussing the terms of the deed of assignment to show that such terms, then used, did not invalidate that instrument. It is true, such language quoted, when separated from the context, and possibly even then, is a very broad statement of a proper legal conclusion. It has been repeatedly held by this court and the United States supreme court that every contract made embodies the law governing such contracts as much as if so stipulated in the contract in express terms. This is what the judge meant to say. Restricted to the context, when used, such language was not erroneous. The exception is overruled.

In their eighth exception appellants contend that the judge erred in holding that: "In the cases of *Tennant v. Stoney*, 1 Rich. Eq. 233; *Beall v. Lowndes*, 4 S. C. 258,—it is said when no time is fixed for creditors to accept, who are, on that condition, to be preferred, they may accept at any time before the distribution of the fund, I do not think the failure to fix a time for preferred creditors to accept vitiates an assignment." Now, it is evident that the conclusion of his honor is announced in the last sentence quoted. And with that conclusion we are not disposed to interfere. He merely intended the two cases quoted as authority for his position or conclusion. An examination of these cases will sustain the circuit judge in regarding them as authority for his conclusion of law. It is with this conclusion of law we are concerned. Let the exception be overruled.

The next alleged error is thus stated by appellants in their ninth exception: "In holding that the description of the property in the assignment was as full as it ought to be in such an instrument, and that it describes the property so that it may be located and identified, and inquiry would have given all the information necessary to enable the creditors to form their judgment of its value." In the light of the testimony here, when applied to the instrument (deed of assignment) itself, we think the circuit judge was fully justified in holding as he did. Let the exception be overruled.

The thirteenth exception complains that the assignee exceeded his authority in issuing notice that he would pay out the funds in his hands to creditors on and after 18th December, 1891. We do not conceive that these plaintiffs have the right to urge this objection now. They have not accepted the assignment. Until they do so they have no cause of complaint, because the other creditors, or many of them, have accepted the assignment, and thereby are entitled to be paid their money by the assignee. Assigned estates should be settled as promptly as prudence will allow. People who can act and will not act, thereby entailing loss or delay upon others equally meritorious with themselves, should be made to act. We know no better mode than notice that after a certain day funds will be distributed in which they will be interested. The pocket nerve is very sensitive with most people. This exception is overruled.

The last exception remaining is the twelfth, and is in these words: "In not giving the several plaintiffs judgments against the defendant Cloud for the several amounts admitted to be due and owing to them respectively by the said defendant." The circuit judge did not directly name this matter in his decree. It must be answered that where he ordered the action dismissed he included in such order or judgment a denial of judgments to these plaintiffs respectively. Ordinarily, in these actions, judgment, when prayed for, as in this instance, against the debtor, would be rendered. There was proof here by some of plaintiffs' own testimony that a suit was pending in North Carolina in these same demands between the same parties, and also some testimony that the plaintiffs Adler & Co. and the Empire Novelty Company had assigned their claims, and their assignees had accepted under this assignment. Under such circumstances we can very well understand why the circuit judge declined to give judgment here. However, in the abundance of caution, in affirming the judgment of the circuit court, we will do so, except as to the right of the plaintiffs to obtain herein, if they can show themselves entitled thereto, judgments against the defendant J. S. Cloud on their respective demands. We could well wish that all parties would accept the assignment.

and share in its benefits; but that is not our business. It is only the expression of a hope. It is the judgment of this court that the judgment of the circuit court be affirmed, but without prejudice to the rights of plaintiffs to apply for judgments in this action against J. S. Cloud on their respective demands.

McIVER, C. J., concurs.

(42 S. C. 511)

CLEMSON AGRICULTURAL COLLEGE  
OF SOUTH CAROLINA v.  
PICKENS et al.

(Supreme Court of South Carolina. Nov. 26, 1894.)

FORECLOSURE OF MORTGAGE—SERVICE BY PUBLICATION—SUFFICIENCY—MOTION TO SET ASIDE SALE—RECITALS IN DECREE—CONCLUSIVENESS.

1. On foreclosure of realty, where defendant, a nonresident, is served by publication, it is unnecessary to comply with the requirement of Code, § 156, that the summons, as published, shall state the time and place of filing the complaint, if the defendant is furnished with a copy of the complaint, as well as the summons.

2. The affidavit on which the order of publication is based is not insufficient for want of venue, or for failing to state facts showing the court's jurisdiction of the subject-matter, where reference is made therein to the complaint, which shows such jurisdiction.

3. The order of publication of the clerk is valid, though bearing neither date nor seal.

4. The examination on oath of the plaintiff in such proceedings, respecting the amount due him on his demand, required by Code, par. 267, before the rendition of judgment therefor, will be presumed to have been made, in the absence of evidence to the contrary, on motion to set aside the judgment.

5. Nor is the omission to sign the complaint or file a notice of lis pendens ground for granting such a motion.

6. Recitals in a decree in a foreclosure proceeding referring the case to a master to compute interest, that "on hearing the pleadings in this case, and the proof of service of defendant by publication of the summons and affidavit, and mailing a copy of the summons and complaint to the defendant, it is ordered," etc., are sufficient, on a motion to set aside the judgment and sale, to show that there was satisfactory evidence before the judge of the publication of the summons according to law, and of the mailing of copies of the summons and complaint to defendant.

Appeal from common pleas circuit court of Anderson county; I. D. Witherspoon, Judge.

Action by Clemson Agricultural College of South Carolina against Samuel M. Pickens and Samuel McCrary to foreclose a mortgage. A judgment of sale was rendered in favor of plaintiff. Defendant Samuel M. Pickens moved to set aside the service of the summons, order of reference, master's report, and judgment of foreclosure and sale of the property. From an order overruling the motion, defendant Pickens appeals. Affirmed.

Tribble & Prince, for appellant. O. W. Buchanan, Atty. Gen., and J. E. Breazeale,

for respondent Clemson Agricultural College of South Carolina. Murray & Watkins, for respondent S. McCrary.

McIVER, C. J. On the 9th of February, 1894, the appellant, Pickens, served upon the attorneys for the plaintiff, and Samuel McCrary, who had become the purchaser at the sale hereinafter mentioned, a notice of a motion, together with the affidavits of said Pickens and R. W. Simpson, president of the board of trustees of the Clemson Agricultural College of South Carolina, and a certificate of the master for Anderson county, copies of which are set out in the case, "to set aside the supposed service of the summons, order of reference, master's report, judgment of foreclosure, and sale of property thereunder," in the case of Clemson Agricultural College of South Carolina v. Samuel M. Pickens. This motion was heard by his honor, Judge Witherspoon, upon the papers thus served, together with the affidavits of H. H. Blease and G. P. Browne, copies of which are likewise set out in the case, on the 17th of February, 1894, who rendered his decree, in which he says: "While there are many irregularities patent upon the face of the proceedings, I think there is enough to show substantial compliance with the statute as to the service of nonresidents, and with the order of Judge Wallace reciting the facts necessary to give jurisdiction. I must hold that the court had jurisdiction of the person of defendant, and of the subject-matter of the action." He therefore rendered judgment refusing the motion, and from such judgment the defendant Pickens appeals, upon the grounds set out in the record, which need not be set out here, as the only question in the case is whether the record in the case of Clemson Agricultural College of South Carolina v. Samuel M. Pickens shows on its face that the court never acquired jurisdiction of the person of the defendant in that case, in which the judgment, as well as the proceedings thereunder, is impeached; for while there are many other irregularities disclosed by that record, they cannot affect the question which we are called upon to determine, except in so far as they show that the defendant would have had a good and valid defense if he had been allowed the opportunity to present the same, by being properly made a party to that action.

From that record, as set out in the case, it appears that, in a case entitled Clemson Agricultural College of South Carolina v. Samuel M. Pickens, a summons was filed in the clerk's office in Anderson county on the 9th of February, 1893, and lodged on the same day with the sheriff of that county, addressed to Samuel M. Pickens, calling upon him "to answer this complaint in this action, of which a copy is herewith served upon you." Upon this summons the sheriff endorsed the following return, dated 18th

April, 1893: "The defendant is non est inventus in my county, but, am informed, resides now in Elberton, Georgia."

Next, we find a paper purporting to be a complaint in said action, but not signed by either plaintiff or its attorney, filed in the office of said clerk on the 9th of February, 1893, for the foreclosure of a mortgage of certain real estate in Anderson county, executed by defendant to one Thomas G. Clemson on the 20th of December, 1887, and given to secure the payment of a note made to said Clemson by the defendant on the 20th September, 1887, and payable on the 1st December, 1888, for the sum of \$1,000. This so-called complaint alleges that said Clemson, by his last will and testament, duly admitted to probate, devised and bequeathed all his real and personal estate, including said note and mortgage, to the state of South Carolina, for the purpose of establishing an agricultural college; that the state duly accepted said devise and bequest, and duly complied with the conditions thereof, by the act of 27th December, 1889, "whereby said state became the owner of the within-named note and mortgage, which by said act was vested in the plaintiffs as herein mentioned"; that by said act the trustees of said college were incorporated as a body politic and corporate under the name and style of the Clemson Agricultural College of South Carolina, with power to sue and be sued; and the prayer was for a sale of the mortgaged premises, application of proceeds to the payment of said debt, and that execution be awarded against defendant for any deficiency. This complaint purports to be verified by the affidavit of W. T. C. Bates, described as "plaintiff in this action." We also find the following indorsement on the summons above mentioned: "Sheriff's Certificate of Service. Clemson Agricultural College of South Carolina, Plaintiff, vs. Saml. M. Pickens, Defendant. State of South Carolina, County of Anderson. I hereby certify that on the 20th day of April, A. D. 1893, at Anderson C.H., S. C., I deposited in the post-office, directed to Samuel M. Pickens, defendant above named, at Elberton, Ga., a copy of the summons and complaint in this action, and prepaid the postage thereon in full. Sworn to before me this 20th of April, 1893. Jno. C. Watkins, C. C. P. & G. S. [Signed] M. B. Gaines, Sheriff of Anderson County."

We next find the following statement made in the case: "In the clerk's office, among the papers, is a paper, not attached to any other paper, of which the following is a copy: 'South Carolina, Richland. Personally appeared W. T. C. Bates, who, being duly sworn, deposes and says that he is the state treasurer of the state of South Carolina, and that, as such treasurer, he is in charge of the evidence of indebtedness now claimed by the Clemson Agricultural College of South Carolina from Samuel M. Pick-

ena, which said evidence of indebtedness came through a bequest of the late Thomas G. Clemson, deceased, to the state of South Carolina, for certain purposes, in said will of Thomas G. Clemson more particularly mentioned; that a cause of action exists against the said Samuel M. Pickens, in favor of said Clemson Agricultural College of South Carolina, and that the same is now due, as upon a reading of the complaint in the action will more fully appear; that the action is brought for a foreclosure of a mortgage, and for judgment for the amount due and costs, the barring of the equity of redemption, and the sale of the premises; that he is informed and verily believes the said Samuel M. Pickens has left the said state, and his residence cannot, with due diligence, be found by your deponent, nor ascertained by him, and is not known by him, but is informed that he is in Elberton, Georgia. Wherefore, deponent prays that an order may be made, directing the service of the summons by the publication in a newspaper, as, in the opinion of the clerk, would be most likely to give him notice, once a week for six weeks." This affidavit was sworn to in the usual form on the 17th of April, 1893.

It is further stated in the case that "on the same sheet of paper, but without any statement of a case pending in any court, appears the following: 'South Carolina, Anderson County. It appearing to me that a cause of action exists against the defendant Samuel M. Pickens, in favor of the Clemson Agricultural College of South Carolina, and that his residence, with reasonable diligence, cannot be found, and is unknown, but believed to be in Elberton, Georgia, and the proper showing having been made, and being satisfied by the allegations of the fact, I do, on motion of D. H. Townsend, attorney general, for the plaintiff in said cause, order that the service of the summons be made upon the said Samuel M. Pickens by due advertisement and publication of the summons in the People's Advocate, a weekly newspaper published in the town of Anderson, for the term of six weeks, being inserted once a week for the time mentioned, and a copy of the summons and complaint be mailed to his address, at Elberton, Georgia. [Signed] Jno. C. Watkins, Clerk of Court, Anderson Co.,—without a seal or a date, but on the back thereof the following indorsement appears: 'Recorded in the Minute Book, No. 8, page 139, this, the 21st day of June, 1893, and certified to. [Signed] Jno. C. Watkins, C. C. C. P.'"

There also appears among the papers another summons, entitled as follows: "State of South Carolina, County of Anderson, Court of Common Pleas. The Clemson Agricultural College of South Carolina, Plaintiff, vs. Samuel M. Pickens, Defendant. Summons for Relief. (Complaint Filed),"—which is addressed to the said Samuel M. Pickens, calling upon him "to answer the complaint

in this action, which has this day been filed in the office of the clerk of court for Anderson county," and bearing date the 18th of April, 1893. It is further stated in the case that: "There is no complaint and summons filed in the office of the clerk of the court of common pleas for Anderson county, in said case, other than the summons and complaint filed February 9, 1893, on which the affidavit of the sheriff is made. There was no notice of the pendency of said action filed in said cause."

Upon this record, of which we have made a full statement, the case came before his honor, Judge Wallace, at the October term for 1893, and on the 2d of November, 1893, he granted an order, in a case entitled, "Clemson Agricultural College of South Carolina, Plaintiff, vs. Samuel M. Pickens, Defendant. Complaint for Foreclosure Real Property,"—which order is as follows: "On hearing the pleadings in this case, and the proof of service of defendant by publication of the summons and affidavit, mailing a copy of the summons and complaint to the defendant, at Elberton, Ga., his place of residence, and it appearing by affidavit that no answer or demurrer has been served upon the plaintiff's attorneys, it is ordered that it be referred to the master to compute the interest on plaintiff's demand, and to report the amount due thereon, with leave to report any special matter." Then follows the report of the master, filed 2d November, 1893, ascertaining the amount due on the mortgage debt, upon which judgment of foreclosure and sale, in the usual form, was rendered on the same day. Under this judgment the land was sold on sales day in December, 1893, and bid off by defendant McCrary for the sum of \$300; and he, having complied with the terms of the sale, has received titles from the master, and has gone into possession of the land.

Our inquiry is whether the record shows on its face that the court never acquired jurisdiction of the person of the absent defendant, Pickens; for, if it does, then the whole proceeding is void, but if this record only fails to show that certain steps necessary to be taken, in order to acquire jurisdiction, were taken, then such defect will be cured by the recitals in the order of 2d November, 1893, set out above. Section 156 of the Code prescribes the mode in which a nonresident of this state, who has property therein, may be made a party to an action, where the court has jurisdiction of the subject of the action. This mode is comprehensively called "Service by Publication," and that section of the Code proceeds to declare how such service may be legally made. Without quoting all of the provisions of the section referred to, it will be sufficient to say that the following are the requisites for such service; at least, so far as the facts disclosed by the record in this case render it necessary to state such requisites: (1) It must be

made to appear by affidavit, to the satisfaction of the clerk, that the person to be served cannot, after due diligence, be found within the state. (2) That a cause of action exists against the defendant, in respect to whom the service is to be made. When these facts are made to appear, then the clerk may grant an order that the service be made by publication of the summons. Then the section proceeds to prescribe how such order of publication shall be made, as follows: (1) The order shall direct the publication to be made in one newspaper, to be designated by the clerk as most likely to give notice to the person to be served, for such a length of time as may be deemed reasonable, not less than once a week for less than six weeks. (2) The order shall also direct a copy of the summons to be forthwith deposited in the post office, directed to the person to be served, at his place of residence, unless it appear that such residence is neither known to the party, nor can, by reasonable diligence, be discovered. (3) Where publication is made, the complaint must be first filed, and the summons, as published, must state the time and place of such filing.

Now, as it is conceded that the defendant is, and was at the time of the commencement of this action, a nonresident of this state, and as it is manifest that such defendant owned real property in this state, which was the subject of the action, of which the court could take jurisdiction so soon as it has acquired jurisdiction of the person of the defendant by proper service by publication, the practical inquiry is whether the record, as set forth in the case, shows on its face that the court did not acquire jurisdiction of the person of defendant, and not whether such record is defective in showing that all of the steps necessary to acquire jurisdiction had been taken; for, as we have said, if there are any such defects in the record, the recitals in Judge Wallace's order of the 2d of November, 1893, must be regarded as supplying such defects. Those recitals must be considered sufficient to show that Judge Wallace had before him, at the time he granted that order, satisfactory evidence of the publication of the summons according to law, and of the mailing of copies of the summons and complaint to the defendant at his place of residence in the state of Georgia, for otherwise he could not have granted the order. For example, in the record as set out in the case, we find no evidence, by affidavit or otherwise, that the summons was in fact published in the *People's Advocate* once a week for six weeks, and yet we must presume that Judge Wallace had before him evidence sufficient to satisfy him of that fact; and this presumption is aided by the affidavits of Blease and Browne, submitted at the hearing of this motion, to the effect that prior to the October term, 1893 (the term at which Judge Wallace's order was made), the publisher of the *People's Advocate* had made an affidavit

that the summons had been published for the requisite time. The proper inference would be that Judge Wallace had this affidavit before him, and the same was subsequently lost.

Recurring, then, to the inquiry whether the record, as set out in the case, shows affirmatively that any of the steps requisite to secure a service by publication were omitted, we are constrained to say that we do not think so. While the record does disclose many irregularities, they are nothing but irregularities, and are not fatal to the jurisdiction. It seems to be assumed, in the argument of counsel, that the summons found among the papers (how it got there is not explained), bearing date 18th April, 1893, was the summons which was in fact published. But we find in the record no evidence whatever upon which to base such assumption. On the contrary, as it seems to us, all the evidence furnished by the record indicates that the summons which was in fact published was the summons bearing date 5th of February, 1893, and filed with the complaint on the 9th February, 1893. That summons bears the indorsement of the return of the sheriff of non est inventus, and also the indorsement of the mailing of a copy of the summons and complaint in this action, which is entitled "*Clemson Agricultural College of South Carolina v. Samuel M. Pickens*," while the summons dated 18th April, 1893, is entitled in the name of a different plaintiff, "*The Clemson Agricultural College of South Carolina*," was never lodged in the sheriff's office, nor was it ever filed in the clerk's office, so far as appears. It is true that the difference in the name of the plaintiff is very slight,—only the addition of the word "*The*,"—yet, as a corporation can only be recognized in law by the name assigned to it by its charter, we do not see by what authority a court could disregard the name which the legislature has seen fit to assign to a corporation. Certainly, the appellant can make no objection to the court observing this slight difference in the name, as he makes a point on it in his argument here. But as there is no foundation for the assumption that the summons bearing date 18th April, 1893, was the summons actually published, all of appellant's argument based upon that assumption becomes inapplicable.

It is contended that the affidavit of W. T. C. Bates, upon which the order of publication was asked for, shows on its face that it was insufficient (1) because it is without venue; (2) because it fails to state facts showing that the court had jurisdiction of the subject-matter of the action. As to the matter of venue, we do not think the objection can be sustained. While it is true that there are cases in which a venue has been held essential to the validity of an affidavit, there are other cases which hold the contrary (see 1 Am. & Eng. Enc. Law, 311); and we are disposed to follow the latter, especially



in a case like this, where the only defect is in the omission of the word "County" after the word "Richland." The other objection is met by the reference to the complaint, in the affidavit, the allegations of which are amply sufficient to show that the court had jurisdiction of the subject of the action.

Again, it is objected that the order of publication is without either date or seal, and is not entitled in any case. We know of no law which renders either a date or a seal essential to the validity of such an order; and, as to the objection based upon the want of a title in any case, it is sufficient to say that we find it as a part of the record in this case, and so set forth in the case.

In regard to the objection that the summons filed 9th February, 1893, does not state when and where the complaint was filed, as required by section 158 of the Code, it seems to us that this requirement is only for the purpose of informing the absent defendant where he can find a more detailed statement of the claim made against him than is furnished by the summons; and therefore where, as in this case, the defendant was furnished with a copy of the complaint as well as the summons, there can be no possible reason for insisting upon a compliance with such requirement. Especially is this so where, as in the present case, there is good reason to believe that the defendant actually received a copy of the complaint; for it will be observed that while the defendant, in his affidavit submitted in support of this motion, does deny that he ever received a copy of the summons dated 18th April, 1893, he does not deny receiving a copy of the summons and complaint filed 9th February, 1893, mailed to him by the sheriff.

Again, it is contended that the record fails to show that the court required the plaintiff or his agent to be examined under oath touching any payments that may have been made to the plaintiff, or to any one for his use, as required by section 267 of the Code and rule 52 of the circuit court, but simply referred it to the clerk to compute the interest on plaintiff's demand, and report the amount due thereon. In the first place, we think it very questionable whether this objection presents a jurisdictional question. But, in the second place, this, at most, is a mere omission, and does not affirmatively show any jurisdictional error; for, from all that appears, it may be that the judge did require the agent of the plaintiff to be examined before the court touching any payments that may have been made, and referred it to the clerk simply to compute the interest, and, in the absence of any evidence to the contrary, we are bound to assume that he did what his duty required him to do.

As to the omission to sign the complaint, and to file notice of the pendency of the action, as well as all other objections not specifically noticed, we do not think they can

avail the appellant in a proceeding of this kind.

In the view which we have taken of the case, the question raised by the counsel for the purchaser, as to whether his title could be set aside under a motion, or whether an action is not necessary, does not arise, and has not, therefore, been considered. Nor have we considered the question, which has not been argued, whether the appellant has the right to set aside so much of the judgment as purports to authorize the plaintiff to issue execution against appellant personally for any balance which is left unpaid by the proceeds of the sale of the mortgaged premises. The judgment of this court is that the order appealed from be affirmed, without prejudice to the right of the appellant, if he shall be so advised, to demand that he be relieved from so much of the judgment as is a personal judgment against him for the deficiency.

POPE, J., concurs.

(42 S. O. 475)

MITCHELL v. MITCHELL et al.

(Supreme Court of South Carolina. Nov. 2, 1894.)

FRAUDULENT CONVEYANCE—HUSBAND TO WIFE—PREFERENCE OF CREDITOR—EVIDENCE.

1. The supreme court will not reverse a finding of fact by a judge sitting as a chancellor, where there is testimony to support it, unless the overwhelming weight of evidence is against it.

2. One whose lands are mortgaged for amounts exceeding seven-eighths of his own valuation, and who has but little personal property, and whose debts, including the mortgages, exceed the value of both his real and personal property, is insolvent.

3. A finding that a mortgage was not made in good faith will not be disturbed on appeal, where it was from an insolvent husband to his wife, who knew of his insolvency, and was executed shortly after the husband's daughter threatened to sue him for money due from him as her guardian, and there was included in the mortgage over \$2,000 more than was due the wife.

4. A finding that a mortgage of land was an assignment by the mortgagor of his property to one creditor to the exclusion of other creditors, within the prohibition of Gen. St. § 2146, will not be disturbed where it appears that the mortgage covered all of the mortgagor's land, and, with other mortgages on the land, amounted to over seven-eighths of its value, and there was no other property out of which creditors for over \$4,000 could collect their claims.

5. A finding that a mortgage was given to delay and defraud creditors is justified by evidence that it was given by an insolvent to his wife, who knew of his insolvency, in settlement of an open account between them, extending over 13 years; that it embraced all his land, and was made after the husband's daughter had threatened to sue him for guardianship funds, and the mortgage, with other mortgages on the land, amounted to over seven-eighths of its value, at his own estimate, and there was nothing else out of which creditors for over \$4,000 could collect their claims.

Appeal from common pleas circuit court of Lexington county; L. B. Fraser, Judge.

Action by Sarah A. Mitchell against John A. J. Mitchell and others to foreclose four mortgages. From a judgment denying the foreclosure of one of the mortgages, plaintiff appeals. Affirmed.

The decree of the trial court was as follows:

"This is an action brought by Sarah B. Mitchell, wife of J. A. Jeter Mitchell, against her husband, to foreclose certain mortgages she holds against his real estate. To this action certain judgment and mortgage creditors of the said J. A. J. Mitchell are made parties defendant. To the suit to foreclose these defendants aver against the plaintiff that her mortgage dated 3d November, 1887, given to secure a bond of that date for the sum of five thousand five hundred and twenty-five 34-100 dollars (\$5,525.34), is, as against the defendant judgment creditors, fraudulent and void—First, upon the ground that it is tantamount to an assignment under section 2014 of the General Statutes and gives undue preference to one creditor over all others; secondly, that if it be not an assignment, within the purview of the said act, it is nevertheless an undue preference, and fraudulent as to these judgment creditors. The issues of law and fact were referred to J. Brooks Wingard, as special referee, with directions to report to the court his findings of fact and conclusions of law. Upon the coming in of that report, exceptions thereto were filed by the said judgment creditors, and the cause was heard before me upon exceptions to said report. The special referee sustained this mortgage of the husband to the wife as a valid security, and recommended the foreclosure and sale of the property covered by that and the other mortgages in the case. Upon the hearing of the cause, I became satisfied that the aforesaid bond of November 3, 1887, was excessive in amount, and should be greatly reduced, as was proposed, and so announced myself to sustain the report of the referee, except in this particular; but a more careful consideration of the testimony and examination of the authorities has satisfied me that this is an erroneous view.

"The question first to be determined is whether J. A. J. Mitchell, at the time he gave this bond to his wife, was insolvent. This question was not decided by the referee. I am satisfied from the testimony that at that time he was insolvent, and that his insolvency was known to himself, and also to the plaintiff. He owned about two hundred and fifty dollars (\$250) worth of personal property, and two tracts of land,—the home tract, consisting of 350 acres, which he valued at eighteen dollars per acre, and another tract of 400 acres, valued by himself at eighteen hundred dollars (\$1,800). These valuations are very full, but even at this valuation of his property, his debts exceeded it. The bond to his wife is made up of various amounts of money, which he is said

by himself and his wife to have collected, as her agent, from her various sources of property and income. They were married in 1872. In the year 1874 he collected for her an interest in taxes amounting to six hundred dollars (\$600). In 1881 he collected for her, as executrix of A. S. Lark's estate, two hundred and sixty-seven 67-100 (\$267.67). He also collected, of her interest in said estate, nine hundred and ninety-seven 18-100 dollars (\$997.16). From 1881 up to the date of the said bond, he collected annually the rent of his wife's Mudlick plantation, in the county of Newberry. For none of these amounts did he give any written acknowledgment to his wife, nor any written promise to pay. The indebtedness was not evidenced by any written instrument until 1887, when he gave the bond and mortgage aforesaid. On every amount which he charged against himself as having collected for his wife, he calculated the annual interest at the rate of ten per cent. These different amounts, with interest aforesaid, calculated up to the 3d of November, 1887, made the sum total of the said bond. Not being satisfied with having given the mortgage aforesaid upon his home place, of 350 acres, to secure the bond aforesaid, on the 10th of May, 1889, he extended this lien by giving a mortgage upon the 400 acres of land to secure the same debt. On the 18th day of October, 1889, he gave to Abram Jones a mortgage to secure the payment of seven hundred dollars (\$700) on the 350 acres of land aforesaid. On the 5th of February, 1892, this bond and mortgage was transferred to Mrs. Mitchell. On the 28th of February, 1895, the defendant J. A. J. Mitchell executed and delivered to U. X. Gunter his notes for ——— dollars, secured by mortgage upon 400 acres of land aforesaid, which notes and mortgages amounted on 1st of October, 1898, to the sum of one thousand and ninety-two 67-100 dollars (\$1,092.67). On the 7th of January, 1890, Mitchell executed and delivered to U. X. Gunter his notes for ——— dollars, secured by mortgage upon the 400 acres of land aforesaid, which notes and mortgage amounted on 1st of October, 1898, to the sum of one thousand and ninety-two 67-100 dollars (\$1,092.67). On the 7th of January, 1890, he gave to his wife his note for five hundred dollars (\$500), and secured the same by a mortgage on the aforesaid 400 acres of land. The plaintiff, Mrs. Mitchell, has become the owner of both the Jones and the Gunter mortgages. The judgments of the defendant judgment creditors amount to several thousand dollars. The exact amount is not given by the referee, but, I presume, will not be less than four thousand dollars (\$4,000). In addition to these debts, he is also indebted as guardian of his two minor children, by his first wife, in amounts not yet ascertained, but which will probably each equal the amount recovered against him by his married daughter, Mrs. N. B. Dial, of whom

he is likewise guardian. In view of these facts, there can be no question that on the 3d of November, 1887, J. A. J. Mitchell realized the fact that he was totally insolvent, and then conceived the purpose of saving out of his estate, to his present wife, the large amounts of money aforesaid. In determining whether this is undue preference or not, I deem it unnecessary to cite the numerous cases which hold that a debtor in failing circumstances has a right to secure one creditor in preference to another, but he has no right to cover up his property by such securities as to defeat, hinder, and delay the creditors who are unsecured; in other words, he has no right to give a preference which is undue, in the sense of the statute of Elizabeth. The present case is on all fours with the case of Mann v. Poole (recently decided by our supreme court) 18 S. E. 145. The only difference between the conduct of J. T. Poole towards his wife and daughters and the action of J. A. J. Mitchell in regard to his wife is that, in about ninety days after securing the claims of his relatives, Pool made a general assignment for the benefit of his creditors. This Mitchell did not do, and could not have done, because he had no property to assign, other than the property which he had so heavily mortgaged. One other distinction may be mentioned, which is, that there was no question as to the bona fide indebtedness of Pool to his wife and daughters. The bona fides of Mitchell's indebtedness to his wife is gravely questioned by the defendants in this case, and not without reason. I hold, therefore, that the bond and mortgage given by Mitchell to his wife on the 3d of November, 1887, is, as to the defendant judgment creditors, an undue preference and invalid. It is adjudged, therefore, that the report of the referee, in his findings of fact and conclusions of law touching this security, be overruled.

"It is therefore ordered, adjudged, and decreed that the U. X. Gunter mortgage, the Abram Jones mortgage, and the mortgage securing five hundred dollars (\$500) to Mrs. Mitchell, being valid securities, be foreclosed, and the equity of redemption be barred. It is ordered, adjudged, and decreed that there was on the 1st of October, 1893, on the Jones mortgage, due the sum of seven hundred and seventy-six dollars and fifty-nine cents (\$776.59); on the U. X. Gunter mortgage, one thousand and ninety-two dollars and sixty-seven cents (\$1,092.67); on the five hundred dollars (\$500) mortgage, the sum of six hundred and fifty dollars (\$650); and that for these amounts, in the aggregate, the plaintiff is entitled to judgment. It is further ordered, adjudged, and decreed that the lands described in the complaint be sold by the clerk of the court of common pleas for the county of Lexington, after due advertisement thereof, on the first Monday in January next, or some subsequent suita-

ble sale day, to the highest bidder, at the courthouse in the county of Lexington, for one-half cash, and the balance on a credit of twelve months,—the credit portions to be secured by bonds of the purchasers, and mortgages of the premises; that the said tracts of land be sold in the parcels recommended by the referee, or in such other parts or parcels as the parties in interest may agree upon before the day of advertisement or day of sale. Out of the cash proceeds of sale, it is ordered that the clerk of court do first pay the cost and expenses of sale and the cost of this action; next, that he do pay the amounts due upon the several mortgages above pronounced valid, applying to each mortgage the proceeds of sale only of the tract on which the said mortgage is a lien; next, that he do pay defendant judgment creditors, according to priority, the amounts due upon their respective judgments; should there be any surplus left, that he do hold the same subject to further orders of the court. It is further ordered that the parties to the action have leave to apply at the foot of this decree for such other orders or measures of relief as may be deemed advisable. The interest upon the valid mortgages above should be calculated up to the date of this decree, instead of up to the 1st day of October. This can be done by the special referee, or by the clerk of the court, or by the counsel in the cause; and so, likewise, the interest upon the judgment. I have not the documents before me."

The plaintiff, Sarah B. Mitchell, appealed from the said decree on the following grounds, to wit: "(1) Because his honor the circuit judge, erred in overruling so much of the report of the referee herein as sustains the bond of the defendant John A. J. Mitchell to the plaintiff, in the penalty of eleven thousand fifty dollars and sixty-eight cents, conditioned for the payment of fifty-five hundred and twenty-five dollars and thirty-four cents, and secured by mortgages of real estate. (2) Because his honor erred in not allowing the said bond and mortgages to stand as valid securities, at least to the extent of thirty-one hundred and fifty dollars and fourteen cents, with interest at seven per cent. per annum on each item of money embraced in the sums borrowed by the said J. A. J. Mitchell from the plaintiff, and constituting the indebtedness secured by the bond, from the day of the receipt by that defendant of each item to the date of the said bond, and interest thereafter according to the terms of the bond. (3) Because his honor erred in deciding that the execution and delivery of such said bond and mortgages amounted to an assignment of the said J. A. J. Mitchell's estate, within the inhibition of the statute laws of the said state. (4) Because his honor erred in holding that the said J. A. J. Mitchell was insolvent at the date of the mortgage of 3d day of November,

1887, or at the date of the mortgage of 10th May, 1889. (5) Because his honor erred in holding that the said J. A. J. Mitchell knew or believed that he was insolvent on the said 3d day of November, 1887, or on the said 10th day of May, 1889. (6) That his honor erred in not holding that the said bond and the mortgages to secure it were executed merely as securities for a valid and subsisting debt from the said J. A. J. Mitchell to the plaintiff (appellant). (7) Because his honor erred in holding that the said J. A. J. Mitchell is, or ever has been, since the beginning of the year 1887, indebted to his two other daughters, besides Mrs. Dial. (8) Because his honor erred in holding that the said J. A. J. Mitchell either knew or believed at any time in the year 1887 that he was a debtor to Mrs. Dial. (9) Because his honor erred in holding that the said bond and the two mortgages to secure its payment were fraudulent, or that any one of them was fraudulent, as intended to delay, hinder, or defraud other creditors of the said J. A. J. Mitchell. (10) Because his honor erred in not sustaining all of the referee's findings of fact and conclusions of law."

J. F. J. Caldwell, for appellant. Meeteze & Muller and Dial & Copeland, for respondents.

POPE, J. This action came on for trial before his honor, Judge Hudson, at the fall term, 1893, of the court of common pleas for Lexington county, in this state. His honor filed his decree on the 23d day of November, 1893. All parties acquiesce in the decree, except that the plaintiff has appealed from the findings of fact and conclusions of law therein whereby her bond, in the penalty of \$11,050.64, conditioned to pay \$5,525.32, with interest thereon from the 18th February, 1887, at 10 per cent. per annum, together with the two mortgages on 754 acres of land, given to secure said bond, were declared invalid, being held obnoxious to both section 2014 of what is known as our "Law on Assignments," and also the statute of Elizabeth. She has presented 10 grounds of appeal, in assigning such errors; but, inasmuch as both the decree and these grounds should appear in the report of this case, we have not deemed it necessary to reproduce them here.

It may be better that we should briefly outline a history of this contest, as set out in this case. It seems that the defendant John A. J. Mitchell was twice married. His first wife died about 1869, and he married again in 1872. By his first marriage he had four children, each of whom inherited an estate, in the state of Tennessee, through their mother. These children being minors, their father became their guardian, and received their respective estates. He was also one of the executors of the will under which his

children derived their estates. Mr. Mitchell also received, for his present wife, some money sent to her from the state of Texas in 1874, and also her share of the estate of her father, the late Andrew Lee Lark, of Newberry county, in this state. The plaintiff, as part of the estate derived from her father, purchased at his estate sale a plantation of land known as the "Mudlick Place." The rents from these lands were all received by Mr. Mitchell with the consent of his wife. Mr. Mitchell, being indebted to one Jones in the sum of \$720, secured such debt by a mortgage on his lands. The plaintiff purchased this mortgage. Mr. Mitchell was also indebted to one Gunter for about \$800, which debt he secured by a mortgage of his lands. This mortgage is now owned by the plaintiff. Some time in 1888, in the summer, that child of Mr. Mitchell who had intermarried with the defendant Nathaniel B. Dial sought a settlement at the hands of her father, as her guardian. It would seem from his (Mitchell's) testimony that from some cause he conceived the idea that he owed his ward nothing, though he says in his testimony he told her he was willing to pay \$750 in full settlement. This settlement she declined. A suit was threatened, and when this was done he used some language it would have been well if he had left unsaid. His language here referred to was, "If you sue, the largest pole will knock down the persimmon." The defendant Mitchell, not long after this, made up an account with his wife, including therein items of indebtedness as far back as 13 years, and so on down to the date of his reckoning of the account, in February, 1887. It appears to be a fact in the case that Mr. Mitchell had given no note to his wife all these years. On the 3d November, 1887, he executed a bond to the plaintiff in the penalty of \$11,050.64, conditioned to pay \$5,525.32, with interest thereon at 10 per cent. per annum from 17th February, 1887. Mrs. Dial put her claim in judgment against him in 1892, first having attained judgment in the courts of the state of Tennessee for \$1,407.90. The other defendants put their claims in judgment in 1892. Under this condition of things, the plaintiff brought her action to foreclose the mortgage she had purchased from Jones, also that purchased from Gunter, and also that executed 3d November, 1887. The defendants admitted the validity of the Jones and Gunter mortgages, but stoutly contested the right of the plaintiff to purchase the mortgage executed 3d November, 1887, on two grounds—First, that it was void under the assignment laws of this state; and, second, that it was made to hinder, delay, and defraud creditors; also, denying the bona fides of the indebtedness represented by the bond in the penalty of \$11,050.64. By an order therefor the issues of law and fact were referred to J. Brooks Wingard, Esq., as special master. He heard the testimony, which

is reproduced in the case. By his report he reduced the amount due the plaintiff under the bond and mortgage of 3d November, 1887, by more than \$2,000, but, so reduced, he sustained its validity, and recommended a judgment foreclosing the mortgage. Exceptions were taken to that report by the other defendants. The case, as before stated, came on to be heard by Judge Hudson, who sustained such exceptions, and decreed accordingly.

The appellant, in the able argument submitted by her counsel, Mr. Caldwell, treats the decree of Judge Hudson as raising two questions: First, that her mortgage of 3d November, 1887, was invalid, under the assignment law of this state; second, that her said mortgage was invalid under the statute of 13 Elizabeth, of force in this state. And we propose to adopt that method of testing the decree of Judge Hudson, in the light of the exceptions thereto by appellant.

1. Was Judge Hudson in error in holding the mortgage in question invalid under the assignment laws of this state? The appellant admits that if the mortgage amounts to an assignment of the whole of debtor's estate, actually or practically, and also that if such security be not given in good faith to secure the payment of a debt, and for the sole purpose of securing that debt, but as a transfer of debtor's estate to one creditor, there being other creditors left unsecured, such mortgage is invalid, under our law governing assignments. It will be readily seen that this conclusion necessarily involves several propositions: First, the debtor must be insolvent; second, the security must cover the whole of such insolvent's estate, actually or practically; third, it must be given in good faith to secure a debt, and for the sole purpose of securing that debt; fourth, it must not be a transfer of debtor's whole estate to one creditor, to the exclusion of other creditors. The circuit judge found that all these propositions entered into the mortgage executed by Mitchell to the plaintiff, for he found that Mitchell was insolvent, that Mrs. Mitchell knew of this insolvency, that the mortgage given covered his whole estate, that it was not given to secure a debt in good faith owing the plaintiff, and that it was a transfer of his whole estate to his wife for the purpose of excluding his other creditors therefrom. The next step on our part is to see if these findings of fact have any testimony to support them, or is the overwhelming weight of the testimony opposed to them? It is almost needless to repeat the rule of this court on this branch of the law: We will not undertake to reverse a decree when there is testimony to support the findings of fact by the judge, sitting as a chancellor, or in case the overwhelming weight of the testimony does support his findings. It is earnestly insisted that in this case such findings of the circuit judge are wanting in both these particulars.

In deference to these suggestions, we have made a careful examination of the testimony, and will now give the reasons for our conclusions.

Who is an "insolvent" under our laws? Our own court, in *Akers v. Rowan*, 33 S. C. 470, 12 S. E. 165, have approved the meaning ascribed to the term "insolvency," in its general and proper meaning, viz. "the insufficiency of the entire property and assets of an individual to pay his debts," and in doing so approve the definition given by Field, J., in *Toof v. Martin*, 13 Wall. 47, of such general and popular meaning. With this understanding of this term, we will answer the question as to testimony in this case establishing the insolvency of John A. J. Mitchell on the 3d of November, 1887. Mr. Mitchell, in his testimony, says he was possessed of \$250 of personal property, and \$3,100 was the value of his landed estate. He was thus the possessor, in the aggregate, of \$3,350 worth of property, real and personal. His indebtedness was as follows:

|   |            |
|---|------------|
| The debt set up by his wife on her bond and mortgage.....                     | \$5,525 82 |
| Interest from 17th February, 1887, to 3d November, 1887, at 10 per cent. .... | 411 36     |
| The debt he owed Dr. F. G. Fuller..   | 1,000 00   |
| The debt he owed Mrs. Dial.....   | 800 00     |
| The debt he owed his other three children, at \$500 .....                     | 2,400 00   |
| The Jones mortgage debt (the oldest mortgage) .....                           | 720 00     |
| The Gunter mortgage debt (dated in 1885) .....                                | 800 00     |
| The three debts now in judgment, about .....                                  | 600 00     |

Aggregate of indebtedness on 3d November, 1887 .....\$12,256 68

Now, by deducting the \$3,350 from the \$12,256.68, we will find he owed \$3,906.68 more than his property, if sold at his own valuation, would pay. Is not this insolvency?

Now, as to the second proposition. On the 3d November, 1887, the date Mitchell gave his wife the mortgage, he owed the Jones mortgage, \$720.00; the Gunter mortgage, \$800.00. Add to these his wife's mortgage debt, \$5,936.68, aggregating for the mortgage debts \$7,456.68. But he had \$3,100 worth of property. Take from this the homestead exemption of \$1,000, which leaves \$7,100 of property covered by mortgage liens of \$7,456.68, and what was then left for his other creditors? But, if we admit that he would not have been entitled to any homestead, the pitiful sum of \$643.32 would have been left for his other creditors. These calculations are based upon the estimate of his property of Mitchell himself. This estimate is referred to by the judge, in his decree, as "very full." So that it appears that the circuit judge's finding, that this mortgage to the plaintiff actually or practically covered his entire estate, thereby leaving nothing to pay the demands of the defendants and other creditors, is fully sustained. Was this

security given in good faith to secure a debt, and for the sole purpose of securing a debt? The circuit judge has found as a fact that it was not. No doubt his honor had in his mind, in this connection, the sensitiveness of a court of equity in scrutinizing transactions of a business character between a husband and wife, parent and child, as the case may be. It was possible, in looking over the items in the account between himself and his wife, that Mitchell made out in February, 1887, the circuit judge may have remembered the case of *Bridgers v. Howell*, 27 S. C. 425 (decided in 1887) 3 S. E. 790, when the court held that the earnings of the wife by her personal services were deemed to be those of the husband, and remembered that in December of that year (1887) the legislature of this state (see 19 St. at Large, p. 819) enacted that, not only such earnings from her personal services, but also her income, shall be her own separate estate. He saw from the testimony that Mitchell was determined, as appeared from his own statement in August, 1886, if his daughter Mrs. Dial sought to test her rights in the courts to her estate (not derived through her father's, but from her grandfather's, estate, that had passed into Mitchell's hands, as her guardian), that in such a contingency "the longest pole should knock down the persimmon." He saw he was then insolvent, which fact was well known to his wife; that Mitchell had included in such bond items of indebtedness for more than \$2,000 (inclusive of interest thereon), that, by his not excepting to the report of the special master, which so found, both he and his wife admitted to be true. And together with other circumstances, from all this testimony, we cannot say that his honor erred in such finding.

Next, was it in fact a transfer of his property to one creditor to the exclusion of other creditors? On the 3d day of November, 1887, as we have before seen, Mitchell owed \$12,256.68, and he had \$8,100 liable in law to the payment of such debts. By adding the mortgage of his wife, given on that day, to those he had already given, it will be seen that he owed, as liens on that estate, \$7,456.68. When his assets, of \$8,100, were reduced by his homestead exemption of \$1,000, he only had property valued at \$7,100 to pay the liens thereon, of \$7,456.68. Was not this last mortgage, for \$5,936.68, therefore, a transfer of his property to one creditor to the exclusion of his other creditors? The circuit judge so found, and, in the light of the testimony here, we cannot reverse this finding. So, therefore, these propositions being accepted as true, can there be any doubt that, when Mitchell gave this mortgage to his wife, it amounted to an assignment under the former section 2014, but now 2146, of our General Statutes, whereby Mitchell gave a preference to his wife, and on that account was invalid?

2. But was this mortgage invalid because it was given to hinder, delay, and defraud

his creditors by Mitchell? The circuit judge so found. The language of the decree on this point is: "In view of these facts, there can be no question that on the 3d of November, 1887, J. A. J. Mitchell realized the fact that he was totally insolvent, and then conceived the purpose of saving out of his estate, to his present wife, the large amounts of money aforesaid [this bond]. In determining whether this is an undue preference or not, I deem it unnecessary to cite the numerous cases which hold that a debtor in failing circumstances has a right to secure one creditor in preference to another; but he has no right to cover up his property by such securities so as to defeat, hinder, and delay the creditors who are unsecured. In other words, he has no right to give a preference which is undue, in the sense of the statute of Elizabeth. The present case is on all fours with the case of *Mann v. Poole* (S. C.) 18 S. E. 145. \* \* \*

The only difference between the conduct of J. T. Poole towards his wife and daughters [grandchildren] and the action of J. A. J. Mitchell in regard to his wife is that, in about ninety days after securing the claims of his relatives, Poole made an assignment for the benefit of his creditors. This Mitchell did not do, and could not have done, because he had no property to assign, other than the property which he had so heavily mortgaged. One other distinction may be mentioned, which is that there was no question as to the bona fide indebtedness of Poole to his wife and daughters [grandchildren]. The bona fides of Mitchell's indebtedness to his wife is gravely questioned by the defendants in this case, and not without reason. I hold, therefore, that the bond and mortgage given by Mitchell to his wife on the 3d of November, 1887, is, as to the defendant judgment creditors, an undue preference and invalid." Before passing away from this quotation from the decree, so far as reference is then made to the character of the indebtedness of Mitchell to his wife not being bona fide, we desire to say that under the uncontradicted testimony of the probate judge of Newberry, and of Mr. Mitchell, here, there can be no question that Mrs. Mitchell did have an estate derived from her father, the late Andrew Lee Lark, which consisted in money and lands, both of which passed under the control of Mr. Mitchell, for his wife. Nor, further, can there be any doubt, under this testimony, that Mrs. Mitchell derived the money from Texas. If, therefore, the circuit judge meant to impugn the bona fides of these sources of property in the hands of Mitchell, for his wife, we cannot consent to such a conclusion. If, however, the circuit judge, looking to the date and the amount included in the bond secured by the mortgage executed in November, 1887, meant to refer to the inclusion in said bond of some items of indebtedness which were objected to, such as the interest at 10 per cent. per annum on all the items of the account, and to disapprove of the same, we cannot say, under

the testimony here, that his criticism was unfounded. Referring to the argument for appellant, we find that he admits that: "Those statutes [statutes of Elizabeth] were enacted for two purposes, one of which is to prevent the debtor from enjoying property while pretending to convey or transfer it to another, and the other of which is to prevent the debtor from transferring or incumbering property in order to escape a debt. The case of *Smith v. Henry*, 2 Bailey, 118, belongs to the first class. The case of *Lowry v. Pinson*, Id. 324, belongs to the second class." We agree with so much of the argument of the appellant, on this branch of the case, as holds that a bona fide conveyance or mortgage is not interdicted under the laws of this state, including the statute of Elizabeth, which is of force here; that the presumption of fraud does not arise from the mere act of incumbering his property; that there must appear some proof either of his arrangement to keep what he pretends to convey, or some proof-satisfactory proof—that he is parting with his property in order to evade a creditor; that under our assignment laws, as well as the statute of Elizabeth, the question is one of intention. Let us look at the testimony, to see if the circuit judge is sustained in his conclusion here assailed. If the debtor did anything by this mortgage to have it set aside as invalid by his creditors, it was under the second clause, namely, "conveying or incumbering his property in order to escape a debt." Does the testimony warrant the finding of the circuit judge in this view? As before remarked, we agree to the judgments of fact that Mitchell was not only an insolvent on the 3d day of November, 1887, but that his wife, the plaintiff, well knew this fact. It appears from Mitchell's own testimony that his wife allowed him to use her money and the rents from the lands for many years, without even a note to evidence this fact; that he had incumbered his whole real estate by mortgages; and still not a word was said or an act done to protect his wife from his insolvency. But, when his daughter wanted her property, then, and not till then, did a word or act proceed from Mitchell in behalf of his wife. It was then that that ugly expression, "If you go to law, the longest pole will knock down the perimmon," occurred. Then it was that accounts 13 years old, and downwards to the date of the account taken 17th February, 1887, were made to bear interest at 10 per cent. per annum. Then it was that an estate estimated by himself at the value of \$8,100 was covered by mortgages in amount just six hundred and odd dollars less than his estimated value of his whole estate. Was this transaction bona fide? The circuit judge said it was not. Was it an effort by Mitchell to incumber his whole estate by a mortgage, so as to hinder, delay, and defeat his other creditors? The circuit judge said it was. And now, in conclusion, it only remains for us to say that, in the light of this testi-

mony, we cannot reverse the circuit judge. It is the judgment of this court that the judgment of the circuit court be affirmed, and the cause be remanded to the circuit court to enforce the circuit decree.

McIVER, C. J., concurs.

(42 S. C. 500)

# STEWART v. GROCE et al.

(Supreme Court of South Carolina. Nov. 26, 1894.)

MORTGAGE SALE—APPLICATION OF SURPLUS PROCEEDS—RIGHTS OF JUNIOR MORTGAGEES—GUARDIAN'S BOND—MORTGAGE TO PROBATE JUDGE.

1. The purchaser of property at a mortgage sale takes it free from junior liens, but subject to senior liens.

2. Junior mortgagees have an interest in the proceeds of a sale under a senior mortgage to the extent of the surplus remaining after the senior mortgage debt has been satisfied.

3. A mortgagee who knows that the mortgagor has assigned his interest in the surplus proceeds on a sale under the mortgage to a junior mortgagee acts at his own peril in paying the full price of a fee-simple title at a sale under his mortgage.

4. Where the holder of a third mortgage, with knowledge that the holder of a second mortgage, who had stipulated to apply the proceeds of a sale thereunder to the payment of his debt and the surplus in payment of junior liens, had applied part of the proceeds in payment of a senior lien, received a part of the proceeds of such second mortgage sale, the amount so received operates as a payment from the surplus to apply on the third mortgage.

5. Where a third mortgage was given to a judge of probate to strengthen the bond of one of the mortgagors as a guardian, because of the insolvency of one of the sureties thereon, the amount received by plaintiff, as assignee of the ward's interest in such mortgage, from a sale of lands belonging to such surety, and applied in settlement of the guardian's default, must be deducted from the amount which plaintiff can recover out of the surplus after a sale under a second mortgage.

Appeal from common pleas circuit court of Spartanburg county; L. D. Witherspoon, Judge.

Action by W. L. Stewart against A. B. Groce, administrator of the estate of John Wheeler, deceased, William M. Morgan, and others for an accounting by defendant Groce for the surplus received by Wheeler on a sale of land under a mortgage.

The decree was as follows: "The plaintiff or assignee of a junior mortgage seeks in this action to compel the defendant, A. B. Groce, as administrator, to account for the surplus proceeds of land sold by John Wheeler under a senior mortgage containing a power of sale. The defendants W. L. Morgan, A. J. Morgan, O. P. Morgan, and L. A. Greene, on December 6, 1886, purchased 596 acres of land, including the Crawfordsville factory, for \$6,435, at sheriff sale, under order of court, paying one-half cash, and executing their bond and a mortgage of the premises to L. M. Gentry, as sheriff of Spartanburg county, for the remaining half of the purchase money. The mortgage to the sheriff did not contain a

power of sale. On the 11th day of December, 1888, the defendants W. L. Morgan, A. J. Morgan, O. P. Morgan, and L. A. Greene, to secure their note of even date for \$5,655, executed and delivered to John Wheeler a second mortgage of the same land, which contained a power of sale, authorized the mortgagee to become the purchaser, if a sale was made in the exercise of said power, and stipulated that in case of a sale the mortgagee would hold the overplus proceeds of sale subject to the rights of the holder of subsequent lien, who may give express notice in writing of the holding of such lien, and, if no such notice be given, then to pay the overplus to the defendant mortgagors. On the 14th of January, 1888, the defendants W. L. Morgan, A. J. Morgan, and O. P. Morgan executed to W. S. Thomason, as probate judge, a third mortgage of the same land to strengthen the guardianship bond of the defendant W. L. Morgan, as guardian of Lilly R. Montgomery, now the wife of Thomas Earle. To further secure the conditions of said guardian bond, the said defendant last above named also assigned and transferred certain notes and accounts with said probate judge for Spartanburg county. On the 4th of February, 1888, under the power contained in his mortgage, after default, John Wheeler sold the mortgaged premises, after due advertisement, on sale day in February, bid it off at \$8,500, executed a deed to himself, and on the same day paid off and took an assignment of the oldest mortgage on the property held by the sheriff. John Wheeler died intestate during the year 1888, and the defendant A. B. Groce is the duly-qualified administrator of his estate. This action was originally instituted by Lilly R. Earle, as assignee of the probate judge, to compel the administrator of John Wheeler to account to her, as the holder of a junior mortgage, for the overplus realized by John Wheeler from the sale of the mortgaged premises under the power of sale contained in his senior mortgage. Since the commencement of the action, Lilly R. Earle has assigned and transferred her interest in said mortgage to the plaintiff, W. L. Stewart, who is now the bona fide owner and holder of said junior mortgage. It appears that the defendant L. A. Greene has sold and transferred his interest in the 596 acres of land to his codefendants W. L., A. J., and O. P. Morgan, before the sale of the premises by John Wheeler under his mortgage. All of the issues were referred to the master. The master concludes, as matter of law, that the defendant A. B. Groce, as administrator of John Wheeler, must account to plaintiff for the overplus in the hands of John Wheeler realized from the sale of the mortgaged premises, after paying his debt and costs. The master states that this amount due plaintiff is left open for future reference, in which a full accounting will be made. The defendant A. B. Groce, as administrator of John Wheeler, excepts to the report of the master, and the cause was heard upon

said exceptions. The main point raised by this exception is, did John Wheeler dispose of or convert the surplus proceeds of the sale of the premises, after paying his debt and costs, contrary to law? No case has been cited in which this point has been decided by our supreme court, and resort must be had to the adjudication by the courts of other states. I concur with the master in the finding, as matter of fact, that the property brought a fair price at the sale made by John Wheeler. I am also satisfied that John Wheeler acted in good faith, and under the advice of counsel, applying a portion of the funds of sale to the first mortgage on the premises held by the sheriff. It seems to me, however, that the rights and liability of John Wheeler must be determined by reference to the mortgage under which he sold the property. He could not exceed the authority conferred upon him under the terms of his mortgage. In selling under the power contained in his mortgage, he became a trustee of the mortgagor as to any surplus of the proceeds of sale realized, after paying his debt and costs. By the term of his mortgage, John Wheeler undertook to pay on the overplus to the mortgagors, if no claim was made on him in writing for such overplus by subsequent lien incumbrancers. It does not appear that John Wheeler had express notice in writing by the holder of the junior mortgage executed to the probate judge, but said mortgage was recorded, and the probate judge testifies that John Wheeler had knowledge of the junior mortgage, and talked to him about it. I do not think that the failure to give written notice of the junior mortgage can have the effect of releasing the estate of John Wheeler from liability to account. The sale by John Wheeler only conveyed the equity of redemption. It cut off the lien of that mortgage executed to the probate judge of subsequent date, but could not affect the older lien of the sheriff's mortgage. The sheriff had commenced proceedings to foreclose his senior mortgage at the time the property was sold by John Wheeler under his junior mortgage. I have no doubt that it was understood by the sheriff that his senior mortgage would be paid out of the proceeds of the property to be sold by John Wheeler under his junior mortgage; but such understanding could not modify the terms, or enlarge the authority conferred upon John Wheeler under his mortgage. A foreclosure by suit was the sheriff's only remedy, and he could not have authorized John Wheeler to do what he himself could not do. No understanding between the sheriff and John Wheeler as to the application of the proceeds of sale could affect the rights of the mortgagors or the holder of the junior mortgage. It would seem to be a great hardship to require the estate of John Wheeler to account for the overplus, but, under the well-established principles of law referred to me in the master's report, I feel constrained to concur in the findings by the mas-



ter as matter of fact, as well as in his conclusions as matter of law. It is therefore ordered and adjudged that the master's report herein be confirmed, and that the exceptions thereto by the defendant A. B. Groce, as administrator of John Wheeler, be overruled. It is further ordered that it be referred to the master for Spartanburg county to take an account and report upon the amount due plaintiff, or assignee of Lilly R. Earle, upon the mortgage executed January 14, 1888, to W. S. Thomason, probate judge for Spartanburg county, his successors or assignees, by the defendants W. L., A. J., and O. P. Morgan. In said accounting, the plaintiff should be required to account for any sum of money received by Lilly R. Earle, or by the plaintiff, as her assignee, upon notes or accounts transferred by W. L., A. J., and O. P. Morgan, as additional security for the performance of the conditions of the bond of W. L. Morgan as guardian of Lilly R. Earle, formerly Lillie R. Montgomery. Upon the coming in of the report of the master, any of the parties to this action are at liberty to apply at the foot of this decree for such further orders as may be deemed necessary to carry out this decree. No direction will be made as to cost until the coming in of the master's report. I. D. Witherspoon, Presiding Judge."

From this decree the defendant administrator appealed upon the following grounds, to wit: That his honor erred: (1) In holding that the failure to give written notice of the junior mortgage cannot have the effect of releasing the estate of John Wheeler for liability to account to such junior mortgagees for the overplus of the proceeds of the sale remaining after the satisfaction of his mortgage. And in not holding that plaintiff has no right to recover, not having given Wheeler "express notice in writing" of the junior mortgage. (2) In not holding that, no express notice in writing of plaintiff's mortgage having been given, the surplus was, under the terms of the power of sale, payable to the mortgagors, and the mortgagors did receive the benefit of it. (3) In holding that the understanding between the sheriff and John Wheeler that the sale should be made under the junior mortgage, and the proceeds of the sale be applied to the satisfaction of the sheriff's senior mortgage, did not justify or protect Wheeler in so applying the proceeds. And in sustaining the master's finding that the whole estate in the land could not have been sold free from incumbrance, even with consent of senior incumbrancer. (4) In sustaining the master's finding that the prior mortgage could not be paid off out of the proceeds of the sale without consent of the subsequent incumbrancers. (5) In not holding that the plaintiff and the defendants Morgan are estopped by their receipts from the sheriff of the moneys which they allege were improperly paid to them, and which they are seeking by this

action to recover again. (6) In not holding that plaintiff could not proceed against the defendant till after having exhausted the other securities assigned, for Mrs. Earle's benefit, to the probate judge. (7) In holding this defendant liable for interest. (8) In sustaining the master's finding that the defendant should pay off the amount due plaintiff by her guardian, and then that the balance of the \$3,753.24 and interest should be paid to the defendants Morgan Bros. (9) In at least not directing, in the accounting ordered by him, that this defendant should have credit for the amounts that have been received by plaintiff, or her assignee, upon the guardianship bond from the estate of the surety Samuel Morgan. (10) In not holding that, if Wheeler erred in paying off the senior mortgage, it was a mistake made by him under advice of his attorney, and he should be protected by the court of equity, especially as the plaintiff parted with no right and suffered no loss on account of the mistake, if it was such.

Judgment for plaintiff, and defendant Groce appeals. Modified.

For prior report, see 16 S. E. 428.

Stanyarne Wilson, for appellant. Ralph K. Carson, for respondent.

POPE, J. The facts of this controversy, with the exception of some additional ones, are thus summarized in the opinion of this court as reported in 37 S. C. 560, 16 S. E. 428: "It appears from the pleadings and other proceedings in this case that on the 6th day of December, 1886, the Crawfordsville factory tract of land was sold by the sheriff of Spartanburg county, and bid off by W. L. Morgan, A. J. Morgan, O. P. Morgan, and L. A. Green, who complied with the terms of sale by paying one-half in cash and giving their bond to the sheriff, secured by a mortgage of the premises, for the other half, which mortgage was in the usual form of mortgages to public officers, and contained no power of sale; that on the 11th of December, 1886, the same persons executed a second mortgage to John Wheeler, the intestate of defendant Groce, on the same land, which last-mentioned mortgage did contain a power of sale; that on the 14th of January, 1888, the said W. L. Morgan, A. J. Morgan, and O. P. Morgan executed a third mortgage on the same tract of land to the judge of probate for Spartanburg county, which was subsequently assigned to the plaintiff herein; that on the 4th of February, 1888, the said John Wheeler, by virtue of the power of sale contained in his mortgage, offered the said land for sale, and himself became the purchaser thereof, and applied the proceeds of the sale to the payment of the debt secured by the mortgage to the sheriff, and to the payment of the debt secured by his own mortgage, which exhausted the proceeds,—whereupon the plaintiff commenced this action, to

which the said L. A. Green has not been made a party, claiming that the said John Wheeler had no right to apply any part of the proceeds of sale made by him to the payment of the debt secured by the mortgage to the sheriff, but that the said Wheeler was bound, after satisfying the debt due to himself, to apply any surplus of the proceeds of sale that then remained in his hands, first, to the payment of the debt secured by the mortgage to the judge of probate, which had been assigned to him, and the balance, if any, to the mortgagors in the mortgage to Wheeler, of whom, as has been stated, L. A. Green is one. The issues in the action were referred to the master, who found in accordance with this view; but, upon exceptions to his report, the circuit judge overruled the report of the master, and rendered judgment dismissing the complaint. From this judgment, the plaintiff \* \* \* appeals \* \* \*." On that appeal this court decided that L. A. Green was a necessary party, and in its judgment reversed the decree of the circuit judge without prejudice, and remanded the cause to the circuit court to carry out its direction.

The said L. A. Green has been made a party defendant, but disavows any interest therein, having long since conveyed all his interest to the defendants Morgan. A change was made in the person of the plaintiff, W. L. Stewart being substituted for Mrs. Lilly Earle under the following circumstances: The wife of W. L. Stewart was the daughter of Samuel Morgan, deceased, who was in his lifetime a surety on the bond of his brother W. L. Morgan as the guardian of the estate of Mrs. Lilly Earle, née Montgomery, and the said Samuel Morgan had conveyed, for love and affection, to his daughter, Mrs. Stewart, a tract of land of over 235 acres, worth \$2,500. Of the 235 acres, 60 acres was sold for \$930, and, with \$1,070 advanced by Mr. Stewart, was paid to Mrs. Earle in full payment of the balance due, and she thereupon assigned the whole claim to W. L. Stewart. Thus he became plaintiff in her stead. The action came on to be heard before Judge Witherspoon on the following papers: The pleadings, the testimony, and the report of the master submitted at the previous hearing before Judge Hudson, and some additional testimony taken before the master. By the decree of Judge Witherspoon, filed 29th December, 1893, he sustained the master's report which, as was stated heretofore, gave the plaintiff the relief sought in the complaint. The defendant A. B. Groce, as the administrator of John Wheeler, deceased, appealed from that decree. As the decree itself and the exceptions of appellant will appear in the report of the case, we will not reproduce them here. Nor will we, in our consideration of these exceptions, stop to formally repeat such as are overruled and such as may be sustained. In our anxiety to have an end of this already protracted litigation, we have taken the

pains to set out fully what we conceive should be the final judgment in this case, having a due regard to the rights and equities of all the parties.

The senior mortgage was held by the sheriff, and contained no power of sale. The second mortgage was held by John Wheeler, with a power of sale, coupled with this stipulation of the mortgagees, that the proceeds of sale, if made under the power, should be first applied to the payment of his debt, including accrued interest and costs of sale; second, that the surplus should be applied to junior liens, who should give written notice thereof, and in lieu of such notice, or if none such, then to the mortgagors. The third mortgage was to the probate judge, who assigned it to the plaintiff. Now, when John Wheeler sold the property for \$8,500, it was his duty, under his mortgage, to pay his debt, \$4,729.26, and his costs, \$17.50; and this left in his hands as mortgagor the sum of \$3,753.24, to go to junior liens, if they should have given written notice of such liens to him, or, if not, to the mortgagors, the Morgans. But no written notice of any junior liens was given to Wheeler, and it would seem that this sum of \$3,753.24 should have been paid to the mortgagors, the Morgans. If this were so, the case would be soon ended, for it is in proof, and not disputed, that the Morgans were at Wheeler's elbow, urging him to take up the senior mortgage,—that held by the sheriff; and this Wheeler did. Unfortunately for Wheeler, at the time the sale took place, and at the time he had this conference with the Morgans, the mortgagors, these very mortgagors, had deprived themselves of the power to give him (Wheeler) any such directions, for, by operation of law, when they (the Morgans) made the mortgage to Thommason, the judge of probate, they thereby transferred to such judge of probate all their rights, under their mortgage to Wheeler, to have him pay to them any surplus at the sale made by Wheeler, and it was his duty to have paid enough of the surplus to Thommason, as judge of probate, to satisfy his mortgage.

But here the appellant brings to the attention of the court these circumstances: (1) That at the sale of the lands made by Wheeler the price realized (\$8,500) was the full value of the fee-simple title. This finding of fact is that of both the master in his report and the circuit judge in his decree, and is not assailed by any party to the record. Therefore it is to us a fact. (2) That of these proceeds of sale paid by Wheeler to the sheriff, in liquidation of the amount due on the senior lien by mortgage, there was paid on the junior mortgage of Thommason, as judge of probate, the sum of \$1,532.63, and that, of the balance of the \$3,753.24, it was applied by the sheriff to the Morgans, the mortgagors, and therefore not a dollar thereof remained in the hands of John Wheeler. (3) That when W. L. Morgan was appointed

guardian of the estate of Mrs. Earle his sureties were Samuel Morgan, A. J. Morgan, and O. P. Morgan; but by reason of the death of Samuel Morgan, insolvent, this mortgage to Thommason, as judge of probate, was given, and thus Samuel Morgan was responsible for one-third part of what the sureties to W. L. Morgan had to pay for his default as guardian; and that inasmuch as the \$3,107.50, with interest thereon at 7 per cent. from the 12th December, 1889, will on the 30th October, 1894, amount to \$4,151.62, which, after allowing \$1,853.87 as the amount thereof paid by W. L. Morgan as principal (he being guardian), will thus leave \$2,767.65 to be paid by Samuel, A. J., and O. P. Morgan as sureties, of which amount Samuel is responsible for \$922.91; and as the present holder of Mrs. Lilly Earle's claim as the ward of W. L. Morgan used about \$922.91 of the funds of Mrs. Stewart, the daughter of Samuel Morgan, derived from the sale of land conveyed to her for love and affection of her father, in payment of the \$1,900 paid to Mrs. Lilly Earle on the settlement with her by the present plaintiff on the 22d February, 1892, which payment by Mrs. Stewart was proper,—by deducting \$922.91 from the \$1,900 then will be due to the plaintiff \$978.09, with interest thereon from the 22d February, 1892, as the amount to be recovered by the present plaintiff from the estate of John Wheeler, deceased.

We will now consider the effect of these propositions of facts. We regret to say that we do not see how this sale, for the full value, of the lands by John Wheeler, at the sale thereof under the power of sale in his mortgage, can help the defendant here. It is no longer an open question in this state that all one acquires as a purchaser under a sale of property by virtue of a junior lien is the property sold, freed from all junior liens, but still subject to the senior liens. *Norman v. Norman*, 26 S. C. 41, 11 S. E. 1096, and the authorities there cited. The interest of the junior lien by such a sale is transferred from the land sold to the purchase money, and in that fund there is no claim except for the surplus that may remain. As to that surplus, the holders of junior liens have a right to look to it as a fund held in interest for them. Such junior liens cannot be prejudiced by any mistakes the purchaser may make to which they have in no wise contributed. In the case at bar, it is not contended that Mrs. Earle or the probate judge, Thommason, did any act which led to the mistake of Wheeler. Not so the mortgagors, the Morgans. They insisted upon Wheeler making the sale and payment to the sheriff, in order to stop the sheriff in his suit for foreclosure of his mortgage given by them, which was then pending. They are estopped by their conduct from questioning Wheeler's actions in the premises, but they did not represent Mrs. Earle or Mr. Thommason, the judge of probate. As we have heretofore

remarked, when the Morgans made their third mortgage on the lands in question, they assigned and transferred all their rights to any surplus that might remain, at a sale made by Wheeler, to Thommason, as judge of probate. This fact was actually and constructively known by Wheeler, and he therefore acted at his peril in paying, as the purchase money of what is sometimes called "the equity of redemption" of the Morgans, the full value of a fee-simple title to said lands when discharged of all incumbrances. We think, however, the receipt by Thommason, as probate judge, of the \$1,532.62 from the proceeds of sale, with a full knowledge, as he had, of all the facts connected with the payment thereof by Wheeler to the sheriff, and the subsequent receipt of this money by Mrs. Earle, bound them, to the extent of this payment, as so much payment of the surplus in the hands of Wheeler applicable to their (third) mortgage, but no further than such payment extends. We conclude, also, that the present plaintiff, having used \$922.91 derived from a part of the sale of the lands in his hands derived as a gift from Samuel Morgan, who was also a surety on the bond of W. L. Morgan as guardian, and therefore liable, along with A. J. and O. P. Morgan, to make good all defaults of W. L. Morgan as such guardian, in the purchase from Mrs. Earle of this mortgage must have his claim for \$1,900 reduced by this \$922.91; and that all he can recover from A. B. Groce, the administrator of the estate of John Wheeler, deceased, is \$978.09, with interest from the 22d February, 1892. As before remarked, none of the Morgans are entitled to anything at the hands of said administrator.

It is the judgment of this court that the judgment of the circuit court be modified as herein required, and that the cause be remanded to the circuit court, to there enter a judgment for the present plaintiff against A. B. Groce, as administrator of John Wheeler, deceased, for \$978.09, with interest thereon from the 22d February, 1892; and, also, that the claims of W. L. Morgan, A. J. Morgan, and O. P. Morgan against said A. B. Groce, as administrator of John Wheeler, deceased, be disallowed.

McIVER, C. J., concurs.

(42 S. C. 522)

CAMPBELL et al. v. SANDERS. SAME v. OLIVER (two cases). SAME v. GRIMKE. SAME v. BEATTIE. SAME v. DOTHAGE. SAME v. PETERSEN. SAME v. WHALEY. SAME v. HOFFMAN. SAME v. LAFFAN. SAME v. BEHKOPF. (Supreme Court of South Carolina. Dec. 8, 1894.)

DIRECT TAX CLAIMS—COSTS—APPEAL FROM COMMISSIONER.

1. The act of 1891 (20 St. p. 1067), providing the mode of distributing direct taxes

collected during the war, does not confer the right to costs upon the prevailing party.

2. The commissioner provided by the act of 1891, before whom direct tax claims are to be proved, is not a "court of inferior jurisdiction," within the meaning of Code Civ. Proc. § 331, providing for costs when the jurisdiction of such court in a special proceeding shall be brought before the circuit court for review.

Appeal from common pleas circuit court of Charleston county; James F. Izlar, Judge.

Petition by Mary B. Campbell, administratrix, and others, against Samuel Sanders, for leave to intervene in a proceeding by said Sanders to collect a "direct tax claim." From a judgment for petitioners setting aside the taxation of costs, said Sanders appeals. Affirmed.

This case was considered with 10 other cases wherein the petitioners were the same and the respective defendants were Henry Oliver, administrator, T. S. Grimke, administrator, E. F. Beattie, administrator, F. A. Dothage, administrator, Ann Petersen, administratrix, B. J. Whaley, Henry Hoffman, administrator, Ann Lañan, administratrix, and Christina Rehkopf, administratrix.

The decree of the lower court was as follows (Izlar, J.): "The foregoing cases are known as 'Direct Tax Claims.' It appears that from the judgments of the special commissioner, Master Miles, in these cases, an appeal was taken to this court under and by virtue of the authority granted by the act of the general assembly entitled 'An act to provide a mode of distribution of the moneys collected as direct tax from the citizens of this state by the United States and turned over in trust to the state of South Carolina,' approved December 24, 1891 (20 St. p. 1067). The appeals in these cases were heard by his honor, Judge Hudson, who, after a careful consideration of the grounds, ordered that the several appeals be dismissed. Afterwards these cases were taken to the supreme court of the United States on writs of error allowed by one of the justices of said court, and there the appeals were again dismissed. 18 Sup. Ct. 1044. On receipt of the mandates from the supreme court of the United States, the attorneys representing the several defendants applied to the clerk of this court to have the costs in these cases taxed and adjusted. Objection was made by the attorneys for plaintiffs on various grounds. The clerk held 'that he had nothing to do with the costs of the United States supreme court, but would proceed to tax the costs in the court of common pleas.' The costs in the court of common pleas were taxed by the clerk in each case as follows: For attorneys of appellee, \$15.00; for clerk, \$8.15; total, \$23.15. From this taxation the plaintiffs appealed to this court on the several grounds stated in the notice. These appeals were heard by me at the June term, 1893, of the court of common pleas for said county. After argument I took the papers, and reserved my decision, as I deemed the legal questions involved not altogether free

from doubt. The following propositions may, I think, be safely asserted: There were no costs, *eo nomine*, at common law. Costs are recoverable at law only by force of statute, and depend upon the terms of the statute, strictly construed. Neither court, jury, nor referee can award costs unless the same are authorized by law. The party claiming costs in any action or special proceeding must therefore put his finger upon the statute which allows the same before he can legally demand them. The act of the 24th December, 1891, above mentioned, makes no provision for costs in case of appeal to this court from the judgment of the master as special commissioner. It is admitted on all sides that the proceedings before the master in these cases were not actions, but special proceedings. Now, is there any statute which allows costs in cases of this nature? Section 331 of the Code provides that 'when the decision of a court of inferior jurisdiction in a special proceeding \* \* \* shall be brought before the circuit court for review, such proceedings shall, for all purposes of costs, be deemed an action at law, on a question at law, from the time the same shall be brought into court, and costs thereon shall be awarded and collected as provided by law.' The second paragraph of section 326 of the Code provides that 'whenever it shall be necessary to adjust costs \* \* \* in any special proceedings, the same shall be adjusted by the judge before whom the same may be heard, or the court before which the same may be decided or pending, or in such other manner as the judge or court may direct.' Now, even if it be admitted that the judgment of Master Miles was the decision of an inferior court in a special proceeding, and falls within the provisions of section 331 of the Code, no direction has been given by any judge or court to the clerk of this court to tax and adjust the costs in these cases. The taxation of costs in these cases by the clerk was, therefore, without direction or authority. But I do not regard the judgment of Master Miles in these cases as the decision of a court of inferior jurisdiction. I do not think the legislature, in providing for the appointment of a commissioner before whom direct tax claims should be proved intended to create or did create a court of inferior jurisdiction. The jurisdiction of Master Miles in passing upon these claims extended to claims over \$100. The case of *City Council v. Ashley Phosphate Co.*, 33 S. C. 25, 11 S. E. 386, is, I think, authority for holding that under the constitutional provisions authorizing the establishment of 'such municipal and other inferior courts as may be deemed necessary' the general assembly cannot create an inferior court with jurisdiction in civil cases over \$100. In this case, Simpson, C. J., after discussing the several constitutional provisions relating to the subject, says: 'We think, therefore, that it would be the exer

else of unconstitutional power on the part of the general assembly to attempt to create an inferior court with jurisdiction in civil cases over \$100.' Master Miles, as said by Judge Hudson in his circuit decree in these cases, filed July 14, 1892, was 'a special commissioner, as it were, created for a special purpose, and with limited jurisdiction. \* \* \* His duty is to ascertain the real claimants and the amount due to each one and to certify his findings to the governor.' My opinion, therefore, is that costs in these cases cannot be allowed under the provisions of section 331 of the Code. Outside of this section of the Code, my attention has not been directed to any other statute whereby costs might be allowed in these cases, and in my investigation I have discovered none. It is therefore ordered and adjudged that the appeals in these cases be sustained, that the taxations of costs therein made by the clerk of this court be, and the same are hereby, set aside, and that costs in said cases be disallowed."

E. B. Hollings, F. A. Dothage, and S. J. Lee, for appellants. Mitchell & Smith and McCradys & Bacot, for respondents.

McIVER, C. J. The eleven cases above stated, all depending upon the same facts, were heard and will be considered together. The facts are so fully and clearly stated in the decree of his honor, Judge Izlar,—which should be incorporated in the report of this case,—that it is unnecessary to repeat them here. It is sufficient to say that these were claims presented by the several appellants to Master Miles for their respective portions of the fund appropriated by the United States government for the purpose of refunding the direct taxes imposed and collected by that government, which fund had been placed in the hands of the state government, and its distribution provided for by the act of 1891 (20 St. p. 1067), entitled "An act to provide a mode of distribution of the moneys collected as direct tax from the citizens of this state, by the United States, and turned over, in trust, to the state of South Carolina." It appears that the respondents herein filed their petition before Master Miles, praying to be allowed to intervene and set up their claims against the several claimants (appellants herein) for portions of the several amounts found to be due such claimants, respectively. The master declined to consider such petition, and from his refusal to do so the respondents herein appealed to the court of common pleas, where their several appeals were dismissed. Thereupon the appellants herein applied to and obtained from the clerk of the court of common pleas a taxation of their costs incurred under said appeals. To such taxation of costs the respondents herein excepted, and the cases went before his honor, Judge Izlar, upon such exceptions, who rendered judgment

sustaining the exceptions, and adjudging that the appellants herein were not entitled to costs. From this judgment these appeals have been taken upon the several grounds set out in the record, which need not be repeated here, as the sole question is whether the appellants are entitled to costs in a proceeding of this kind. It is well settled that the right to costs is of purely statutory origin, and hence, when any one sets up a claim for costs, he must point out the statute conferring the right to costs in the case in which such right is asserted. *State v. County Treasurer*, 10 S. C. 40; *Scott v. Alexander*, 27 S. C. 15, 2 S. E. 706. We do not think that there is any statute conferring the right to costs in a proceeding of this kind. It is very clear that the act of 1891, above referred to, does not confer the right to costs. On the contrary, while it does provide for the compensation of the commissioners sent to Washington, and for the compensation of the masters, as well as for the payment of certain other expenses incurred in carrying out the provisions of the act, it is entirely silent as to any costs to be allowed the parties, or any officials other than those above named. It is contended, however, that the right to costs is secured by the provisions of section 331 of the Code of Civil Procedure. That section reads as follows: "When the decision of a court of inferior jurisdiction in a special proceeding, including appeals from the probate courts, shall be brought before the circuit court for review, such proceeding shall, for all purposes of costs, be deemed an action at issue, on a question of law, from the time the same shall be brought into court, and costs thereon shall be awarded and collected as provided by the law." It will be observed that this section applies only to cases "when the decision of a court of inferior jurisdiction, in a special proceeding, including appeals from the probate courts, shall be brought before the circuit court for review." Hence, in order to make this section applicable, it is necessary to ascertain whether Master Miles had been constituted a court of inferior jurisdiction by the act of 1891. When the state, under the provisions of the act of congress, received the money appropriated to refund the direct taxes collected during the war, it thereby became a trustee for those entitled to share in that fund, as is expressly recognized in the title of the act of 1891, and, but for its sovereignty, would have been liable to an action to account for such fund. Inasmuch, however, as the state cannot be sued, in its own courts, except by its own consent, the act of 1891 was passed in pursuance of section 4 of article 14 of the constitution, whereby the general assembly is authorized to "direct by law in what manner claims against the state may be established and adjusted," simply for the purpose of enabling those interested in the direct tax fund to have their claims against the state estab-

lished and adjusted. We do not find anything in the act of 1891 which indicates an intention on the part of the legislature to constitute either of the masters therein referred to a court in the sense of that term as used in the constitution. On the contrary, the provision in section 5 of that act authorizing an appeal to the court of common pleas, followed immediately by the words, "whose judgment shall be final," clearly indicates that the legislature did not intend to create a court, for, if it had, then either party would have had the constitutional right to invoke the judgment of the supreme court, and the judgment of the court of common pleas could not, properly, have been declared to be "final." Again, if the legislature had intended to create a court, it could only do so in the provisions contained in section 1 of article 4 of the constitution, authorizing the general assembly to "establish such municipal and other inferior courts as may be deemed necessary"; and, if they acted under that authority, then the jurisdiction of the court thus established would have been necessarily limited to claims not exceeding one hundred dollars. See *City Council v. Ashley Phosphate Co.*, 33 S. C. 25, 11 S. E. 386. But, as we have said, we do not think that the legislature intended to create a court at all, but simply a temporary commission or tribunal, for a specific, temporary purpose, to ascertain certain claims of a certain character against the state, just as was done in case of the tribunal presided over by Hon. James C. Coit, which this court held, in *Ex parte Childs*, 12 S. C. 111, was not a court. Indeed, that case was stronger than this, for there the tribunal was called in the act establishing it "a court," while in the act of 1891 we find nothing of the kind. If, then, Master Miles was not constituted a court by the act of 1891, then section 331 of the Code does not apply, and there is no statute allowing costs in a proceeding of this kind. It is the judgment of this court that the judgment of the circuit be affirmed.

POPE, J., concurs.

(94 Ga. 410)

**STROUP et ux. v. CHASE.**

(Supreme Court of Georgia. March 19, 1894.)

**CUSTODY OF INFANT.**

The facts showing that the paternal grandparents, by express gift of the mother on her deathbed, and by subsequent acquiescence of the father until he himself died, acquired full and complete parental right to the child in question, the maternal grandmother cannot by habeas corpus deprive them of the custody of the child on the ground that they detain it illegally from her. *James v. Cleghorne*, 54 Ga. 9; *Hammond v. Hammond*, 16 S. E. 285, 90 Ga. 527.

(Syllabus by the Court.)

Error from superior court, Catoosa county; Milner, Judge.

Petition by N. E. Chase for a writ of habeas corpus against Jacob Stroup and wife to recover the custody of a child, Jessie Stroup. From a judgment of the superior court sustaining a judgment awarding the custody of the child to petitioner, respondents bring error. Reversed.

The following is the official report:

Mrs. Chase, the maternal grandmother of Jessie Stroup, a girl of four years, brought a petition for habeas corpus to recover the custody of the child from Jacob Stroup and wife, the parents of the child's father. The ordinary awarded the custody to the petitioner, and this ruling was sustained on certiorari. The petition of Mrs. Chase, sworn to by her, alleges that the child's father, before his death, which occurred a few months previously, gave her to petitioner, to take charge of when Mrs. Jacob Stroup should become so that she would be unable to take care of her; that Jacob Stroup and wife are not able to care for the child properly; that they are very poor, and Jacob Stroup is mentally infirm, and his wife physically so; that the child, being of tender years, and being herself somewhat infirm, needs care and attention which neither Jacob Stroup nor his wife can bestow; that their claim of right to the custody of the child is unfounded; that they restrain the child by overawing and threatening to kill petitioner if she attempts to take her away; that the child is needing medical treatment, as she has some ailment of her head; and petitioner desires her custody so that proper treatment may be afforded her and her wants and necessities supplied. At the trial Mrs. Chase testified that the child's mother died about four years previously, and her father only a short time ago; that defendants were both old and poor, and not able financially or physically to take care of and support the child properly; that Jacob Stroup was very infirm, and able to work but little, and his eyesight was bad; that he never went to church, and had peculiar notions about religion. Witness heard him say that God was an unjust God, and had dealt with him unjustly, and had heard him cursing in the presence of the child, not long ago. She had no knowledge of the child having been taken to Sunday school. It was, and had been all its life, a sickly child. Witness thought it needed medical attention, and did not get any from defendants. They were not able to give it such as it needed. Did not clothe it properly. On some occasions, while the child was at her house, it needed underclothing, and witness gave it some, Mrs. Stroup saying she was not able to "get them for the child." Witness had about \$160, and her boys owed her about \$50. Had no other property. Had two sons working on the railroad, who divided with her their wages, and helped her along, but were not obliged to do so. With their help she expected, if she got the child, to be able to supply its wants prop-

erly. One of her sons got \$45, and the other \$50, per month. At the end of each month they gave her the greater part of their wages, and were anxious to help raise and educate this child. A sister of the child's grandmother testified that on one occasion Jacob Stroup was at her house, and spoke about what a hard time he had to make a living, that he was nearly blind, and able to work but little, etc. She heard him say he had paid \$40 towards the land he and his son lived on, and his son had paid \$50, same being full amount paid for the land. She heard Jacob Stroup, when at her house, saying something about trying to get on the county, in connection with his talk of the hard times he had getting along. The child's mother died when it was only four or five months old. James Hooper testified: After the death of the child's mother its father married a daughter of witness who survived him. After this second marriage the child's father lived on the same place, but in a separate house from defendants, and cropped together with Jacob Stroup. Then the child's father, W. A. Stroup, moved to another county, and lived a while, and afterwards came back and lived with Jacob Stroup in the same way as formerly. Some time prior to W. A. Stroup's death, and while he was sick, he and his wife came to witness' house, where he died, leaving the child with the defendants. W. A. Stroup being sick and unable to work, witness voluntarily, and without solicitation from defendants, helped work the land for corn. He did this because it was needed. Jacob Stroup went after some of the neighbors to help work. He had worked in the field. He is not lazy at all. Goes about where he pleases. Is peculiar in his ways. Will eat with his hat on, etc. The child always had clothes to wear when witness saw it. One Clark testified that defendants were poor, and Jacob Stroup is somewhat infirm, but is very industrious. Stays close at home and works in the field. His wife is a nice old lady, so far as witness knows. He has taken meals at their house, and saw plenty to eat. He had heard Jacob Stroup say he would starve, was not able to work, and was blind. Had heard him talking this way for 20 years. He seems to be a chronic complainer. There was testimony by two doctors that they had examined the child, and found that it was affected with some constitutional trouble, and needed a tonic, which any one could administer after it was prepared. Her mother and father were similarly affected. They died with consumption. One of these witnesses testified that plaintiff is a nice lady, and would be in every way a suitable person to have the custody of the child; that Jacob Stroup is peculiar, and a chronic complainer, but he can see to work, and does work, on the farm; and witness thinks he is able to support himself, his wife, and the child with what aid his wife can give him.

Jacob Stroup testified that the child's mother, when on her dying bed, gave the child, then an infant of five or six months, to his wife to raise and take care of until it was grown. Under this gift he and his wife took possession of the child, and have had it since. They have cared for it, and supplied its wants. Its father never disputed their right to it. He lived on the same land with witness, and they cultivated the crop together, witness furnishing stock, until the spring of 1892, when his son became sick and unable to work. Witness gathered the crop himself. During the first two years of the child's life, she was sickly and hard to raise. Witness' wife waited on her all this time, and cared for her by day and night until she got about stout, and has at no time neglected her. Plaintiff wanted to keep the child a while, and defendants let her stay with the plaintiff, and while there plaintiff made her a few clothes, without any request from either of the defendants. This was all that plaintiff did for the child. She never offered to keep her while she was little and sickly, and now that she is getting up, and will soon be able to do something, plaintiff wants to take her from defendants. They have taken care of the child, and are still able to do so. Have plenty of corn to make their bread until witness makes this crop, and plenty of meat to do them two years. They have a good cow, and get all the milk and butter they need. The child is stout and well. Sometimes she has a rising in one of her ears, which does not last long, and does not seem to hurt her. Witness and his wife are able to work, and do any kind of work that is needed. He has a crop planted this year. He sometimes complains, and says he cannot work, when he does not mean it. Supposes he is a chronic complainer. Has done this for years. Does not go to church much, but is a constant reader of the Bible. He never teaches the child anything improper. He never called on Hooper, or any one, to help him in the crop. This was Hooper's own doing, for the sake of W. A. Stroup, who was sick. Mrs. Grubb testified that she was present when the child's mother was sick, and gave it to Mrs. Jacob Stroup, and told her to take it and raise it until it was grown, and to let no one have it as long as she lived, and told her not to let plaintiff have it, as she had not raised her right. It is now a fine, stout child. Defendants have treated it well and kept it clothed. Its father never took control of it. Defendants always have plenty to eat, and witness thinks they are well able to take care of the child properly. Jacob Stroup is peculiar, but very industrious. Witness thinks he means what he says.

Payne & Walker, for plaintiffs in error.  
W. E. Mann, for defendant in error.

PER CURIAM. Judgment reversed.

34 Ga. 514)

**STEININGER et al. v. DONALSON.**

(Supreme Court of Georgia. April 23, 1894.)

**EXECUTION—CLAIM OF THIRD PERSON—QUESTION FOR JURY.**

The facts in evidence made a case for determination by the jury, and the court erred in directing a verdict for the claimant.

(Syllabus by the Court.)

Error from superior court, Decatur county; B. B. Bower, Judge.

Action by J. Steininger & Co. against John B. Donalson, and L. A. Donalson interposed a claim to land levied on under an execution against defendant. There was a judgment for claimant, and plaintiffs bring error. Reversed.

The following is the official report:

An execution in favor of Steininger & Co. against John B. Donalson for \$264.03, principal, with interest, etc., based upon a judgment of July 8, 1889, was levied on lot No. 232, and the west half of lot No. 210, in the Twentieth district of Decatur county. A claim was interposed by Miss L. A. Donalson, daughter of defendant, to two acres off the southwest corner of the west half of lot No. 210. Upon the trial the court directed a verdict for claimant, to which plaintiffs excepted, alleging: (1) The evidence was sufficient to raise an issue as to the bona fides in the transaction by which a large amount of property passed from defendant to John E. Donalson pending plaintiffs' suit, and a short time before judgment, and then the property claimed passed from John E. Donalson to claimant without consideration, she being a daughter of defendant. (2) "That the fact that defendant in *fi. fa.* went upon the land claimed, and at his own expense did purchase lumber and erect a dwelling for claimant, subsequent to the date of plaintiffs' judgment, which is now occupied by the defendant in *fi. fa.* and the claimant, who is his unmarried daughter, and several hundred dollars of the proceeds of one lot returned to defendant in *fi. fa.*" Upon the trial plaintiff put in evidence the *fi. fa.*, and closed.

For claimant, Fain testified: "At the date of the levy, claimant was in possession of the property levied on,—was living on the place. At that time defendant was living with claimant, his daughter, on the property levied on." Claimant put in evidence deed from defendant to J. E. Donalson to lot 232, and the west half of lot 210, consideration, \$661.53, dated March 25, 1889; also, deed from John E. Donalson to Fain to lot 232, consideration, \$346.33, dated December 2, 1889; also, deed from John E. Donalson to claimant to west half of lot 210, consideration, \$157.67, dated December 3, 1889. In rebuttal, plaintiff showed the filing of the suit on which their judgment was obtained, prior to the deed from defendant to J. E. Donalson; also, that defendant returned this property for taxation in 1888, and in 1889

returned no land at all, and only \$300 personalty. For plaintiffs, the defendant testified: "I suppose that was all the property I had when I gave in my property under oath in 1888. After I made the deed to John E. Donalson, I owned nothing else I did not give in. Think I owed the Corbin Banking Company about \$600, Loeb over \$300, and other debts. If Steininger was suing me at the time of this deed, I do not recollect it. Buck Bell was suing me somewhere about that time. Do not think I owed him \$200 or \$300 at that time. Thought I had paid Ehrlich. Think he got judgment against me about that time. I owed Jake Hayes a good large sum of money at that time. [Claimant admitted defendant's insolvency.] Fain married my daughter before Mr. Donalson made the deed. Fain got land from John E. Donalson. I suppose he had the money. When John E. took that deed, I had no arrangement with him about making the deed back to me and my family. Suppose the land was worth, when I made the deed to John E. Donalson, three or four dollars per acre, and there was 375 acres. When this thing was going on, Gray & Butler did not offer me anything for the land, and there was no trade pending between Butler in regard to any land, nor any trade between Gray and myself about this land. He had made me no offer through Buck Bell. I have talked with Bell about the purchase, and suppose I asked him, for the land, about the same cousin John E. Donalson gave. Do not remember exactly. Bell offered me nothing for it, and I did not own it at that time. When I made John E. the deed, I gave him possession, and rented the land from him a year after that. He took the land; it was his. I could not say there was any time specified about his giving the land back,—about his making the deed back when I paid the money. It might have been about a year he gave me to redeem the land. I merely made him the deed to secure him and the Loeb debt and Corbin Banking Company. Do not think I told Bell, if he would get me \$1,800 for the land, I would take out the \$150 I owed him. It was after J. E. got the land that I talked with Bell. I was trying to sell the land because J. E. told me to. I had nothing to do with the title. It is not my recollection that, if I could sell the land to raise money to pay Mr. Donalson, I was to have all above those debts. The agreement was to pay those,—the debts to Loeb and the banking company; and I wanted to pay them, and that was all I cared for, and I owed him, and wanted to pay him. I thought it would take more than the land would bring to pay and satisfy him. I live now on lot 210. Was not living on the land sold to Fain when my house was burned up. Did live on part of the land I deeded to J. E. Donalson. I have been there ever since. Lived in a house that was built for one of my children. Did not cultivate



any part of the land sold to Fain, and none of my tenants did. Fain cultivated it. I think I built that new house in the fall of 1889, getting the lumber from Littlefield and Rawles. Do not think I told Littlefield that, as soon as I could sell this land, I would pay him for the lumber. I did not state, in the presence of Evans, that I had placed, or would place, my property where my creditors could not get hold of it." Littlefield testified that, when defendant got the lumber for the house, he said he could not pay for it until he got pay for his land; that it seemed to witness at that time defendant was about to trade his place to Speight, though witness was not positive; that that was in 1889, later than July; that defendant did not say what he expected to get for his land, and said nothing about having made a deed to J. E. Donalson to the land. Evans testified that he heard defendant say that neither Ehrlich nor any one else could get anything out of his old place, because it was sold to Fain, and the title taken in J. E. Donalson for two years prior to that sale, that that was the way witness understood it; that defendant told witness at the same time that the deeds had been in John E. Donalson for two years to secure money that he owed Donalson; that witness has no recollection about what was said in that conversation was to be done with the property after Donalson and Fain were paid what was owed them; and that this was the substance of what witness recollected of the conversation. Thomas, who now owns the fl. fa. of Steininger & Co., testified: That he heard Donalson talking with Evans. That Donalson said he owed Ehrlich and had sold his place, but neither Ehrlich nor any one else could get anything; that he would take his time now in paying these outside parties, after paying John E. Donalson and Fain what he owed them; that, when this land was sold to Fain, he had to allow John E. to keep out what he owed him, and a small amount due Fain, and with the balance of his money, after paying these debts, was going to pay for the lumber in his house, and what was over he was going to keep to support his family. That Fain told witness that, when Fain got this land, defendant owed Fain a hundred dollars or so, and allowed Fain to keep it out; that defendant did not make him (Fain) a deed to the place; that he took the deeds from John E. Donalson, and what papers Mr. Donalson had went into his possession, which he relied on to protect himself in the matter. John E. Donalson testified: "The moving consideration of taking the deed from defendant was to collect a debt I had of \$661. I bought the land subject to a mortgage of the Corbin Banking Company for \$541, and another mortgage in favor of Fain. I bought the land, agreeing to pay off these mortgages, and paid them off. The consideration is about \$1,500. I got all of the money from Fain. The debt to me

was a valid debt. I paid the Corbin Banking Company and Fain debt with money furnished by Fain. It did not cost me anything. After I took my money, I gave Fain the papers. He bought one lot of the land, and paid me enough to satisfy my debt and the Corbin Banking Company. I think he paid me \$1,500 for the one lot. There was nothing done with the balance of the property by Fain's direction or instance, nor at the instance of defendant. What was done was by my own motion. Fain left enough money with me to pay off my debt and these other debts, and that gave me a half lot. My object was to collect my debt, and I made a deed of gift to claimant. Think I did that on my own motion. Defendant did not make me any request. Defendant was mistaken about my giving him time to redeem the land when I took the deed. I rented it to him that year. Fain did not live on that place at all. When defendant made the deed, I knew that for a large amount he would be insolvent. Heard him say he owed debts, but I did not know he was absolutely insolvent. There was no arrangement or understanding between us by which he was to have control or direction of any of the property after he sold to me, but I told him, if he could find a purchaser for the land at any time, he could do so. Do not think I stated that, if the land brought over and above my debt, he was to have all that was over. Think my deed to claimant was made subsequently to my deed to Fain. There was absolutely no kind of reservation that defendant was to have any benefit from it after I got it. I made the deed of gift because they were relations of mine. I had enough; had collected my debt. I pressed him pretty hard to make the deed. He wanted to pay the banking company, and I thought that by agreeing to pay that he would give me a deed to secure my individual debt. It was not the intention of taking this deed to delay or hinder creditors. At the time of this whole purchase from defendant I did not know the land, and would have hated to have given a thousand dollars for it. Defendant never told me what it was worth, that I know of. I think there was some money left over out of that brought me by Fain after paying these debts, and may be one or two hundred dollars went back to defendant out of that transaction. I gave him some of it back, and his daughter a deed to lot of land. There was no trade of that sort between us when I took the deed. I assumed the banking company debt, Fain debt, and Loeb debt. I never spoke to Fain on the subject until he came up to get his deed, and I do not know that he did that. I may have sent it to him. I returned the money to defendant on my own motion. I had paid my debt, and he might have said to me that I had got my money, and ought to give him that. I do not know how that was. Suppose defendant made the trade

with Fain. I told defendant he could sell the land to anybody; that, so I got my money, I was satisfied." Fain, being recalled, testified: "Think I gave Donalson \$1,550 in cash for the land in the deed. Paid that much because I wanted the land. I made trade with the defendant, who told me he did not own it; that John E. owned it, and had authorized him to sell it if he could. Do not know what was to be done with the balance of the money after paying John E. I was never given any of the money to take back to defendant. Do not know why the consideration expressed in the deed is \$336.40, when I paid \$1,550 for it. I was to give John E., for the land, what I did,—\$1,550. I came up here to buy the place, bargained for it through defendant, and came to town to pay the money. John E. Donalson was not here, and I turned the money over to Nusbaum, his agent, until he came home, and took up the Corbin Banking Company's papers and others, and would make me a deed. Then the money was to go to John E. I did not hand defendant, nor any one for him, a dollar of that purchase. Do not know what J. E. gave any one for him, nor what defendant owed J. E. Did not hear defendant say that J. E. was holding the property to save him from trouble. When I bought, there was no arrangement made by which defendant was to be benefited. I actually paid that money for the land. It was my money. Have no knowledge of any arrangement between defendant and J. E. by which the money was to go back to defendant." The defendant testified that he never got back a dollar of the \$1,550 that Fain says he paid, and none of his family got back any that witness knows of; that he was owing John E. for a debt of Loeb's, and never got back a dollar that he remembered. Littlefield further testified that the cost of erecting the dwelling, with the cost of the material, were paid by defendant since the date of plaintiffs' judgment.

G. F. Westmoreland and D. A. Russell, for plaintiffs in error. Donalson & Hawes, for defendant in error.

**PER CURIAM.** Judgment reversed.

(94 Ga. 730)

#### MORRISON v. DODGE.

(Supreme Court of Georgia. April 30, 1894.)

**REVIEW ON APPEAL—INSUFFICIENT RECORD.**

Neither the documentary evidence specified in the bill of exceptions, nor any brief of the same, being set out and authenticated, either in the bill of exceptions or in the transcript of the record, and it not appearing that said evidence ever was briefed and approved by the judge, so as to become a part of the record, and none of the errors assigned being susceptible of proper examination and adjudication without considering the evidence, no reversal of the judgment of the court below is legally possible.

(Syllabus by the Court.)

Error from superior court, Montgomery county; C. C. Smith, Judge.

Action between D. Frank Morrison and Morman W. Dodge. There was a judgment for Dodge, and Morrison brings error. Affirmed.

D. W. Rountree, R. R. Norman, and W. L. Clarke, for plaintiff in error. De Lacy & Bishop, for defendant in error.

**PER CURIAM.** Judgment affirmed.

(94 Ga. 594)

#### RUSSELL v. STATE.

(Supreme Court of Georgia. June 11, 1894.)

**CRIMINAL PROSECUTION — LEADING QUESTIONS — NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—RECORD ON APPEAL.**

1. That the presiding judge, in the exercise of his discretion, during the trial of a criminal case, allowed the solicitor general to propound leading questions to the state's witnesses, presents no cause for a new trial, especially when it appears that no objection to these questions was made by counsel for the accused, and the ground of the motion fails to disclose what the questions were.

2. It appearing that the accused was represented at his trial by nine attorneys; that only one of them made an affidavit as to ignorance of the alleged newly-discovered evidence; and that this evidence itself would not probably produce a different verdict,—a new trial cannot be granted for this cause.

3. An affidavit presented to the presiding judge, after a motion for a new trial has been heard and finally decided, though identified by the signature of the judge, is no part of the record, and cannot be considered by this court in reviewing the judgment refusing a new trial. This is so, although the facts set forth in the affidavit may be material, and such as might have influenced the judge in making up his decision on the motion.

4. Although the principal witnesses for the state conflicted in some respects with themselves and in some with each other, there was ample evidence to sustain the verdict; and, the same having been approved by the trial judge, this court is constrained to allow it to stand.

(Syllabus by the Court.)

Error from superior court, Clayton county; R. H. Clark, Judge.

Israel Russell was convicted of a crime, and brings error. Affirmed.

J. B. Hutcheson, Doyal & Doyal, W. M. Wright, Watterson & Krinsey, and J. P. Chatfield, for plaintiff in error. J. S. Candler, Sol. Gen., and Geo. W. Stevens, for the State.

**PER CURIAM.** Judgment affirmed.

(94 Ga. 676)

#### ADAMS v. SPIVEY.

(Supreme Court of Georgia. Aug. 14, 1894.)

**EJECTMENT—TITLE ACQUIRED IN PAROL PARTITION.**

Where tenants in common agree by parol upon a partition, defining in the agreement the boundaries of the part assigned to each in severalty, and each enters into possession, thus

executing the agreement, the partition clothes each with a perfect equity, and is thus the equivalent of legal title; and, on such title, recovery may be had in ejectment, or in a statutory action for land, against one who subsequently enters without a better title.

(Syllabus by the Court.)

Error from superior court, Jasper county; C. L. Bartlett, Judge.

Action by Emily F. Adams against Thomas Spivey to recover real estate. Judgment for defendant, and plaintiff brings error. Reversed.

The following is the official report:

Emily F. Adams sued Thomas Spivey in complaint for land lying within the corporate limits of Machen. The land was described as: Beginning at the corner, formerly a stake, on the lands of Willis Newton, on the public road leading from Monticello, in said county (Jasper), to Shady Dale, in said county, and passing through Machen; thence running north, 35 deg. east, along said public road 35 feet, more or less, to a corner of a lot occupied by O. H. Arnold, in said town or city; thence north 200 feet, more or less, to an original lot line, over which the dwelling house of Willis Newton is erected, said original line running due east and west through the county; thence due west on said original line to the lands of Willis Newton, adjoining the lands of petitioner; thence south to the stake upon said public road, the beginning point,—embracing one-fourth of an acre, more or less, and being a part of a lot of land, number not known, but distinguished and originally known as a part of the "Whitfield Mill Lot," in the Sixteenth district of Jasper county. The said land sued for being bounded on the north by other lands of petitioner, on the east by lot occupied by O. H. Arnold, on the south by the public road, and on the west by the lands of Willis Newton, and on which lot sued for is a business or store house now occupied by said Spivey. After the introduction of the evidence for plaintiff, a nonsuit was granted on the ground that the evidence was insufficient to authorize a recovery, to which ruling plaintiff excepted.

The evidence for plaintiff showed the following: Matthew Whitfield died in 186—, leaving a will by which his lands in Jasper county were given to his four grandsons, John B., Bolling, Robert, and Clifton, to share in equally after the death of his wife. By deed made December 29, 1869, his grandson Matthew Whitfield conveyed to Clarence Hill all his interest in the estate of his grandfather. Clarence Hill, and after his death his administrator, Joshua Hill, controlled in the estate the interest to which said Matthew was entitled as a legatee. In 1874 the three other legatees and Clarence Hill agreed to have the lands divided, but whether the agreement was in writing or not does not appear. Commissioners divided the land, but whether they made a written report or not does not appear. It was distinctly understood by all the legatees and the commis-

sioners that they were to divide the land so as to make the public road leading from Shady Dale to Monticello the line between the different parcels. The lands allotted to Clarence Hill lay on the west of that public road, and those allotted to Bolling Whitfield on the east. Clarence Hill in the division received the Beeland lot, and Bolling Whitfield the mill and Mitchell lot (according to the testimony of John G. Whitfield). The public road was the dividing line between the lands of these two. After the division, each party went into possession of his land. There has been no change in this public road, as to where it runs, for 30 years. John G. Whitfield was present when the small tract of land Newton bought of the executors of Matthew Whitfield to build on was surveyed, and drove down the stake on the road to designate the corner of the land on the road. This was before the division of the land among the legatees. The stake was a piece of oak rail. It was at this corner the surveyor commenced his survey (hereinafter referred to) of the 20 acres for plaintiff. Willis Newton's purchase of the executors was a part of the Beeland lot and a part of the mill lot; was west of and in the rear of the stores. The corner of Newton's purchase was on the old road as it now runs. In the division Hill got the Beeland lot and Whitfield lot. Hill claimed during his lifetime that he did not own any land lying east of the public road, but that that road was the boundary between his lands and Bolling Whitfield's. One Tucker bought from Bolling Whitfield some of the lands Bolling got in the division of the estate, and he deeded to Tucker only to the public road. Both Hill and Bolling Whitfield said, when they were in possession of the lands, respectively, on each side of the road, that they claimed the public road as the boundary of their lands. The administrator de bonis non of the estate of the elder Matthew Whitfield recognized Clarence Hill as the rightful owner of the one-fourth interest in the estate of Matthew Whitfield that was owned by the younger Matthew as a legatee of the elder, and in distributing the estate turned over to Clarence Hill, as long as he was in life, and to his administrator, his share of the estate. Under the will this administrator de bonis non wound up the estate of Matthew Whitfield. Clarence Hill died some time during 1875. On March 23, 1875, Clarence Hill by deed conveyed to Emily F. Adams all that tract of land in the county of Jasper "adjoining lands of Bolling Whitfield, Willis Newton, and Robert Whitfield, beginning at the corner of Newton's land on the public road from Shady Dale to Monticello, in Jasper county, and running from Newton's to Shady Dale as far as what is known as the corner of the 'Little Beeland Field,' containing twenty acres, more or less." On February 13, 1890, the county surveyor of Jasper county surveyed for Mrs. Adams 20 acres

of land, and furnished a plat of the same. Before commencing the survey, he was shown a deed from Clarence Hill to Mrs. Adama. The survey commenced at a point on or near the public road which was pointed out to him as the beginning corner of Willis Newton's land. Newton was present, and showed said corner, as near as possible, as being the corner of his land on the public road. From this point the surveyor ran up the public road, north, 35 deg., east, 15.65, thence north, 44 east, along the public road, to what was shown him as the corner of the "Little Bee-land Field," and laid off 20 acres, with the front as a base, lying north and northwest of the public road. This survey included and embraced the land on which the store houses at Machen are situated. The plat (which was introduced on the trial) also showed another line, run by the surveyor the same day, which took the original line as a base, which original line runs back (north) of the stores at Machen, making a parallelogram which measures 20 acres. The father of plaintiff testified: "Have been living where I now reside for many years, and lived there before a division of the lands of Matthew Whitfield was made. After the division was made, the plaintiff purchased from Clarence Hill 20 acres of the land, that he drew in the [division of] the estate of Matthew Whitfield. I have occupied this land since the purchase thereof in 1875. My daughter gave it to me for life. I have, by tenants, had a part of it cultivated at different times, but have never, either by myself or agent, cultivated the lands now in dispute. Did not notify Leverett and others not to build on it. Was present when Col. Hill gave notice to Leverett and others not to build on it. Hill was claiming it. I did not then claim it. I did give notice not to trespass on the land lying west of the old road, but not as to the particular land in dispute. The stores were built without objection from me. I did not know where the line was until I sent to town for the deed, which was about the time the surveyor made his survey. I did not object to the occupancy and cultivation of it by Willis Newton. The road runs now as it did when plaintiff bought and for several years before. I know of no change in it, and had lived in the house where I now live, on said 20 acres, several years before the purchase. At the time of the purchase, I was living on the opposite [side] of the road, and nearer Shady Dale. My daughter purchased the land that I might have a home for my life, and I have lived there ever since. Clarence Hill had no land east of the public road."

A. M. Speer and J. H. Holland, for plaintiff in error. Fleming Jordan, for defendant in error.

**PER CURIAM.** Judgment reversed.

(94 Ga. 715)

**ASHWORTH v. EAST TENNESSEE, V. & G. RY. CO.**

(Supreme Court of Georgia. March 19, 1894.)  
**NEW TRIAL—ACTION AGAINST RAILROAD COMPANY  
 —PERSONAL INJURIES.**

There was no error in granting a second new trial in this case.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by J. B. Ashworth against the East Tennessee, Virginia & Georgia Railway Company for injuries. Verdict and judgment for plaintiff. A new trial was granted, and plaintiff brings error. Affirmed.

Following is the official report:

Ashworth sued the East Tennessee, Virginia & Georgia Railway Company for damages for personal injuries. As to the circumstances attending the injury, and the cause thereof, he alleged: He was going to his home at night, along — street, a public road used by the public in traveling to and from Rome; said street being one opened by the New Rome Land Company, and a dummy line being then used along and through the street, and across the track of defendant. He came to the crossing of the railroad track across the dummy line and street. The defendant has a side track running just along its main track, and across the dummy line and street; and when he approached the crossing he found on each side of the dummy line and street, and between him and the defendant's main line, a long line of standing freight cars. Expecting no danger, and no signal being given at the crossing, he stepped from between the standing cars at once, upon the main line; but as soon as his feet rested on the main line he perceived an engine and train of cars approaching, and already on him, running at the rate of 20 miles an hour, silently, without signal or warning. That he attempted to turn and escape, but, using all rapidity, was struck by the front of the engine. The declaration then detailed the nature of the injury inflicted, and alleged negligence on the part of defendant because the train was not stopped at the crossing, because no signal was given at the crossing, and because freight trains and cars were left standing on the side track, obstructing the view of the main track. By amendment he alleged that when he approached the railroad of defendant he used all care to pass the crossing safely; that before going on the side track or main line he looked as carefully as might be for an approaching train, but, because of the obstructions (alleged in the declaration) negligently left by defendant between the road on which he was and its main line, he could not see the main line; that he stopped and listened as carefully as might be for an approaching

train, but, because of the negligently silent and rapid manner in which it ran, could hear no sound of it; that it was the duty of the conductor and engineer on the train to come to a full stop within 50 feet of the crossing of any independent railroad track, and then move slowly over such crossing; that the dummy line was an independent railroad, and he had a right to expect defendant to stop within 50 feet of the crossing, and then move slowly over; that he was within 10 feet of said crossing, and, had such duty been observed by defendant, it would have been impossible for him to have been injured, but defendant ran negligently, willfully, and maliciously, over the crossing at the rate of 20 miles an hour; that beyond the crossing of the public street, within 400 yards of it, and just ahead of the train, as it was then running, was one of the public roads of the county; that had a blow post been placed 400 yards from such crossing, and the whistle blown thereat, he could not have been injured; that he had the right to expect defendant to have blow posts 400 yards from the public street, and 400 yards from the crossing of the public road, and that whistles would be blown or bells rung at such posts, but defendant failed to erect such posts, or blow any whistle or ring any bell in approaching either of the crossings, or the dummy line crossing. Plaintiff obtained a verdict for \$6,500, which was set aside on motion of defendant. The case being again tried, the plaintiff had a verdict for \$5,000. Defendant moved for a new trial, and the motion was granted. Plaintiff excepts.

The grounds of the motion were that the verdict was contrary to law, evidence, etc., and excessive, and because the court erred in refusing to grant a nonsuit. Also, because the court erred in charging: "Four hundred yards from the point where a railroad crosses a public road, it is the duty of the railroad company to erect a post, and then it is the duty of every engineer driving an engine on that railroad, when he reaches that post, four hundred yards from a public road crossing, to begin to sound his whistle, and to continue to sound it until he reaches that crossing; simultaneously check the speed of his train, and continue to check it, so that he can stop his train if any body or thing shall be on the crossing. That is the law, and a failure to comply with those requirements is made criminal under the law of Georgia." Alleged to be error because, though substantially in the language of the statute, it was not applicable to the facts, as shown by the evidence; movant insisting that the proof showed that the train came to a standstill within the 400 yards from the public road crossing, and it would have been wholly impracticable to comply with the statutory provisions. That plaintiff was not injured at the public road crossing, but two or three hundred yards south of it, and the

statute was intended to protect persons crossing at public crossings. That the train was under such control that it was stopped before it reached said road crossing. And that it was misleading and erroneous to charge, under the facts, that the failure to comply with said statutory provisions was criminal. It directed the attention of the jury to a failure to comply literally with those provisions, as the pivotal point in the case. Error in charging in reference to a projected street in a projected town, neither of which were ever built: "But, under the circumstances, if you find further that it [the projected street] was a place that was traveled frequently by the public, and that it was traveled under such circumstances as to have become known to the defendant that it was used for a passway across the defendant's track,—and I charge you that the fact that the planks were laid as for a road crossing, and permanently, might determine whether the defendant's agents knew it was used as a crossing,—I say, if you find those facts true, you may consider that in connection with all the other circumstances in the case, and say whether or not the defendant, by its agents, on this particular occasion, used such precaution as was commensurate with the safety of persons crossing there." Alleged to be error, in that it imposes a greater degree of caution upon defendant in running its trains across paths and ways (neither public roads nor private ways established by law) which the public, or some portion of it, choose to use, than at other points not protected by statutory provisions, and because it imposes additional caution upon defendant, if its agents knew of such uses, and made a single circumstance sufficient to fix notice upon defendant, to wit, "the fact that the planks were laid as for a road crossing, and permanently." Movant insists that the court assumed this to be a fact, and did not submit the question of whether it was or was not a fact, and that the proof showed that the land company had put in some planks at that place for its own convenience. Movant alleges that the charge erroneously makes this assumed fact sufficient to affect it with notice of how the plankway was used, and imposes upon it a degree of caution required at no other place, except at public crossings. The caution must be commensurate with the safety of persons crossing them, without regard to its own rights or convenience. Defendant must be an insurer of the safety of persons crossing at that place. Error in charging: "If there was an independent railroad line crossing the defendant's railway at the point where this injury occurred,—and you are to find whether that was true or not,—then I charge you that a train of this defendant, within fifty feet of where it crosses this independent railroad line, should come to a dead stop, and then move slowly across the other railway line. Now, the court char-

ges you that was defendant's legal duty. You are to say whether or not its agents in charge of this train complied with this law, and, if you find that they did not, you are to say whether, under the peculiar facts of this case, that was or was not negligence, if you find it that way contributed to plaintiff's injury." Alleged to be error because the statutory provisions therein contained are solely for the prevention of collision of trains, and have no reference to the safety of persons traveling on or near railroads crossing each other.

H. M. Wright, Nat Harris, and R. R. Harris, for plaintiff in error. McCutchen & Shumate and O. W. Underwood, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 587)

#### HOWARD v. STATE.

(Supreme Court of Georgia. April 16, 1894.)

##### ADULTERY—HUSBAND AS WITNESS.

The crime of adultery and fornication being one in which the woman is necessarily guilty as well as the man, the husband of the woman is an incompetent witness against the man to prove the act of adultery and fornication, although, by statute, persons accused of this offense must be severally indicted, and although the acquittal of one will not operate to acquit the other. The incompetency of the husband as a witness existed prior to the evidence act of 1866; and the exception in that act in these words: "Nothing herein contained shall apply to any action, suit or proceeding, or bill, in any court of law or equity, instituted in consequence of adultery, or to any action for breach of promise of marriage,"—embraces both criminal and civil proceedings. Acts 1866, p. 138.

(Syllabus by the Court.)

Error from criminal court of Atlanta; T. P. Westmoreland, Judge.

William Howard was convicted of adultery and fornication, and brings error. Reversed.

The following is the official report:

Howard was convicted of the offense of adultery and fornication. His motion for a new trial was overruled, and to this ruling he excepted. The motion was upon the ground that the verdict is contrary to law and the principles of justice and equity; also upon the ground that the court erred in allowing, over the objection of defendant, one Spencer, a witness for the state, to testify, he being the husband of the woman with whom it was alleged defendant had committed adultery, the objection being that said witness was incompetent to testify to a crime affecting his wife. Spencer was the only witness for the state, and testified to such facts as appear sufficient to convict the defendant.

Geo. P. Roberts, for plaintiff in error. L. W. Thomas, for the State.

PER CURIAM. Judgment reversed.

(94 Ga. 552)

#### HAYES v. MAYOR, ETC., OF LITHONIA. (Supreme Court of Georgia. June 11, 1894.)

##### CERTIORARI—SUFFICIENCY OF PETITION.

Where one of the errors assigned in a petition for certiorari is that the judgment complained of was without any evidence to support it, and contrary to the evidence, the petition should set forth the substance of all the evidence that was introduced; and a statement in the petition that a number of witnesses were introduced to prove the commission of the offense, but none of them would so testify, without setting out what they did testify, is insufficient. For this reason the judge did not err in refusing to sanction the petition for certiorari in the present case.

(Syllabus by the Court.)

Error from superior court, Dekalb county; R. H. Clark, Judge.

Petition for writ of certiorari by one Hayes against the mayor and town council of Lithonia. From a judgment denying the writ, petitioner brings error. Affirmed.

The following is the official report:

A petition for the writ of certiorari was presented on behalf of Hayes, alleging that he was illegally convicted and sentenced in the mayor's court of the town of Lithonia under the charge of "violating section 11 of the town ordinance by keeping spirituous liquors for sale." The writ was denied, and Hayes excepted. The ordinance, as set forth in the petition, is: "That it shall be unlawful for any person or firm of persons to have or to keep for sale in any quantities whatever, in the town of Lithonia, Ga., any spirituous, vinous, malt or other intoxicating liquors of any kind whatever; this to include all such drinks as vici tonic, rice beer, cider of any kind except fresh apple cider made in the community and which has no intoxicating qualities. The fact of a sale being made by any person in said town of such liquors, shall be sufficient evidence to make out a case of violation of this ordinance. Any person convicted of a violation of this ordinance shall be fined in a sum of not less than \$25 and not exceeding \$100, and in default of payment of same shall be sentenced to work in the chain gang of said town not less than ten days nor exceeding sixty days." The petition alleges that on July 4, 1893, Hayes was arrested by the town marshal, and required to go before the mayor under said charge. The only testimony on the part of the town was by the marshals, who said that they found some jugs of corn whiskey in the possession of Hayes, which they seized and brought into court. One of the jugs was not full; the other two were, one of which was corked and sealed, and so remained. Said witnesses further said, when they arrested Hayes, he said he had never sold any liquor, nor did he have it for sale; that some party outside the limits of said town had written to him to bring him some, but that he had never seen the party. The mayor then rendered the following judgment:

"Found guilty; sentenced to pay a fine of twenty-five dollars and cost, or to serve 35 days in the town chain gang." Petitioner alleges that this finding and judgment is erroneous, because: (1) The ordinance is illegal, unconstitutional, and void, the charter of the town giving no authority to pass it, or to collect fines by imprisonment for their nonpayment. (2) The judgment is a nullity. It does not define whether petitioner shall do 35 days' work or pay the city \$25. (3) The finding was without evidence to support it, contrary to the evidence, and contrary to law, justice, and right.

J. N. Glenn, for plaintiff in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 549)

### McDONALD v. TISON.

(Supreme Court of Georgia. June 11, 1894.)

SPLITTING CAUSE OF ACTION—ASSENT OF DEFENDANT—PRESUMPTIONS—JUSTICE'S COURT—JURISDICTION.

A creditor cannot without the assent of his debtor, but with such assent he may, cut up into several parcels an open account resting on one and the same entire contract, so as to maintain thereon several actions in a justice's court. The debtor's assent should be presumed where the actions were simultaneously brought in the same court and duly served, and no express objection to the severance appears to have been made, by plea or otherwise, until after appeal to the superior court, and after judgment on appeal was rendered in one of the actions. It was then too late to raise the question by pleading this judgment as a former recovery on the contract in abatement of one of the actions still pending on appeal, the defendant admitting on the trial of the plea that the part of the account thus resisted is just and unpaid, and it being manifest that none of the items therein were embraced in or covered by the suit in which the judgment was rendered. The facts showed that, while the judgment may have been based on the same original contract involved in all the cases, it really decided nothing as to any items of the account except those embraced in the one suit, and this was virtually admitted in open court. Effect should not be given to general rules of technical law where to do so would defeat the admitted justice of the particular case, these rules being intended to secure justice or guard doubtful cases, and not to work palpable and manifest injustice in any instance. No question of jurisdiction was raised, the jurisdiction of the justice's court being conceded by pleading the judgment of the appellate court as a binding adjudication. If the jurisdiction was sufficient as to one of the cases, it was sufficient as to the others, each case not involving more than \$100 principal.

(Syllabus by the Court.)

Error from superior court, Glynn county; J. L. Sweat, Judge.

Action by John W. Tison against W. A. McDonald. There was a judgment for plaintiff, and defendant brings error. Affirmed.

The following is the official report:

Tison sued McDonald, September 7, 1891, on an account dated May 30, 1891, for nine head of beef cattle,—\$99. In justice's court the plaintiff had judgment, October 15, 1891,

and defendant appealed to the superior court, where, on December 7, 1892, he pleaded that the plaintiff already had judgment against him for the cause of action on which this suit was based, having, on May 6, 1892, in the superior court, obtained judgment against defendant for \$88 principal, besides interest and costs, in a suit between the same parties and on the same cause of action as in the present. The jury found for the plaintiff, \$99, with interest. A motion for new trial was made, to the overruling of which exception is taken. At the trial, plaintiff testified that defendant owed him \$99, and that the same was due and unpaid. The money was owing for nine head of cattle that defendant had purchased from him, a lot of beef cattle, at \$11 per head; and said debt was made on account of such purchase. The transaction arose thus: Plaintiff owned a bunch of cattle, and defendant, being in the butcher business, wanted to kill them for beef, and applied to plaintiff for them. Plaintiff told him he might have what he wanted of them at \$11 a head, and to kill them as he wanted them, and that defendant was to pay plaintiff whenever he called for the money. Defendant killed a lot of the cattle, and paid some money on account of them, but never paid up in full; and, at the time of the filing of this suit, defendant owed him \$220 on account of the cattle so killed, which was all due when said suits were instituted; and he divided such amount into three parts, and brought three separate suits therefor in the justice's court; and the judgment obtained by him against defendant on May 6, 1892, in the superior court, was in one of said suits and for a portion of said cattle. The cattle were all sold by him to defendant on the same day, defendant coming to his home to see him about killing them. Defendant agreed with him there. The price agreed on (\$11 per head) was due and payable by defendant as he killed each head. Plaintiff did not know the number he butchered, and relied on him to tell the number he killed, which he did. Something was also said by defendant at the time (to which plaintiff agreed) that he was to pay plaintiff at the end of each week for the number of cattle he had killed during that week. Plaintiff has never obtained a judgment against defendant for which plaintiff is now suing, nor has the same been paid, though plaintiff has demanded payment from him repeatedly. Defendant testified substantially as did plaintiff, and, further: "Under the agreement with plaintiff, I understood that the money for each beef was due and payable by me as soon as I had a beef killed. The price was \$11 a head. I think we had some agreement about paying at the end of each week for the beeves killed during that week. Some weeks I killed as many as 8, 9, or 10 head a week. I owe the money, and consider it a just debt." In evidence was

the record of the case in which judgment was obtained against defendant on May 6, 1892, in the superior court. It was commenced in a justice's court on September 7, 1891, on an account dated May 20, 1891, in favor of plaintiff against defendant, for eight head of beef cattle, at \$11 per head,—\$88. Judgment was rendered in the justice's court in favor of plaintiff, October 15, 1891, and defendant appealed to the superior court, where the jury found for the plaintiff, \$88, with interest, upon which verdict judgment was entered, as before stated. The motion for new trial alleges that the verdict is contrary to law and evidence, "the evidence showing that the account made the basis of the three suits was one entire contract, and that there had been a former recovery thereon"; and "such an account cannot be lawfully divided, and thereby brought within the jurisdiction of a justice's court, and made the basis of more than one suit in such court." For like reasons, it is alleged that the court erred in charging the jury that, if they should find that the cattle were to be paid for as killed or whenever plaintiff might demand the money, the jury must find in favor of the plaintiff.

Johnson & Johnson, for plaintiff in error.  
D. W. Krauss, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 549)

McELVEEN COMMISSION CO. v. JACKSON et al.

(Supreme Court of Georgia. June 11, 1894.)

CONTINUANCE—NEW TRIAL—ABSENCE OF PARTY—SICKNESS IN FAMILY—ACTION AGAINST PARTNERS—ONE DEFENDANT NOT SERVED—EFFECT.

1. The court may refuse to grant a continuance applied for on the ground of the providential absence of the party, when the truth of the ground is unsupported by any evidence, except a telegram from the party to his counsel.

2. A new trial may be denied, the ground of the application being that the movant was absent from the court because of the sickness of his wife, where the only evidence of her sickness is his own affidavit, if the affidavits of other witnesses, to whom the court gives credit, contradict this affidavit as to a material matter, and if, according to the party's own showing, the wife's sickness was not sudden, but had existed for some days, so as to afford time to furnish the court with proper evidence of its existence before the trial began.

3. It was not error to refuse to postpone the hearing and decision of the motion for a new trial to enable the movant to obtain other affidavits, which he said he could procure, to support his own, as to the sickness of his wife; he not naming any person or persons who could or would make such affidavit, or who had knowledge of the alleged sickness.

4. It is not cause for a new trial that the court refused to dismiss the action on motion of defendant; the ground of the motion being that the suit was against a partnership composed of two persons, only one of whom had been served, and there was no return of service, or of non est inventus, as to the other. This is

true, whether the cases of *Printup v. Turner*, 65 Ga. 71, and *Ells v. Bone*, 71 Ga. 466, were correctly ruled or not.

(Syllabus by the Court.)

Error from superior court, Glynn county; J. L. Sweat, Judge.

Action by W. K. Jackson & Bro. against J. B. and J. R. McElveen, under the style of the McElveen Commission Company. There was a judgment for plaintiffs, and defendants bring error. Affirmed.

The following is the official report:

Jackson & Bro. sued J. B. and J. R. McElveen as copartners, under the style of McElveen Commission Company, alleging that they shipped to defendants 996¼ bushels of corn to sell for account of petitioners; that defendants sold the corn for 55¼ cents per bushel; that defendants had agreed with petitioners that they would sell the corn so that petitioners would realize 41 cents per bushel, and would collect and deliver the same to petitioners; and that defendants have collected the money for the corn, and retain in their hands all the proceeds of the sale, refusing to pay for the corn, or account for the proceeds, though petitioners have frequently demanded of them the money due them. Defendants pleaded the general issue, and that they never purchased, received, or got possession in any way of any property belonging to plaintiffs, to sell on commission or otherwise, and never had any business with plaintiffs. There was a verdict for plaintiffs, and defendants' motion for new trial being overruled, they excepted. The motion contained the ground that the verdict is contrary to the evidence, in that the evidence failed to establish any right in plaintiffs as against defendants. Also, because the court erred in refusing to continue the case upon the showing made therefor by defendants' counsel, to wit, that J. B. McElveen was absent from the court; that he was the only one of said firm that counsel knew in the transaction; that counsel had just received a telegram from him, in the words following: "Am detained here providentially by sickness;" that the telegram was from Atlanta; that J. B. McElveen was his client in the case, and counsel believed his absence was providential, and could not go safely to trial in his absence, in that he was the only witness by whom counsel could prove no indebtedness to plaintiffs; and that counsel could prove by said McElveen that defendants were not indebted to plaintiffs in any sum, in that they never contracted with plaintiffs. Error in not dismissing the suit on motion of defendant J. B. McElveen, upon the ground that the record showed a complaint against a copartnership composed of two individuals, and only showed a service as to J. B. McElveen, without any return of non est inventus as to J. R. McElveen, the other defendant, and because the court erred in ruling counsel to trial while said return had not been made. As to this ground



of the motion for new trial, the judge below states: The motion to dismiss was not made until the case had gone to the jury, and a witness had been sworn, and was therefore not entertained or allowed by the court. The motion for new trial was also based upon the following extraordinary grounds: J. B. McElveen was absent from court providentially, in this: That he would have attended the trial but for the sickness of his wife, which was of such character that it required his presence with her, to give her the care and attention of a husband, her condition being such as to imperatively require his presence and attention. Defendant had a perfect defense to the suit, and said McElveen was the only witness by whom it could be established. The defense was that defendant had never known or dealt with plaintiffs in any manner, had never received any merchandise from plaintiffs to sell on commission, and had never purchased any merchandise from plaintiffs; that defendants had never directly or indirectly admitted to plaintiffs, or either of them, that they were in any way, legally or equitably, indebted to plaintiffs for anything, including the merchandise, the price of which is sued for, and that defendants were absolutely not indebted to plaintiffs for the account stated in the declaration, and the price of which is sued for; that J. R. McElveen, the other defendant, knew nothing about the transaction, and was at the time of the trial, and for a long time prior thereto, absent from the state; that the defense of the case was solely conducted by this defendant; and that the wife of J. B. McElveen was sick in Atlanta, Ga., at the time of the trial, and for some days prior thereto. It appears that the case was tried on May 24, 1893. J. B. McElveen made affidavit that he had particularly examined the ground of the motion last above stated, and that the matters and things therein stated are just and true.

The motion was called up for hearing on June 30, 1893. When it was so called, respondent offered to read in evidence two affidavits, one by J. D. Cunningham and the other by E. M. Cason and D. S. Looney, which had been marked "Filed" in office June 29, 1893, but which had not been served upon movant. Counsel for movant objected to the reading of the affidavits, upon the ground that they had not been so served. Thereupon, the court ordered service made, and movant's counsel acknowledged service June 30, 1893. Upon said service being made, movant's counsel asked that the court would give a reasonable time for movant to meet these affidavits by showing that J. B. McElveen was in attendance on his sick wife during May 24, 1893, and stated that he would have to take said affidavits in Atlanta. The court refused to allow the time, and ordered the affidavits filed as part of the record, proceeded to hear the motion for new trial, and overruled it. Defendants excepted

to the refusal to grant the time asked, as well as to the refusal to grant the new trial. The affidavit of Cunningham was: On May 23, 1893, about 11 o'clock in the morning, J. B. McElveen came to deponent's house, near Marietta, Ga., and remained in Marietta until about 12 o'clock noon of the same day; that McElveen requested deponent to return to Atlanta with him, and deponent did so, and spent about two hours with him that afternoon at the Hotel Aragon, leaving him about 5 o'clock p. m.; that deponent did not see McElveen's wife; that McElveen said nothing about her being sick; and that deponent is no relation of either McElveen or his wife, and is not a physician. The affidavit of Cason and Looney was: J. B. McElveen was arrested on the charge of gambling, done at the Hotel Aragon, in Atlanta, on April 29, 1893, the arrest being made in Atlanta between 3 and 4 o'clock p. m., May 24, 1893. He was arrested at the station house, where he was held in custody until some time between 9 and 10 o'clock that night, when he was released on bail. About 7 o'clock in the evening of said day, McElveen asked permission to telephone his wife, and, the permission being granted, telephoned her that he was detained with some friends, and could not be at dinner until 8 o'clock. While at the telephone he spoke as if he were talking directly to his wife, in person. Said McElveen was seen frequently and at different times on the streets of Atlanta on the 25th and 26th days of May, 1893.

F. H. Harris and J. L. Harris, for plaintiff in error. Owens Johnson, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 542)

#### CLARK v. HOLTON.

(Supreme Court of Georgia. April 30, 1894.)

TAX DEED—ADMISSIBILITY IN EVIDENCE—PAROL EVIDENCE.

As sheriffs' sales for taxes, and deeds founded thereon, are, under the Code, governed by the same rules that apply to ordinary sheriffs' sales, a deed made by a sheriff, reciting a tax *fi. fa.* and the sale thereunder, is admissible in evidence with the *fi. fa.* to which it refers, although the deed be blank as to the day and month of the levy, and also of the sale, except that the sale was on a first Tuesday, and although the deed itself be undated except as to the year. If necessary, parol evidence is admissible to supply the omitted dates, and to prove the amount for which the property sold, and the actual payment thereof by the purchaser to the sheriff.

(Syllabus by the Court.)

Error from superior court, Appling county; J. L. Sweat, Judge.

Ejectment by J. J. Clark against Nathaniel Holton. There was a judgment for defendant, and plaintiff brings error. Reversed.

The following is the official report:

Ejectment was brought by J. J. Clark against Nathaniel Holton, July 7, 1891, for land lot 30 in the Second district of Appling county. The plaintiff offered in evidence a wild-land tax *fi. fa.* and a sheriff's deed, which were rejected by the court; to which ruling, and to the grant of a nonsuit, the plaintiff excepted. The *fi. fa.* appears to have been issued by W. L. Goldsmith, comptroller general, October 1, 1877, is directed to all and singular the sheriffs of said state, and commands them to levy upon and sell, according to law, lot of wild land No 30, district 2, county of Appling, so as to make \$6.42, the same being state and county tax on said lot of land for the years 1874, 1875, and 1876, with lawful costs, etc. Indorsed on the *fi. fa.* was an entry of levy on said lot, April 1, 1878, by the sheriff of Appling county, and the following entries: "Name of purchaser, settled by J. J. Clark; date of sale, May 7th, 1878; county of sale, Appling; sheriff's costs, \$4.00; advertising, \$4.00." The deed was signed by the sheriff who signed the entry of levy. It bore an entry of record dated May 31, 1879. The date of it is recited as "the — day of —, in the year of our Lord 1878." It recites that the sheriff "did, on the — day of —, 1878, levy upon the land" mentioned in the *fi. fa.*, "and on the first Tuesday in —, 1878, expose the same to public sale in Baxley, in said county, before the courthouse door, between the legal hours of court, after advertising the same for the term of once a week for four weeks, \* \* \* did sell the said property on the — day of —, 1878, the same being levied on and sold as unreturned wild land under and by virtue of an execution issued by W. L. Goldsmith, comptroller general of said state, for state and county tax due thereon," to J. J. Clark, the highest bidder, for \$17.50; the lot containing 490 acres, and certain stated fractional parts of it having first been offered, etc.

Graham & Parker, for plaintiff in error.  
G. J. Holton & Son, for defendant in error.

PER CURIAM. Judgment reversed.

#### PARKS v. STATE.

(Supreme Court of Georgia. June 25, 1894.)

##### CHEATING—FRAUDULENT REPRESENTATIONS.

In selling or exchanging a cow as a milk cow, to knowingly, falsely, and with fraudulent intent represent her to be a "three-gallon cow,"—that is, a cow having the milk-yielding capacity of three gallons per day,—when in fact her capacity was less than one gallon, whereby the purchaser was cheated and defrauded, is an offense under section 4595 of the Code. And in this case the evidence warranted the verdict.

(Syllabus by the Court.)

Error from criminal court of Atlanta; T. P. Westmoreland, Judge.

John Parks was convicted of cheating and defrauding, and brings error. Affirmed.

Following is the official report:

The defendant was convicted of cheating and defrauding Mrs. Garner out of a cow by deceitful means and artful practices. He moved on the general grounds for a new trial, which was denied. The testimony for the state was, in brief, as follows: Defendant went to Mrs. Garner's house, accompanied by a cow and calf, and tried to sell her the cow for \$30. She did not want to buy her, but proposed to "swap" her cow, which was worth \$25, for his. Her cow gave one and one-half gallons of milk a day. Defendant said his was a three-gallon cow,—that she gave three gallons of milk a day,—and asked Mrs. Garner seven dollars difference. He said the calf was eight weeks old, and that his cow was gentle, and only six years old. He further stated that he lived in Fayette county, and his post office was Fayetteville, Ga. Mrs. Garner wanted to know his post office, she told him, so she could come back on him if the cow was not as he stated. He also said he had owned the cow a year, and that she was gentle. Mrs. Garner went up to her, and she shied off. Defendant then went to her, and, after rubbing her, milked a small quantity from her. Mrs. Garner did not want the calf, and they traded cow for cow, and he kept the calf, and took it away with him. The cow lowed for the calf that evening, but did not appear much distressed over the loss of it, and did not let Mrs. Garner milk her. A pen was made to put her in, so they could milk her that evening. She never would give as much as a quart of milk at a milking, and they could never get her gentle, although they treated her kindly and fed her well. They milked her for nine days, and she never gave much more than a pint at a milking. Then they sold her for \$12. Defendant said he had brought her from the country the day before. In trading for her, Mrs. Garner relied solely on defendant's statements. She found out, after buying the animal, that it was a dry cow. The calf seemed older than defendant said. The cow they got from defendant was wild, and would kick. After the first day she ate heartily. The Garners gave her all the hay and bran she wanted. She would not eat anything that was wet, and would not drink slop. The husband of Mrs. Garner made inquiries, and found that defendant did not live in Fayette county, but had been living in Atlanta for two or three years. He asked him to come and get the cow, and he would not do so. Garner is an experienced hand with cows, and knows how to milk. A son of Mrs. Garner testified that defendant said, when he had milked the cow in question, in Mrs. Garner's presence, that the reason she did not give more milk was because he had milked her that morning, and the calf had sucked her. The testimony for defendant was, in brief: Harden sold him the cow, and told

him she was a three-gallon cow, and that her calf was seven to eight weeks old. Defendant paid him \$23.50 for her. On the same day, one Wade had offered Harden \$22.50 for her, having looked at her, and believing she was a two and one-half or three-gallon cow, and wanting her for his own use. Harden did not milk her himself, but was told by parties he purchased her from that she was a three-gallon cow, and believed she was when he sold her to defendant. She was kind and gentle. Harden lives in Fayette county, 50 miles from Atlanta. He paid \$18 for the animal, the day before he left for Atlanta. Never saw her before, and knew nothing about her of his own knowledge. He lives on a rented place. Has a horse and wagon. No other property. On the day after he sold to defendant, Wade came back to give the \$23.50 asked for the cow, and found that defendant had purchased her. Wade is a cow trader. Buys and sells cows, one or two at the time. Has known defendant for a long time. They trade together in cows. The cow was worth nearly \$23.50 for beef. In Wade's opinion, the calf was about two months old. Two witnesses gave testimony to the effect that if cows are changed from place to place, and great care is not exercised, they will lose their milk. Some will go dry, and others shrink to almost nothing as milkers, especially when you take the calf away from them, though this is true only with a cow with a young calf. It is not probable with a cow having a calf eight weeks old. To move a cow to a strange place and take her calf away from her at the same time is very dangerous. It would be sure to affect them materially in their milk, etc.

F. L. Haralson and C. Gowdy, for plaintiff in error. L. W. Thomas, for the State.

PER CURIAM. Judgment affirmed.

(94 Ga. 579)

### AUTREY v. AUTREY.

(Supreme Court of Georgia. June 30, 1894.)

DECEDENT'S ESTATE — RIGHT TO POSSESSION OF LAND—RENTS—DISTRIBUTION THROUGH PERSONAL REPRESENTATIVE — CONVEYANCE OF HEIR'S INTEREST—ERROR.

1. Where land is rented for one year, without any conveyance of an interest in the land itself, the right to possession and use for the year is disposed of, but, under section 2279 of the Code, no estate whatever passes out of the landlord into the tenant. On the death of the landlord intestate, within the year, the land descends to his heirs, incumbered with the right of possession previously disposed of by their ancestor to his tenant. They acquire no right to the possession, and consequently have no title, merely as heirs, to the rent accruing for that year, whether the crops were planted before or after their ancestor's death. The rent is personalty, and the right to collect and distribute is in the personal representative of the decedent.

2. As to lands left by the intestate with the right of possession and use undisposed of, the heirs take, not only the land itself, but the right to immediate possession, subject to the quarantine and dower rights of the widow, if any, and to the power of the administrator to administer according to law. If there are no creditors, and the administrator rents out the land, the accruing rents, when not needed to pay the expenses of administration, belong to the heirs as such, although the legal right to collect is in the administrator. He is a mere trustee for them.

3. A conveyance by an heir to a purchaser of all his interest in the land of the intestate, which is silent both as to rents and the time of giving possession, passes no title to rents to become due from tenants who at the date of the conveyance are occupying for the year in which the intestate died, if such tenants occupy under contracts with the intestate himself; but if they occupy under contracts made with the administrator, it is otherwise, unless creditors or the expenses of administration are unsatisfied. When the heir, as such, would be entitled to money collected by the administrator on account of rent, had he retained title to the land, his unconditional vendee will succeed to this right as to rents accrued and collected after the change of ownership.

(Syllabus by the Court.)

Error from superior court, Milton county; C. C. Smith, Judge.

Action by T. A. Autrey against Josephus Autrey to recover on an account. Judgment for plaintiff, and defendant brings error. Reversed.

The following is the official report:

T. A. Autrey sued Josephus Autrey on an account for \$81.45, and obtained a verdict for \$50.97, with interest from March 16, 1893. Defendant moved for a new trial on the grounds that the verdict was contrary to law and evidence, that the court erred in refusing to grant a nonsuit, and in directing the jury to render verdict for the plaintiff. The motion was overruled. The evidence shows that the father of these parties died on February 25, 1891, leaving certain lands, and on March 20, 1891, the plaintiff purchased of the defendant his interest in these lands, receiving defendant's deed therefor. One of the administrators of the estate testified that the deceased, Autrey, had two croppers on his land at the time of his death, and some of the land sown in oats; that the administrators rented out some of the land at standing rents; that, after deducting the expenses, commissions, and one-fifth of the rents due the widow (she having elected to take one-fifth of the estate), the balance was divided among the other distributees, and defendant was paid \$50.97 as his share of the rents which accrued during the first year after the death of his father, and went into the hands of the administrators, and were distributed among the heirs. The plaintiff testified that all the crops on the land were grown and planted after he bought defendant's interest.

T. L. Lewis, for plaintiff in error. B. F. Simpson and E. Faw, for defendant in error.

PER CURIAM. Judgment reversed.

(34 Ga. 589)

**MARSHALL v. STATE.**

(Supreme Court of Georgia. April 16, 1894.)

PROSECUTION FOR BURGLARY—GINHOUSE—ENTRY THROUGH OPENING—GOODS IN DEFENDANT'S POSSESSION—EVIDENCE OF IDENTITY—CONTINUANCE—SICKNESS OF COUNSEL.

1. There was no error in overruling the motion for a continuance on the ground that one of the movant's counsel was sick, the movant being represented by four others, and it not appearing that the one indisposed was his leading counsel.

2. In order to prove that cotton baskets found at the scene of the burglary, some of which the accused admitted belonged to him, were similar to other baskets found on the premises of the accused, which he also admitted were his, it was not necessary to produce any of the baskets to the jury and submit them to their inspection.

3. In so far as the requests to charge the jury were pertinent and legal, the substance of them was embraced in the general charge.

4. Although the lower story of a ginhouse may be open and accessible to all comers, yet if cotton be stored in the upper stories, and they are closed, so as to exclude entrance otherwise than through a hole necessary for a band to occupy in working machinery, and this hole is neither intended nor used for ingress or egress, and is inaccessible save by climbing to it in an unusual and intrusive manner, entrance through it by pushing aside the band, to make room for the body, may be a burglari-ous entry, without any breaking except that involved in this proceeding.

5. The evidence warranted the verdict, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Sumter county; W. H. Fish, Judge.

Larkin Marshall was convicted of burglary, and brings error. Affirmed.

The following is the official report:

Marshall was found guilty of burglary, alleged to have been committed at the ginhouse of one Stewart. He moved for a new trial, and, his motion being overruled, excepted. The motion contained the grounds that the verdict was contrary to law, evidence, etc.

Also, because the court refused to continue the case, defendant having made a written motion therefor upon the following grounds: He employed C. R. Winchester, attorney at law, in October, 1893, immediately on his arrest, to represent him in the case, Winchester being the first counsel employed, and defendant relied on him to represent him as an attorney. He had secured Winchester's fee, and desired his services in the matter, but, owing to Winchester's sickness, has been unable to have his services in the investigation of the case as desired, and further desires his assistance in the trial. He supported his motion to continue by the affidavit of a physician that C. R. Winchester is now (January 12, 1894) sick, and had been prior to January 1, 1894, and during the latter part of December, 1893; that Winchester's condition had been such that he could not exert himself, and is such that, in affiant's opinion as a physician, it would not be advisable for him to undergo any exertion at all, espe-

cially in the trial of the case. Defendant also showed by Winchester himself that he was unable to go into the trial, and, from the condition of his health, had been unable, since his employment to the date of the trial, to give the case his attention; that his fees had been secured; that his physician had advised it would be best for him to take vacation; that he did not feel that he could do himself or his client justice to enter upon the trial of any cause; and that he had been unable to consult the defendant since the finding of the indictment, and for several weeks prior thereto, on account of his sickness, or to investigate the evidence in the case. Defendant further showed, by his attorney W. P. Wallis, that Wallis was not employed until his fees had been secured, which was several weeks after defendant's arrest; that Winchester was the first attorney employed, but Wallis was employed on the same day; that the bill of indictment was found at this, the November, term of the court; and that defendant had been in jail since his arrest up to the present time. In a note to this ground the judge below stated: "On or before October 18, 1893, soon after his arrest, the defendant employed five lawyers to represent him in this case, viz. Fort & Watson, Pillsbury & Winchester, and W. P. Wallis. They were all present at the trial to the end thereof. During the early part of the November term, 1893, in December, while on civil docket, the court announced that the criminal docket would not be called before second Monday in January, 1894, 8th day of that month, and at that time all jail cases would be in order for trial. On the second Monday this case was called, and set to be called on the following Thursday, 11th January. It was not reached on Thursday, but was called on Friday, the 12th January, when defendant moved to continue on account of Mr. Winchester's sickness, and submitted his written affidavit, and that of Dr. Winchester of that date, and introduced Mr. C. R. Winchester, who testified substantially as he did on the 19th January, when the case was tried. The court overruled the motion to continue, but stated that time would be given for all the defendant's attorneys to prepare the case for trial, and set the case to be called on the following Wednesday, the 17th January; but, on account of Judge Fort requesting a leave for Wednesday, the case was then set to be called on Friday, the 19th January. When called on January 19, 1894, defendant moved to continue, on account of sickness of Mr. Winchester, one of his attorneys, and submitted the written affidavits of himself and Dr. Winchester and the testimony of Mr. Winchester, his attorney, and of Mr. Wallis. The defendant was ably represented by distinguished counsel, Judge Allen Fort, Judge J. F. Watson, Judge J. B. Pillsbury, and Mr. W. P. Wallis; and Mr. Winchester, while unable to take any active part in the trial, yet was present dur-

ing the whole trial, and rendered such aid as he could. Whilst Mr. Winchester is a promising young lawyer, the court did not consider him the leading counsel for defendant, nor did defendant so swear, nor did he swear that Mr. Winchester was the attorney upon whom he mostly relied, nor that he could not go safely to trial without the services of Mr. Winchester, nor that he expected his services at the next term, nor that said application was not made for delay only. The evidence also showed that Mr. Wallis was employed on same day that Mr. Winchester was; that Wallis, and not Winchester, represented defendant on committal trial; and that fees of all the attorneys were secured on same day. All the evidence on motion for continuance should be considered in connection with this ground of motion."

Also, because the court refused to give the following written request to charge made by defendant:

"That a breaking is necessary to constitute the crime of burglary, and if it appeared that the house was entered through an open hole, left open for the band or other parts of the machinery, which required no lifting of a bolt, no removing of a shutter, then the offense would not be burglary, and you would not be authorized to convict the defendant of burglary, though it should appear that said party entered and committed a larceny, or for the purpose of committing larceny." In a note to this ground the judge states that this request was refused because the court had already substantially given it in charge to the jury.

"To authorize the conviction of larceny, the property stolen must be the property of the person charged to be the owner in the bill of indictment; and if the evidence shows that if the ownership was not in Stewart, as charged, but in Stewart and others, you could not convict of larceny. The same rule does not apply to burglary. If it appears that a burglary was committed, in that case the possession and right of possession would suffice. A burglary consists of the breaking and entering with the intent to steal, and may be complete without a larceny. But larceny requires the act of stealing, and not the intent only, to constitute this." As to this request the judge states that it was refused because, so far as it was law and applicable, the court had already substantially charged it.

"The defendant is charged with a burglary of Stewart's ginhouse of particular cotton on October 4, 1893, and what may have transpired before this as to different and other burglaries should not be considered in ascertaining the guilt or innocence of the accused." As to this part of the request the judge stated that it was given as requested.

"If there was a hole in the outer wall of

the house through which the accused entered, if you believe he entered said house without a breaking, as I have defined to you, and if, in going through the house, it became necessary to raise a box inside of the house to enter another portion of the house, then, under this bill of indictment, you could not convict of burglary. The breaking must have been into the house, and not in the house after it was entered, to constitute burglary as charged.

"If there was an entry into the house through an open space without breaking in the house or through the house, and a door should be open after so entering the house, out of which the person went out of the house, the opening of the door to get out of the house would not constitute the offense of burglary.

"If they should believe from the evidence that defendant was at the ginhouse the night of the burglary, and was at the platform, and that some one else opened the door from the inside, then there would be no charge of conspiracy, or of aiding or abetting any one else in taking cotton from the ginhouse; they could not find defendant guilty of any offense under allegations under the indictment."

As to the requests set out in the last two paragraphs, the judge states that they were refused because substantially given.

Also, because the court permitted the witness Stewart to testify as to the similarity of the baskets from comparison, the objection being that the baskets themselves would be the best evidence. The court permitted Stewart to testify, over objection: "I got two baskets out of the defendant's cottonhouse the next morning, and carried them down to the gin, and compared them with the baskets on the platform, and they looked to be the same shaped baskets exactly." Defendant further objected that the witness had no right to go to defendant's house and get the baskets, and, having unlawfully procured them, he had no right to put them in evidence, the evidence further showing that the comparison of these baskets was made in the absence of defendant. As to this ground the court states that the evidence showed that the defendant's cotton baskets, which were examined by the witness, were in defendant's possession or custody at the time of the trial, and could not be put in evidence by the state, and that defendant conceded and was perfectly willing that the witness should examine his cotton baskets, and take them from the cottonhouse. The baskets were not put in evidence.

Fort & Watson and Wallis & Winchester, for plaintiff in error. Jas. M. Du Pree, Sol. Gen., and L. J. Blalock, for the State.

PER CURIAM. Judgment affirmed.

(94 Ga. 530)

**SAVANNAH, A. & M. RY. CO. v. McLEOD.**  
(Supreme Court of Georgia. April 30, 1894.)**ACTION AGAINST RAILROAD COMPANY — PERSONAL INJURIES — INSTRUCTIONS AS TO DAMAGES — USE OF ANNUITY TABLES — CONTRIBUTORY NEGLIGENCE.**

The action being for a personal injury by negligently running a locomotive, and the evidence showing that the plaintiff's capacity to labor was impaired to the extent of one-half, and there being evidence from which the jury could have inferred that the plaintiff contributed in some degree to the injury by his own negligence, inasmuch as he was in such full possession of his faculties that he knew danger was impending, and knew, also, that after the engineer saw him he did not blow his whistle nor slow up his train, it was error to charge the jury thus: "It is contended by the plaintiff that he has sustained permanent injuries in lessening his capacity to labor and work. If this is true, I charge you that he would be entitled to recover, under the rules that I will give you, if you find from the testimony that he has sustained permanent injury. Look to the testimony, and see what his age is, and what his probable length of life is, and I will give you a table,—the way prescribed by law to govern jurors in this class of cases. Look to these tables now, and apply the tables to this case. There are two tables that you will have out before you. I will give you these rules now in reference to those tables: Estimate the value of the property in which the life estate or dower is held; then find its yearly value at six or seven per cent, on the rate agreed upon; multiply this result by the figures in the table above, opposite to the age of the life tenant in the seven per cent. column, which is as McLeod in this case. The reversionary interest is obtained by subtracting the value of the life estate from the value of the property." The law merely permits jurors to use the tables; it does not require them to do so. Moreover, the annuity table cannot be rightly used on a basis of earnings and age, without deducting—First, a due proportion (in this case one-half) for continuing ability to labor; secondly, some amount for probable diminution of ability by old age; and, thirdly, a due proportion for the plaintiff's contributory negligence, if the jury should believe that there was such negligence. The concluding part of the charge, which refers to dower and reversionary interest, was irrelevant, and might have been misleading.

(Syllabus by the Court.)

**Error from superior court, Dodge county; C. C. Smith, Judge.**

Action by Allen D. McLeod against the Savannah, Americus & Montgomery Railway Company. There was a judgment for plaintiff, and defendant brings error. Reversed.

E. A. Hawkins, for plaintiff in error. E. Herrman, W. B. Coffee, and E. A. Smith, for defendant in error.

**PER CURIAM.** Judgment reversed.

(94 Ga. 551)

**GEORGIA PINE INV. & MANUF'G CO. v. HOLTON et al.****(Supreme Court of Georgia. June 11, 1894.)**  
**ADVERSE POSSESSION — COLOR OF TITLE — INJUNCTION — CUTTING TIMBER.**

1. Although a deed may describe several lots of land as one tract, yet if, in fact, they

do not lie adjacent, so as to constitute one tract, actual possession of one of the lots will not be constructive possession of another of them, which neither adjoins the former nor is connected with it by intervening lots covered by the deed.

2. On the facts in evidence there was no error in denying the injunction prayed for.

(Syllabus by the Court.)

**Error from superior court, Appling county; J. L. Sweat, Judge.**

Action by the Georgia Pine Investment & Manufacturing Company against R. R. Holton and others for an injunction. From a judgment for defendant, plaintiff brings error. Affirmed.

**The following is the official report:**

The petition of the Georgia Pine Investment & Manufacturing Company alleged: It is the true and lawful owner of the timber for turpentine purposes on lots 363 and 364 in the Fifth district of Appling county, to which privilege it has a perfect title, an abstract of which is attached. As such owner it is entitled to the free and uninterrupted enjoyment thereof. Under some pretended claim, and without its consent or any legal authority, R. R. Holton and J. F. Hall, Jr., by themselves and employes, have entered upon these lots, and are engaged in boxing and otherwise working the pine timber thereon for turpentine purposes, and, unless restrained by the court, will continue to do so and to remove the crude turpentine, to petitioner's damage a large sum. Having the perfect right and title mentioned, petitioner, through its agents, Sessoms & Co., went upon said lots and commenced to work the same for turpentine purposes, when Hall and Holton, by their servants and employes, threatened employes of petitioner with violence unless they should cease to work the timber for turpentine purposes, and afterwards had some of the employes arrested by a warrant, thus depriving petitioner of the right to so work the timber. Petitioner prayed for a restraining order against defendants, their agents, etc., commanding them to desist from boxing, cutting, or working the timber, and from interfering with petitioner or its employes in the conduct of its business until further order, and, at the final hearing, for perpetual injunction, and for general relief and process. The answer denied the allegations of the petition, and set up that Hall was the lawful owner of the timber for turpentine purposes, by virtue of a lease from Holton to him for a fair and valuable consideration, he believing Holton to be the owner of the land, and by virtue of actual possession of the land and timber under such lease. Hall alleged that about November 28, 1893, he entered upon the lands, took possession of them, and commenced boxing the timber to work it for turpentine purposes, and has continued to do so at great expense; that he is the only person who has had actual possession of the lands and timber; that some time after he

had taken possession under his lease, and boxed a greater part of the timber, at an expense of about \$500, Sessoms & Co. sent their hands and employes upon the land to oust him and take possession, and, when they attempted to interfere with his agents and employes, Holton forbade the employes of Sessoms & Co. from boxing the timber, saying he was willing to abide by the decision of the court, but that they should not enter upon the land by force, and oust the hands of this defendant and box the timber; that this defendant is not informed that Holton used, or threatened to use, violence, though it is true he sued out warrants for the employes of Sessoms & Co. for trespassing upon the lands, after they persisted in boxing some of the timber, contrary to his express desire, etc. He prayed for injunction against plaintiff.

Upon the hearing, plaintiff put in evidence a tax execution by the comptroller general, dated October 1, 1877, against lot 364 in the Fifth district of Appling county, for \$6.42, state and county taxes for 1874, 1875, and 1876, lawful cost, transferred October 27, 1877, by the comptroller general to Daniel Lott, levied by the sheriff of Appling county on said lot January 31, 1878; also, deed from said sheriff, dated March 5, 1878, reciting proper levy and advertisement and sale, consideration \$32, and properly witnessed, the deed being to Daniel Lott, and recorded April 18, 1878, in Appling county; similar *fi. fa.*, transfer, levy, and deed by the sheriff of Appling to Lott, for a consideration of \$9, to lot 364, the deed being recorded April 17, 1878, in Appling county; also, deed from Daniel Lott to Reppard & Walter, November, 1879, conveying said lots with a great many others, consideration, \$18,300, recorded in Appling county, February 25, 1880; also, deed from Reppard & Walter, December 20, 1883, consideration, \$300,000, conveying many lots of land in Appling, Ware, Coffee, Pierce, and Clinch counties, among them the lots in question, "being in all 161 whole lots of 490 acres each, containing in the aggregate 78,890 acres," and recorded in those counties, and recorded in Appling county April 4, 1884; also, lease for turpentine purposes from the Waycross Lumber Company to Ellis, Young & Co., January 4, 1889, conveying the timber for turpentine purposes on many lots of land in Appling and said other counties, among them the lots in question, recorded in such other counties, and recorded in Appling county February 7, 1889; similar lease from Ellis, Young & Co. to plaintiff, November 13, 1890, for \$14,381.32, recorded in the other counties, and recorded in Appling county November 20, 1890. The deed from Reppard & Walter to the Waycross Lumber Company covered all the mill timber upon 250 acres of lot 377 in the Fifth district of Appling county, and also covered lot 362 in said district. The subsequent leases also covered lot 362, and 245 acres of

377. Sessoms made affidavit: In October, 1893, plaintiff, through Sessoms & Co., their agents and tenants, built upon lot 362 several houses for the use of the hands working on the turpentine farm, and have been in continuous possession of the same ever since. On November 16, 1893, plaintiff, through its tenant, Sessoms & Co., entered upon lot 377, and commenced to box the timber thereon for turpentine purposes. Lot 362 lies adjoining lots 363 and 364. Lot 377 lies adjoining 376, 375, 374, and 373 (also covered by the deed and leases), which lots last named adjoin 363 and 364. The turpentine distillery of plaintiff is on lot 453 in the Fifth district of Appling county (also covered by the deed and leases), which lot has been in the actual possession of plaintiff four years. Plaintiff was in possession of 362 and 377 before defendants entered into the actual possession of lots 363 and 364. When Hall and Holton commenced to box the timber on 363 and 364, deponent informed Holton that plaintiff owned the timber for turpentine purposes on said lots, and Holton informed him that he (Holton) was having the timber boxed for turpentine purposes. Crosby made affidavit: He is the land and timber agent of the Waycross Lumber Company, and as such familiar with the location, situation, and general condition of its land and timber interests. In addition to its being in actual possession of lots 16 and 31 in the Eighth district of Ware county, upon which its sawmill is situated, it has a railroad extending through the Eighth and Fifth districts of Ware county, Fifth district of Appling county, and Seventh of Coffee county, used by it in the conduct of its sawmill business, and the same has been in operation through said districts and counties since 1886, and certain portions of it much longer; that this road extends through many of the lots of land described in the deed from Reppard & Walter to the Waycross Lumber Company, among which are certain lots mentioned in the Fifth and Eighth districts of Ware county, and lot 453 in the Fifth district of Appling; that it owns and has cut the timber on all the other lots in the Eighth and Fifth of Ware through which the road runs, and prior to November 28, 1893, had entered upon and cut the timber for sawmill purposes on a number of lots of land mentioned in the Fifth district of Ware; that under the same deed it has been in possession of almost all the lots named in the deed in the Eighth district of Ware, and used the timber thereon for turpentine purposes several years ago, and thereafter, and long before November 28, 1893, cut and used the timber thereon for sawmill purposes; and that it has been in the actual possession of lot 519 in the Fifth of Ware for three years or longer. Also, affidavit of the general manager of the Waycross Lumber Company, which does not seem material to be reported, except that it stated that the Waycross Lum-

ber Company bought from Reppard & Walter in good faith, paying a valuable consideration, and went into possession, and has been in the actual possession, of lots 16 and 31 in the Elghth district of Ware, conveyed by said deed, since December 20, 1883; that said possession has been absolute, continuous, exclusive, uninterrupted, and peaceable, and accompanied by a claim of right during all these years; that the land and timbers leased by it January 14, 1889, to Ellis, Young & Co., was leased as a tract consisting of a number of acres described in such lease, and was similarly leased to plaintiff; that lots 363 and 364 in the Fifth of Appling were conveyed to the Waycross Lumber Company in the Reppard & Walter deed as a tract consisting of a number of acres mentioned in said deed; that during all these years since the purchase by the Waycross Lumber Company it has paid taxes upon the property described in said deed, and in addition to being in actual possession of lots 16 and 31, on which its mill is situated, has exercised acts of ownership over all the lots thus conveyed, by cutting the timber on many of them, and by having many of them worked for turpentine purposes, as well as having a railroad running through them, owned and operated by it in connection with its sawmill.

Defendants introduced a lease to the timber for turpentine purposes on lots 363 and 364 in the Fifth of Appling, for three years commencing from the date of boxing the timber, from Holton to Hall, October 17, 1893, recorded January 25, 1894. Also, affidavit of Knowles: He is acquainted with the land in question. About November 28, 1893, Hall entered on lot 364, and took actual possession of it by boxing the pine timber thereon, and has remained in the actual possession of the lot ever since. About December 27, 1893, Hall entered on lot 364, took actual possession of it by boxing the pine timber thereon, and has remained in the actual possession of the lot ever since. Hall has turpentine boxes on nearly all the pine trees on 364, and on about half the pine trees on 363. When he entered on the lots they were wild lands. Neither Sessoms & Co. nor any other person except Hall and Holton ever had actual possession of said lots. About January 15, 1894, while Hall was in actual possession of said lots and timber, and had nearly all the pine timber on the lots boxed, the employes of Sessoms & Co. attempted to enter upon the lot, and oust the employes of Hall, and box the pine trees thereon. Also, similar affidavit of Holton, with the addition that he bona fide claims the title to said lots under a chain of deeds, and that he leased the lots to Hall for the purpose of boxing and working the timber thereon for turpentine purposes.

The judge below granted an order refusing the injunction, to which order plaintiff excepted. The order was as follows: "It appearing that said petition, having been filed

under 'An act to amend the practice in equity, as to granting injunctions, restricting the cutting of timber or boxing the same for turpentine purposes,' approved October 13, 1885, and the acts amendatory thereof, upon the allegation that petitioner is the true and lawful owner of the timber for turpentine purposes on lots of land Nos. 363 and 364 in the Fifth district of Appling county, to which privilege and right petitioner has a perfect title,' there being no averment of insolvency or that the damage will be irreparable, and that defendants had entered upon said lots, and were engaged in boxing and working the pine timber thereon for turpentine purposes, without any right to do so, with the prayer that they be enjoined, etc.; and it appearing that the perfect title relied on by plaintiff is based and rests upon the claim of seven years' possession under color of title; and the court, from the evidence submitted, finding that neither plaintiff nor those under whom it holds, had or held any actual possession of or upon the lots in controversy, or constructive possession by reason of said lots being a part or parcel of a continuous body or tract covered by its deeds or conveyances of record, some portion of such tract being in actual possession for the statutory period of seven years, the said lots adjoining or being contiguous thereto, and the claim of constructive possession of the lots in controversy by reason of the actual possession of some lot or lots adjoining or adjacent thereto, covered by its recorded deed or conveyance, for a less period than seven years, giving plaintiff a right of action against a mere trespasser or wrongdoer, not being applicable or pertinent to the case at bar, where under the law and allegations made perfect title is relied on and must be shown to authorize the grant of injunction,—it is therefore ordered and adjudged by the court that the injunction prayed for be denied and refused, and the restraining order heretofore granted rescinded."

Leon A. Wilson and John C. McDonald, for plaintiff in error. E. D. Graham and Harrison & Peeples, for defendants in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 603)

WYNNE et al. v. WILLIAMSON, Ordinary. (Supreme Court of Georgia. June 11, 1894.)

INTOXICATING LIQUORS—LOCAL OPTION ELECTION.

Under the act of December 22, 1892 (Acts 1892, p. 106), amending the general local option liquor law, no election upon prohibition or nonprohibition can be held in any county in less than four years from the time when the last election on that question was held in that county, notwithstanding the same may have been held before the passage of the amending act. The amending act is applicable to all elections held after its passage, in so far as the interval of time necessary to have elapsed since the last prior election is concerned,



whether that election took place before or after the original act was changed by the amending act.

(Syllabus by the Court.)

Error from superior court, Dodge county; C. C. Smith, Judge.

Mandamus proceedings by M. Wynne and others against A. G. Williamson, ordinary. From a judgment denying the writ, petitioners bring error. Affirmed.

The following is the official report:

On April 5, 1892, an election was held in Dodge county under the act of September 18, 1885, known as the "General Local Option Liquor Law," which resulted "for the sale." On April 6, 1894, a petition signed by more than one-tenth of the qualified voters of the county was filed with the ordinary, for the calling of another election under the same law. The ordinary refused to order the second election, holding that he was without authority to do so, by reason of the act of December 22, 1892, which amends the local option law by making four instead of two years the time following an election within which no further election shall be held. On petition for mandamus, this decision was sustained, and plaintiffs excepted.

De Lacy, Bishop & Peacock, for plaintiffs in error. E. B. Milner and E. Herrman, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 517)

BIRMINGHAM LUMBER CO v. BRINSON  
et al.

(Supreme Court of Georgia. April 23, 1894.)

TRIAL—RULING OUT EVIDENCE—ASSUMPSIT—RECOVERY OF MONEY PAID FOR ANOTHER—SALE OF GOODS—GUARANTY OF PAYMENT—BOOK ACCOUNT—EVIDENCE.

1. Where a motion to rule out evidence is too broad, comprehending both admissible and inadmissible evidence given by the witness named, and not distinguishing the one from the other, the motion should be denied.

2. The court may decline to rule out inadmissible evidence after it has been received without objection in response to a question propounded by the party making the motion.

3. One who, on the parol request of another, purchased in the market, and paid for, checks issued and signed by a third person, may recover on account what the checks cost him, as money laid out and expended for the other's use; but the checks thus acquired should be delivered or tendered in due time to the party for whom they were purchased, and if this was omitted they should be produced and surrendered at the trial, or it should at least appear that they are held subject to the owner's order.

4. Where one, in authorizing a merchant to furnish goods to a third person, and charge the same to the account of the person giving the authority, stipulates with the merchant that the latter is to notify him when the account in each month reaches a certain sum, such notice must be given conformably to the stipulation, or there will be no liability on the account for more than that sum in any one month.

5. In order to prove a book account without introducing the books, or accounting for their nonproduction, it is requisite that the evi-

dence shall establish the correctness of the account, irrespective of knowledge acquired by witnesses from the books, inasmuch as the books themselves, when properly authenticated as correct, are the primary evidence, and information derived from them is only secondary.

(Syllabus by the Court.)

Error from superior court, Decatur county; B. B. Bower, Judge.

Action by S. Brinson & Son against the Birmingham Lumber Company. There was a judgment for plaintiffs, and defendant brings error. Reversed.

The following is the official report:

Brinson & Son sued the Birmingham Lumber Company on an account, the items of which extended from July 23, 1890, to October 7, 1890, for \$427.50 principal, according to one recital in the bill of exceptions. In another place it appears that the account sued on was for merchandise to the amount of \$841.24, and for trade checks amounting to \$397.95, and was credited by checks of the defendant, \$150 and \$156. It was made out against the Birmingham Lumber Company, for Thomas Wilson. The jury found for the plaintiffs, \$399.64 principal, and \$66.10 interest to judgment, May 11, 1893. The defendant's motion for a new trial was overruled, and exception was taken. The evidence was directly conflicting. It appears that Thomas Wilson was engaged in sawing and shipping lumber to the defendant, and that the merchandise was furnished to him, and the trade checks were issued by him in payment of wages due employees of the sawmill. According to the plaintiffs' contention, the merchandise was furnished by direction of the vice president of defendant. The most of the checks were taken in payment for goods sold to the holders (except \$55 worth, and a few more, the amount of which does not clearly appear, which were bought up by the plaintiffs from other merchants who had taken them), there being an agreement with said vice president that this should be done, the defendant to have a certain percentage of discount from the face value of the checks. The defendant contended that there was no such agreement, and that, under the vice-president's instructions to the plaintiffs in regard to furnishing merchandise to Wilson, the amount furnished was to be \$150 per month, and when that amount was reached the defendant was to be notified by plaintiffs, and any further credit on this account was to depend on defendant's authorizing it, if Wilson's business with defendant would warrant further extension.

The motion for a new trial alleges that the verdict is contrary to law and evidence, and that the court erred as follows: In not granting defendant's motion for a nonsuit at the close of plaintiffs' case, the same not having been made out, nor the account proved according to law. In overruling defendant's motion to rule out S. Brinson's evidence as to the justness of the account, and grant a nonsuit; it appearing that his evi-

dence was based solely upon his books, and not upon his own recollection, and the books not being produced or accounted for. In overruling defendant's motion to rule out S. Brinson's evidence, stating that "Mr. Wilson saw the account on books, and knew the Birmingham Lumber Company charged it up to him"; Wilson being dead, and the books being the highest evidence of what appeared upon them. The reason for this ruling was that this evidence was an answer to a question asked by defendant's counsel themselves. In charging the jury that if plaintiff "had express authority to go out and buy those checks, whether the defendant was to get 5 or 7 per cent., or any other per cent., and the plaintiff went out and paid his money for those checks, then he would be entitled to recover of the defendant whatever he paid for those checks, less whatever per cent. the defendant was to get." In charging that defendant could make itself liable by anything short of a written contract for the payment of trade checks issued by and in the name of Thomas Wilson (so far as will be shown by reference to the charge of the court in this record). It is further alleged that the verdict was contrary to the charge of the court, wherein the jury were instructed that they were bound to take the version of a contract or transaction sworn to by a party which is most unfavorable to himself.

Defendant also brings forward the following as newly-discovered evidence, the same being bills of plaintiffs against Thomas Wilson: (1) \$333.38, beginning June 11, 1890, and running to July 22, 1890, for merchandise and trade checks; (2) \$91.76, from October 7, 1890, to November 1, 1890, for merchandise only; (3) \$187.02, beginning April 16, 1890, and ending June 9, 1890, for merchandise alone; (4) a certain account beginning November 5, and ending November 24, 1890, for merchandise alone; (5) \$15.63, beginning January 8, 1891, and ending January 31, 1891, for merchandise alone; (6) \$21.30, beginning February 2, and ending February 27, 1891, for merchandise alone; (7) a certain account beginning April 16, and ending May 10, 1891, for merchandise alone. With these bills were submitted affidavits of the president and vice president of defendant, and of its counsel, that said evidence was unknown to them and to defendant at the time of the trial, that they exercised due diligence in preparing for trial, and that the newly-discovered evidence is material. It further appears from the affidavits of the president and vice president that they had no reason to believe that any such accounts were in existence, but they were obtained from the widow of Wilson, residing at Iron-ton, or Anniston, Ala., by correspondence, since the trial. An affidavit of S. Brinson was filed upon the hearing of the motion, to the consideration of which defendant objected, and now assigns the same as error.

This affidavit is as follows: In testifying to the account sued on, he did testify that he would not have sold Wilson individually, and this is true, and he did not sell him anything until he was authorized to do so by defendant. The account for \$333.38, which appears in the brief of evidence, and which was paid by the defendant July 22, 1890, was not the first account paid deponent for Wilson by defendant, as will be shown by the evidence of both deponent and the vice president. They paid the account for \$187.02, as they had agreed to do, and all other accounts prior to the one sued on. Deponent did testify in this case that he sold Wilson nothing else after Woodruff (who, plaintiffs claimed, was defendant's agent) notified him to stop Wilson's account, but deponent was testifying as to this account alone. He did not sell Wilson anything else on defendant's account. That is what he meant and intended to say. After defendant stopped Wilson's account, they had a contract with him by which they were to advance him \$4 on each 1,000 feet of lumber delivered by him to them; and plaintiffs let him have some things, as shown by the account attached as newly-discovered evidence, with the agreement and understanding that they were to be paid for out of this advance, and this was done. This contract extended over a period of about two months. After its expiration, Wilson hired to Woodruff at \$1.75 per day, and deponent sold him a few things under this contract, with the agreement and understanding that it should be paid from this employment each pay day.

Hines, Shubrick & Felder, Townsend & Westmoreland, and D. A. Russell, for plaintiff in error. Donalson & Hawes, for defendants in error.

PER CURIAM. Judgment reversed.

(94 Ga. 557)

CASH et al. v. TOWN OF DOUGLASVILLE et al.

(Supreme Court of Georgia. June 18, 1894.)

AMENDMENT OF TOWN CHARTER — EXTENSION OF LIMITS—TAXATION TO PAY PREVIOUS DEBTS —PUBLIC SCHOOL TAX—VALIDITY.

1. In chartering a town or amending its charter, the legislature may give such extent and boundaries to the incorporated territory as it may choose, and all the inhabitants and their property within the corporate limits so fixed are alike subject to taxation to raise municipal revenue for all legitimate purposes, without respect to the time when some of the liabilities arose to which the revenue is to be applied. Thus, binding debts of the corporation contracted before the limits were extended, unless otherwise provided in the new or amended charter, are chargeable upon the territory added, as well as upon that comprehended by the boundaries before they were altered and extended.

2. Inasmuch as the petition, fairly construed, rests the alleged nonliability of the petitioners to taxation upon the theory that they were not legally and constitutionally made cit-

izens of the town of Douglasville, and that theory being incorrect, the court did not err in dismissing the petition; but inasmuch as other questions are loosely indicated by the petition, which, if properly raised, might lead to an adjudication that some of the taxes assessed and sought to be collected are not such as could be enforced against any of the citizens of Douglasville without some preliminary election by the qualified voters, and the adoption of some system of public schools by the corporation, direction is given that the judgment dismissing the petition be so modified as to provide that the dismissal is without prejudice to the rights of the petitioners to bring another action setting up the want of power in the municipal government to impose and collect any taxes whatever on account of education, educational facilities, or the cost of the same, past, present, or future, this court, however, not intimating any opinion as to whether such power exists or not.

(Syllabus by the Court.)

Error from superior court, Douglas county; C. G. Janes, Judge.

Action by W. H. Cash and others against the town of Douglasville and others to enjoin the collection of certain taxes. There was a judgment for defendants, and plaintiffs bring error. Affirmed, with directions.

The following is the official report:

This was an equitable petition of Cash and nine others against the town of Douglasville and the marshal thereof to enjoin the defendants from collecting municipal taxes on the property of petitioners situated in the extension of the limits of that town, as provided for by the act of August 28, 1891, and to declare that act unconstitutional and void. A demurrer to the petition was sustained, to which ruling, and to the refusal of the court to allow an amendment offered, the plaintiffs excepted. The act in question, to create a new charter for the town of Douglasville, is found in Acts 1890-91, vol. 2, p. 701. The former charter of the town, the act approved February 25, 1875, is found in Acts 1875, p. 162. The petition makes the following allegations: The town was organized under the act of 1875, by the people electing the officers provided for by that act. The town was then very large in proportion to the population and taxable property inside its limits. The territory was so extensive that it necessitated more streets than the street tax could possibly keep in order, except in certain localities. Plaintiffs were not residents of the town, but were citizens of the county, residing near by with their farms and other property. Their principal business was farming, and their lands suitable only for that purpose. The extension of territory provided by the act of 1891 embraces plaintiffs' farms with their residences, and but few others who are taxpayers. The extension will require the opening of new streets and the extension of present ones, adding many miles of street to the town, without a corresponding number of street hands and street tax, which will make the taxes onerous on plaintiffs without a corresponding bene-

fit, but will greatly damage them, not only by increasing their burden, but by diminishing the value of their lands, as such farm lands would not sell for farm purposes (and they are worthless for any other purpose) so heavily burdened by taxation, and so cut in pieces by the running of streets through them. At the time the act of 1891 was introduced in the legislature, the citizens of the town and community were so incensed in opposition to it that a mass meeting was called and held in the courthouse, and was regularly organized by appointing a chairman and secretary; and, after a full description of the merits of the act, a motion was made to withdraw it from the legislature, which motion, after full and free discussion, was unanimously passed, the representative in the legislature from Douglas county being present, participating and acquiescing in the action of the meeting. From said action, and the cheerful manner in which all the advocates of the bill acquiesced in the same, plaintiffs had reason to believe that it was all done in good faith, that the bill was withdrawn, and that it had been abandoned by its advocate. Plaintiffs rested quietly under said impression, not knowing but that the representative of the county in the legislature had withdrawn the bill until it had been passed by the legislature, they having had no opportunity to file any objection to its passage, no notice having been given, by publication or in any other means, after the withdrawal of the bill as aforesaid; said bill being in violation of article 3, § 7, par. 16, of the constitution. It is further in violation of article 3, § 7, par. 8, of the constitution, as it contains more than one subject-matter, and contains matter in the body that is not expressed in the title: First, the incorporation of the town as one subject-matter; and, second, the organization and appointment of a board of trustees for the Douglasville College. It provides for the appropriation of the public school funds of the state, and placing them in an educational board of the town, consisting of the board of trustees of the college, authorizing them to charge tuition under the name of a matriculation fee. It requires an election by the qualified voters of the town to be held on the first Monday in February, 1891, and annually thereafter on the first Monday in February, when in fact the act was not approved until August 28, 1891; but, immediately after said approval, the mayor and council elected under the first charter of the town met and elected two additional members of council, and then declared that they were legally organized under the above void and unconstitutional act, and assessed the corporate tax against plaintiffs, and ordered the same to be collected by the town marshal.

If the act is legal, the levy of said tax is illegal until the organization was made in accordance with the act by an election by the

people. Plaintiffs are not citizens of the town, and are not liable to be taxed as such. Under the first charter the town incurred a considerable "bond and debt," of which \$3,500 is due and unpaid. The same was submitted to the then vote of the town. Plaintiffs, then residing out of the limits, had no voice "in said taxation for the payment of said bonds." The town is now seeking to tax plaintiffs to pay said "bond and debt," which is unjust and illegal. No public-school system has been adopted by the town. No legal tax was due from plaintiffs for educational purposes other than for common schools. The only school in the town is known as the "Douglasville College," wherein a regular collegiate course of study is pursued, diplomas and degrees are conferred, a regular college faculty is established, and each student is charged a matriculation fee of from three to five dollars per term, or from six to ten dollars per scholastic year. The citizens of the town have not offered, nor do they offer, to comply with the act of 1891. The act of 1875 was repealed on August 26, 1891. No election was held under the act of 1891 on the first Monday in February, 1891; but after August 26, 1891, the mayor and officers of the old corporation held over, claiming to be officers of the new corporation, and acted as such without being elected or qualified to do any act as mayor, council, or corporation, but, assuming to themselves the powers, duties, and functions of officers and agents of the town, elected and established in office as councilmen for what they pleased to call the "Douglasville Extension," and the council, as augmented, had the boundaries of the town extended as before stated, all of which was ultra vires and void. The council did not annually make up and enter upon the journal an accurate estimate of all sums which are or may be lawfully chargeable for the government of the town, and could not for this reason lawfully impose a tax on the people; especially could they not impose or collect taxes for college purposes upon the old or new town. Section 21 of the act of 1891 is illegal and void, and would not, if an election were held, authorize the collection of taxes for any purpose. The bonded debt of the town is illegal as to plaintiffs, even if good as to the town, under the charter of 1875. Before liability could attach to them, the provision of section 795 of the Code would have to be complied with, which has never been done; and the corporation, by its agents and servants, failed to comply with the law that the notice given for an election on the incurring of a debt must specify the amount of bonds to be issued, for what purpose, the amount of interest they should bear, how much principal and interest should be paid annually, and when they should be fully paid. The act of 1891 was passed upon the recommendation of the representative alone

from Douglas county, and not by the citizens of the old or new town. If notice had ever been given of a proposed amendment to its charter, the same was, by a town meeting held for the purpose, formally withdrawn, and the representative of the county notified before the passage of the act, which passage, under the circumstances, was a fraud upon the law, upon the legislature, upon the citizens of the old town, and especially on plaintiffs. The territory included within the proposed extension of the town limits under the act of 1891 was at the time of the passage of that act, and is now, farming and agricultural land, used as such and for no other purposes; is cleared into fields, pastures, etc., and used only as other farming and agricultural lands in Douglas county outside of incorporate towns. No streets, lights, sewerage, or other advantages or benefits usual and common to incorporated towns have been offered or proposed for the benefit of the citizens living within said territory. No additional school accommodations for the children living within said district have been offered or proposed for the benefit of the residents of said territory. Plaintiffs set forth various quantities of land of the value of \$20 per acre, as included within the extended territory, which defendants are endeavoring to subject to taxation, imposing enormous burdens upon plaintiffs without their consent and without any benefit to them, they being included within the extension. Said self-constituted municipal authorities apportioned, assessed, and levied a tax of 40 cents per \$100 on the taxable property of plaintiffs, and caused a notice to be published, calling on and requiring them to give in their taxable property within said extension on or before the 25th or 26th of September, 1891, and that on failure to do so they would be double-taxed as a penalty. Plaintiffs specify the amounts of said assessed tax and the persons assessed, so far as known, and allege that the town authorities, through the marshal, were proceeding to collect the tax when, on November 1, 1891, plaintiffs filed their petition. Since the grant of the injunction on October 19, 1891, the municipal authorities have made another and like assessment of taxes on the same property and the same parties, and *fi. fas.* are now outstanding against them.

The grounds of demurrer were: (1) No equity. (2) The petition is premature, showing that there is no execution or order to proceed on any execution against the property of any of plaintiffs. (3) The act of 1875, or so much of it as is in conflict with the act of 1891, is repealed and superseded by the later act, which is, and was at the time of filing the petition, operative in the town. (4) The act of 1891 is constitutional in whole and every part. (5, 6) The petition does not show what amount of property of plaintiffs is inside or outside of the corporate

limits under the act of 1891, nor how much tax is levied or assessed, or what amount of money would be collected out of any of plaintiffs, nor that any sum of money would be so collected. (7) The passage of the act is conclusive as to want of notice. (8) All the plaintiffs are citizens of Douglasville, and were made so by the act of 1891, and as such are amenable to the laws of the town, and are compelled to pay whatever taxes are required ad valorem of other citizens of the town; the law being that the council shall levy or assess a tax to pay the further expenses of the town, the burden of which is compelled to be borne by the plaintiffs as well as other citizens of the town.

The amendment which the court refused to allow alleges the following: The territory embraced within the corporate limits of the town, as defined in the act of 1875, was by authority of the corporation surveyed, mapped, platted, and laid off into building lots and streets, and lots for public buildings, churches, schools, etc. Up to August 1, 1891, not so much as half of these lots had been appropriated or used for building or town purposes; on the contrary, in 1890 and 1891, and previous to August 26, 1891, a large number of enterprising citizens of means and influence had removed from the town, and from 1890 to August 26, 1891, there was no real, existing, or prospective evidence of the growth, expansion, or increase of population or business in the town, demanding or requiring, for any legitimate purpose or use of the town, its business or people, even the unoccupied territory and lots within the limits prescribed by the act of 1875. Up to August 26, 1891, nor to this date, was or is there any manufactory or other industry tending or calculated to add to the prosperity and growth of the town so as to require the use of said unoccupied territory within the corporate limits. The resident population of the town up to August 26, 1891, was, as plaintiffs are informed, less than 1,200,—about two-thirds whites and one-third colored; and there were about 253 white and 70 colored children of school age entitled to the benefits of the common-school fund. On June 14, 1889, the Douglasville College was incorporated by the superior court according to law, whereby the mayor of Douglasville and six other named persons, board of trustees, and their successors in office, were incorporated as a private incorporation under the name of "The Douglasville College," with power to enforce good order, receive donations of realty and personalty, erect and assist in erecting additional college buildings and such other things as may be necessary, and to do all other acts necessary or proper in the management of the affairs of the college, not for the purpose of trade or profit, but for promoting the general design and looking after the general

interest of the college; also, the power to confer degrees, issue diplomas, and do all other things usually conferred on colleges of similar character. Plaintiffs are informed and believe that in 1889 (exact date and particulars not known to them, because of the refusal on demand to allow them and their attorneys to examine books and minutes of the mayor and council) a bonded debt was incurred by the corporate authorities of the town for the purpose of building the college so incorporated; and they charge that this was in direct violation of the constitution and laws of the state. They charge that the mayor and council, in violation of the constitution and laws, afterwards (date and proceedings being unknown, because of the refusal just mentioned) apportioned, assessed, levied, and collected a tax upon the property and business within the corporation, for the purpose of paying off said bonds and interest, as provided by the stipulations of the bonds. Plaintiffs are informed and believe that the income of the college from tuition taxes and matriculation fees was insufficient to meet and discharge the accruing interest and maturing bonds and other expenses of the college, and that, for the purpose of adding to the taxable property to meet the demand for the payment of the bonds, a bill with the title of the act of 1891 was introduced into the legislature during the session of 1890. The question of extending the limits of the town, as provided by section 795 of the Code, was not complied with and submitted to the people to be included, nor were they so much as advised with as to whether the bill should be introduced in the legislature, nor had they any knowledge of the facts of any proposed tax to meet said college debt until long afterwards. Three of them, being then and now residents within the proposed extension limits, had no knowledge or information of a proposed amendment or new charter until long after the bill had been introduced in the legislature. In December, 1890, and while the legislature was in session, a large and representative public meeting was held in obedience to a public call of the citizens interested in the proposed new charter as advertised in Douglasville; and after discussion, in which many participated, a resolution was adopted by said meeting, instructing their representative in the legislature to withdraw and not pass said bill, which resolution was adopted without a dissenting vote, every one in the meeting voting affirmatively. After this, plaintiffs relied with implicit confidence that the bill would be withdrawn. The then representative had knowledge of said action asking the bill to be withdrawn; but in disregard of the constitution and laws, and especially of section 795 of the Code, he caused and procured the passage of the act of August 26, 1891, without disclosing the facts to the general assembly, which passage, un-

der the facts before stated, was a legal fraud on the general assembly, the state, and the plaintiffs. The act contains matter variant from the title, and distinct subject-matters, and is the enlargement of a judicial charter in violation of the constitution; that is, from the first to the twenty-first section, inclusive, it refers to the extension of limits, corporate powers of the town in the management, control, police authorities, and levy of taxes for general expenses and common schools for the town, and from the twenty-second to the thirty-sixth, inclusive, to the enlargement of the corporate powers, management, control, and maintenance of the college, and the levy of taxes for the purposes of the college, the same being a private charter granted by the court. On the passage of the act of 1891 the corporate authority of the town was vested, under the act of 1875, in the mayor, recorder, and five councilmen, who should hold until their successors were elected and qualified; but said officers, without authority, and in express violation of section 4 of the act of 1891 and of section 2 of the act of 1875, organized, without any election, the municipal authorities for the town, together with a treasurer and marshal, as provided to be done after an election had in section 3 of the act of 1891; and said last-mentioned, self-constituted municipal authorities, without legal authority, in disregard of law and the rights of plaintiffs, proceeded to take charge of the affairs of the town, and assumed municipal control of the territory as extended under the act of 1891, and in September caused the extension boundary to be surveyed. The tax *fi. fas.* issued since October 19, 1891, have been and are being used to deprive plaintiffs and all other resident citizens within said extension limits from enjoying the right of suffrage. The tax levied on their property and being attempted to be collected was for the purpose of paying said maturing bonds and interest thereon for the maintenance of the college; said debt having been incurred in violation of article 7, § 7, of the constitution, and of section 21 of the act of 1891. The extension of the town limits as provided in the act of 1891 is unconstitutional for the further reasons that the territory included within the extended limits embraces the farm and agricultural lands of plaintiffs, and was and is sought to be taken and subjected to a tax for collegiate purposes for the education of a class, without either compensation or other benefit to plaintiffs, and not for public uses, in that said included territory was neither necessary nor required for the extension, growth, health, or general commercial interests or business of the town, but is being sought to be taxed for the sole benefit of residents within the corporate limits as fixed by the act of 1875, and said college purposes. No system of common schools, open and free alike to all children of school

age and for the children of the town, white and colored, has been organized or established in the town, as provided by the constitution and laws of the state, or by the act of 1891, which provides that before section 27 thereof shall take effect, to authorize the levy and collection of a tax for establishing and maintaining a system of schools, the same shall be submitted to the qualified voters of the town. The college, for the benefit of which this tax is sought to be collected from plaintiffs, and said extension of town limits is sought to be made, is a college for whites only, as shown by its annual catalogue attached to this amendment. A matriculation fee for \$5 per pupil per term is required in advance for one grade, and \$3 for each pupil in the primary and preparatory grades per term; and many indigent white children of the town have been denied entrance in the school because unable to pay the matriculation fee. Plaintiffs attach a receipt given to one of them by the town marshal for municipal tax for the year 1891, the amount being \$6.78, of which \$2.38 is stated to be for general fund, and \$4.40 for college fund. There is not, nor has there been, nor has it been proposed to establish, any other school for whites in the town than the college; and the entire fund raised for school purposes within the town for white children, under the provisions of the act, is paid over to the trustees of the college for the payment of said bonded debt and interest thereon. Petitioners are informed and believe that, while the colored citizens of the town have 70 or more children of school age, and are entitled to like benefits with the whites in the common schools, they have not received one cent levied and collected by the municipal authorities under the act of 1875 or the act of 1891; and that no provision has been made by the municipal authorities whereby the colored children can receive any school benefits from the taxes so levied, although said authorities have levied and collected taxes from colored as upon white citizens. More than one-fourth of the territory included within the corporate limits prescribed by the act of 1875 has never been used for town purposes, but was at the time of the passage of the act of 1891, and is today, used as farm land, and cultivated in corn, cotton, and other crops, or wholly unoccupied and in the woods, with many of the streets, as laid off, unused and unworked; and the same is much better suited and located for town purposes than the land within the proposed extension. The lands included in the proposed extension are farm and agricultural lands on which plaintiffs reside in the pursuit of their business as farmers; and the threatened extension of the corporate limits, with the threatened imposition and levy of taxes, with the additional burden proposed by the act of 1891, depreciated the value of their lands and prop-

erty, and still continues to do so, with no compensation to plaintiffs or corresponding benefit, either for schools for the education of their children or in any other way.

Wm. Phillips, Harrison & Peeples, John V. Edge, and Thos. B. Irwin, for plaintiffs in error. B. G. Griggs, W. A. James, and J. S. James, for defendants in error.

**PER CURIAM.** Judgment affirmed, with direction.

(115 N. C. 198)

In re TROTTER, Public Administrator.  
(Supreme Court of North Carolina. Nov. 20, 1894.)

**PUBLIC ADMINISTRATOR—REMOVAL—FAILURE TO RENEW BOND.**

A public administrator, not otherwise in default, cannot be removed for failure to renew his bond, where he offers to renew it in response to the notice served upon him.

Appeal from superior court, Guilford county; Winston, Judge.

Order to show cause why he should not be removed from the office of public administrator for the county of Guilford for failure to renew his bond was issued to W. D. Trotter by the clerk of the superior court of said county. At the hearing, respondent tendered a bond executed by him, with sureties, but judgment was rendered by the clerk removing him from office, which judgment was affirmed by the judge in chambers on appeal. From this judgment, respondent appeals. Reversed.

L. M. Scott, for appellant. Dillard & King, for appellee.

**PER CURIAM.** We have examined the authorities cited by counsel with much care, and, after due consideration, we conclude that his honor erred in sustaining the action of the clerk in refusing to accept the bond of Trotter upon the ground stated by him. It is not found that the said Trotter has been in default in any particular except a failure to renew his bond, and this he offers to do in response to the notice served upon him. Reversed.

(115 N. C. 739)

**STATE v. HORNE.**

(Supreme Court of North Carolina. Nov. 20, 1894.)

**ORDINANCES—VALIDITY—PROFANE SWEARING.**

A town has no power to pass an ordinance forbidding the "use of profane language in the town," unless authorized by the legislature.

Appeal from superior court, Anson county; Brown, Judge.

J. M. Horne was charged with violating an ordinance, and acquitted. The state appeals. Affirmed.

The Attorney General, for the State.

CLARK, J. In *State v. Cainan*, 94 N. C. 880, this court held valid a town ordinance which forbade "loud and bolsterous cursing and swearing in any street, house or elsewhere in the city." This ruling was followed and affirmed in *State v. Debnam*, 98 N. C. 712, 3 S. E. 742. These decisions are placed upon the ground that such conduct does not amount to a "nuisance" (because not in the presence and to the annoyance of divers persons), which would be punishable under the state's jurisdiction, but is "disorderly conduct," which the town might well forbid and punish. In *State v. Warren*, 113 N. C. 683, 18 S. E. 498, this court held constitutional an act forbidding the use of "profane language that disturbed the peace" in a certain locality. In the present case the ordinance simply forbids the "use of profane language in the town." It does not forbid it when "loud and bolsterous," which would be disorderly conduct, as in the first two cases above cited, nor when it "disturbed the public peace," as in the last-named case. As the ordinance stands, it would make punishable profane language, used, perhaps thoughtlessly, in the utmost privacy, when neither loud and bolsterous, nor calculated to disturb the peace. Indeed, the special verdict finds that the language used was not loud and bolsterous, nor obscene, nor calculated to disturb the peace. We do not think the powers granted this corporation, upon a fair construction, were intended to confer jurisdiction to that extraordinary extent, and we must hold the ordinance invalid. We forbear to pass upon the question whether the legislature could, if it chose, confer upon the town authority to pass such an ordinance, as the question is not before us. No error.

(115 N. C. 166)

BURTON v. FURMAN, State Auditor, et al.  
(Supreme Court of North Carolina. Nov. 20, 1894.)

**MANDAMUS TO STATE AUDITOR—PAYMENT OF CLAIM—EXERCISE OF DISCRETION—DUTIES OF STATE TREASURER.**

1. Code, § 3850 (7), requires the auditor to examine and liquidate all claims against the state in cases where there is sufficient provision for the payment thereof. Priv. Laws 1893, c. 100, § 7, in order to provide a fund for the payment of the attorneys employed in litigation against a certain railroad for back taxes, requires the railroad company to pay a certain percentage of the taxes due the different counties, etc., into the state treasury. *Held*, that after the auditor had allowed such attorneys a certain amount, mandamus would not lie to compel him to issue his warrant for a balance claimed to be still due for such services, since said section of the Code invests the auditor with discretion in the payment of claims.

2. The state treasurer did not, by receiving the money so paid into the state treasury, become trustee for said attorneys.

Appeal from superior court, Wake county; Hoke, Judge.

Petition for writ of mandamus by R. O. Burton against R. M. Furman, auditor, and another. There was a judgment for defendants, and plaintiff appeals. Affirmed.

R. O. Burton, for appellant. The Attorney General and R. C. Strong, for appellees.

MacRAE, J. This is an action whereby the plaintiff, an attorney at law, seeks to recover \$974.88, the balance of a fee of \$5,000, claimed by him for services rendered the state in litigation with the Wilmington & Weldon Railroad Company over its liability for state, county, and city taxes, and to compel the payment to him of said sum out of the fund placed in the state treasury by the counties and the railroad company under the provisions of section 7, c. 100, Priv. Laws 1893. As set out in the complaint, there had been much litigation concerning the right to tax the said company, and the act above named was the result of long negotiation for an adjustment of all matters in difference on said account. Section 7 is the final section of this act, and reads as follows: "That to provide a fund for the payment of the attorneys employed by the state in litigation against said company, in making payments to the counties, cities and towns of the amounts due each under this act, the said company shall deduct from the amount due each county, city or town fifteen per centum, which said per centum the said company shall pay into the state treasury. \* \* \* And said company shall for like purposes pay into the state treasury the sum of \$2,500." The parts omitted are immaterial for our present purpose. The action is both to ascertain and declare the amount due and to procure a mandamus to the auditor compelling him to issue his warrant, and to the treasurer to compel him to pay the same. There is no further contention that the writ of mandamus is a high prerogative writ, as it was at common law. It is now a writ of right, to be used as ordinary process; and every one is entitled to it where it is the appropriate process for asserting the right claimed. Code, §§ 622, 623; Belmont v. Reilly, 71 N. C. 280. So the first question presented is, is this the appropriate process for ascertaining the plaintiff's right? The purpose of this writ of mandamus is to require some superior court, officer, corporation, or person to do some particular thing which appertains to their office or duty, and it will not be granted where the law affords to the party aggrieved another and complete specific remedy. Neither will this writ be granted to compel the performance of an act involving the exercise of judgment and discretion on the part of the officer to whom its performance is committed. The law is so thoroughly settled in this state by the former adjudications of this court that

we have nothing to do but to refer to them. A case strikingly like the present one is Boner v. Adams, 65 N. C. 639, where the plaintiff, a clerk of the general assembly, who had received a warrant for the entire number of days to which he was entitled at \$7 per day, claimed that he was entitled to be paid \$3 per day in addition to what he had already received, under an act of assembly (chapter 1, Sess. 1869-70) which provided that the mileage and per diem of the clerks shall be the same as allowed by the last general assembly. And further it was provided that "the auditor of the state is hereby authorized to draw his warrant upon the treasurer for such sums as have not been paid or may hereafter be due." The auditor refused to draw his warrant upon the treasurer for the additional sum demanded, and thereupon application was made to the court for the writ of mandamus to compel the auditor to issue the warrant and the treasurer to pay it. It was held that mandamus would not lie against the treasurer, because no warrant had been issued, and not against the auditor, because it was something more than a ministerial duty sought to be required of him. This was before the act of 1871 (section 622 of the Code), which provided that all applications for mandamus should be made by summons and complaint; but the principles governing the issue of mandamus were the same then as now, and the decision is a controlling one, in which we fully concur. Since the passage of the last-named act the subject has been often considered. Selecting one of such cases (Brown v. Turner, 70 N. C. 93), we find a very clear statement by Mr. Justice Bynum: "Mandamus will lie when the act required to be done is imposed by law, is merely ministerial, the relator has a clear right, and is without any other adequate remedy. Mos. Mand. 68. But it does not lie where judgment and discretion are to be exercised, nor to control the officer in the manner of conducting the general duties of his office. 2 Dill. Mun. Corp. § 665; Com. v. City of Pittsburg, 34 Pa. St. 496. In Decatur v. Paulding, 14 Pet. 497, it was held that mandamus would not lie against the secretary, because the duty required by the writ was executive, in which judgment and discretion had to be used, to wit, in construing and passing upon an act of congress. To the same effect are Brashear v. Mason, 6 How. 92; U. S. v. Guthrie, 17 How. 284,—where the court says: "It has been ruled that the only acts to which the power of the court by mandamus extends are such as are purely ministerial, as to which nothing like judgment and discretion in the performance of the duties is left to the officer." Code, § 3350 (7), prescribes, among the duties of the auditor, "to examine and liquidate the claims of all persons against the state in cases where there is sufficient provision of law for the payment thereof, and, where



there is no provision. to examine the claim, and report the fact, with his opinion thereon, to the general assembly." It will be seen at once that the duty of the auditor is not in this instance a ministerial one, but he is required to exercise his judgment in the examination of claims and the construction of statutes applicable thereto.

Some authorities have been cited to us by the plaintiff, among them *Heard's Short Extr. Rem.*, which go so far as to say that while in former times a mandamus was held to lie only to compel the performance of a ministerial duty, modern cases have gone much further, and a mandamus will now be granted, when necessary, to compel the performance of any public duty. Perhaps the present case aptly illustrates the meaning of the author. If upon the presentation of his claim to the auditor by the plaintiff the auditor should refuse to examine the same, the action for a mandamus would lie, and the auditor would be commanded to do his duty, but the court would not undertake to direct or control him in the exercise of his judgment and discretion in the course of such performance. There have been occasional cases of this kind against boards of county commissioners to compel them to hear applications of persons applying for license to retail spirituous liquors, but the court could go no further than to require them to exercise their discretion. This claim has been presented to the auditor. He has examined it, and has refused to issue his warrant. It must be that in his opinion there is no provision of law for its payment. We have no power to require him to do more than he has done, unless, perhaps, if he should refuse to report the case, with his opinion, to the general assembly.

As to the treasurer, his duty is, if possible, more clearly defined. Section 3356: "To pay all warrants legally drawn on the treasurer by the auditor, and no moneys shall be paid out of the treasury except on the warrant of the auditor." There are some exceptions to this general provision, as in sections 1169 and 1170 of the Code, by force of which the governor may draw his warrants in certain events; but there is nothing to affect the general rule in its application to this case. No mandamus will lie to compel the treasurer to pay except upon his refusal to honor a warrant. But it is contended that by virtue of the act of 1893 the treasurer became a trustee for the plaintiff and his associate counsel as to the money put into the state treasury to be paid to them, and that this court has the jurisdiction to enforce the performance of the trust. And in this view of the case it is admitted by the plaintiff that if this were a claim against the state this suit could not be maintained. But by examination of the aforesaid section 7 of the act of 1893 this fund is to be paid into the state treas-

ury, out of which, as we have seen, no money can be paid but upon the warrant of the auditor. If there is a trust in this case, it is the state which is the trustee, and the state cannot be sued, except as provided in section 9, art. 4, of the constitution. It would hardly be contended that the state treasurer is not liable on his official bond for the safe-keeping and disbursement of this particular fund. If such be admitted, it follows that the treasurer's trust is in favor of the state. Besides, if by virtue of this act the treasurer became a trustee for plaintiff, it would be a personal trust, apart from his office. No warrant from the auditor would be required, and mandamus would not lie against him as an individual to compel its performance, there being other adequate remedy afforded him by law.

Since the argument, we have been referred by the learned counsel for the plaintiff to several authorities in other states bearing upon the question before us, but, as the statutes of those states may be different from those of our own, they cannot have weight with us against the clear and controlling enunciations of this court to which we have referred. In this case it will be seen that the treasurer had already paid the plaintiff—presumably upon the warrant of the auditor—the sum of \$4,125.02, and the auditor, in his answer, avers that the sum so paid is sufficient compensation for the services rendered by the plaintiff. It is not distinctly alleged in the complaint that there was a special contract between the plaintiff and one authorized to make it, fixing the amount of said compensation, although it is alleged that the amount charged by plaintiff for his fee was well understood by the governor and treasurer to be \$5,000. It was therefore clearly committed to the auditor to exercise his discretion in the examination and liquidation of the claim, and it may be that he declined to allow this further claim, because he had already acted in the matter, and made such allowance as in his judgment was proper, and therefore that there was no provision of law for a further payment. If there had never been any allowance made to plaintiff for his services, it might be that the refusal to audit the account, when it appeared to the court that there was provision of law for its payment, would subject him to the jurisdiction of the courts in this proceeding to command him to audit and make such allowance as he deemed proper, as in the cases cited in the opinion of the court in *State v. Warner*, 55 Wis. 271, 9 N. W. 795, and 18 N. W. 255. But we do not think that under the statutes in this state the court below would have been warranted in submitting an issue as to the value of the services to a jury, as was done in the case last cited. Neither is there in our case a specific appropriation by statute of a sum certain to be paid to this plaintiff, and a

direction to the auditor to issue his warrant for the same, as in the case of *State v. Moore* (Neb.) 59 N. W. 755, leaving but a ministerial duty to be performed, in which case we think the writ of mandamus would lie. Nor is there an admission of the correctness of the bill presented, and of the existence of a special fund for its part payment, as in the case of *Journal Co. v. Boyd*, 36 Neb. 60, 53 N. W. 1116, where it was intimated that the peremptory writ would issue to the defendant, the governor, to issue his warrant upon said special fund, if it had not been made to appear that he was ready to issue such warrant. The other cases cited seem to have been founded upon the statutes of the several states, and are not authority for the plaintiff's contention.

Some question was made as to the propriety of making the governor a party to these proceedings, which it will be unnecessary for us to consider. Neither are we called upon to examine into the merits of the case. There is no error.

(115 N. C. 385)

**LEVERING v. SMITH, Sheriff.**

(Supreme Court of North Carolina. Nov. 20, 1894.)

**UNLAWFUL SEIZURE—EVIDENCE.**

1. Where defendant justifies a seizure under execution by alleging ownership in a third person, plaintiff can show by such person that he had sold the property, under a bill of sale executed prior to the date of seizure, to plaintiff's assignor.

2. It is competent for the plaintiff, for the purpose of proving his assignor's possession of the property at date of the assignment to plaintiff, to show that the original owner had leased the ground on which the property was situated to plaintiff's assignor.

3. As between plaintiff and a sheriff who seized property as belonging to A. which in fact A. had sold to B., and B. to plaintiff, the mode of conveyance from B. is immaterial, and an unregistered deed of assignment is a valid means of proof.

4. Where it is proved that other lumber had been placed in the yard with plaintiff's after the date of the bill of sale, a charge that plaintiff must show that the lumber seized was part of that in the yard before the bill of sale, or that he was the owner of all the lumber in the yard at the time of the seizure, is proper.

5. A deed executed in Philadelphia, Pa., and containing the description, "All the real estate, and also all the goods, chattels, and effects and property of every kind, real, personal, and mixed," of the said grantor, will include lumber owned by grantor in Cumberland county, N. C.

6. Where plaintiff sells his claim after beginning the action, the purchaser may, in the discretion of the court, be made a party plaintiff, even though, under the Code, the right of action were not assignable.

7. In such case, as the liability of defendant is not changed, an objection to the introduction of a deed of assignment of the claim to the party made coplaintiff is properly overruled.

8. The court is not required to give an instruction precisely in the language requested.

Appeal from superior court, Cumberland county; Shuford, Judge.

Action by W. A. Levering against J. B. Smith, as sheriff, for the value of goods seized under a writ of execution. From a judgment for plaintiff, defendant appeals. Affirmed.

N. W. Ray, for appellant. J. W. Hinsdale, for appellee.

**BURWELL, J.** The executions which came to the hands of the defendant sheriff directed and authorized him to seize and sell for their satisfaction the property of H. W. Steinhelper and the Starr Lumber Company. The two actions brought against him—which, without objection in apt time, were treated as one, and tried together upon one set of issues—were founded upon the allegation that in executing those writs the defendant had taken certain personal property that did not belong to the defendants in those executions, or either of them, nor was in their possession. Of course, if that fact were true, he became, by such unauthorized and wrongful act, liable to some one for damages. The plaintiff C. W. Sparhawk, the originator of these actions, alleged in his complaint that the personal property which the defendant wrongfully seized and sold to satisfy the said writs belonged to him, and was in his possession, and demanded the damages due to him for this alleged trespass upon his rights. While such a cause of action as was thus set out by the plaintiff Sparhawk was not assignable (Code, § 177), the rights of the defendant were not prejudiced by allowing one to become a party plaintiff who claimed that whatever sum should be recovered by the original plaintiff should be paid to him because of an agreement to that effect made between him and that plaintiff. If the latter did not object to his presence in the action, the defendant should not be allowed to do so, for his defense could in no wise be affected by what had occurred between them after the alleged causes of action against him accrued. The issues submitted to the jury by his honor without objection, and the responses thereto, are as follows: Issues as to first cause of action: "(1) Was the plaintiff Sparhawk, at the date of levy and sale, September 17, and September 28, 1891, the owner of the lumber levied on and sold by the defendant sheriff under the executions mentioned in third paragraph of plaintiff's first alleged cause of action? Yes. (2) If so, what damage has plaintiff sustained? \$565, with interest from date of sale." Issues as to second cause of action: "(1) Was plaintiff Sparhawk, at the date of levy and sale, September 28 and October 26, 1891, the owner of the lumber levied on and sold by defendant sheriff under the executions mentioned in first paragraph of plaintiff's second alleged cause of action? Yes. (2) If so, what damage has plaintiff sustained thereby? \$600, with interest from date of sale. (3) Has plaintiff Sparhawk, since the commencement of this action, sold,

and for value transferred, his claim for damages to the plaintiff Levering? Yes." The third issue was one that concerned only the plaintiff Sparhawk and his associate, Levering, and we need give it no further consideration.

There seems to have been no dispute between the parties as to the proper measure of damages, in case it was found that the seizing of the property by defendant was a trespass upon the rights of the plaintiff Sparhawk; and there was no exception taken to evidence, or to the charge, so far as related to the damages in the event the jury should find issues numbered 1 in favor of the plaintiff. We have therefore to consider the exceptions taken by defendant to the admission of evidence, and to the charge of his honor, as relating solely to the question, was the plaintiff Sparhawk the owner of the lumber sold by defendant sheriff at the date of the levy and sale? We will pass upon these questions without regard to the order in which they appear to have been taken in the case on appeal.

The plaintiff offered in evidence a bill of sale from H. W. Steinhelper to W. A. Levering, dated May 5, 1891, for 2,367,741 feet of lumber. H. W. Steinhelper, a witness for the plaintiff, testified that he signed the bill of sale; that it was written and signed in the city of Philadelphia, and was witnessed by John Warner and G. A. Leinan, who signed the same as subscribing witnesses. The defendant objected to the introduction of this bill of sale on the ground that the same could only be proved by the subscribing witnesses. This objection was overruled, and the defendant excepted. Inasmuch as the defendant, in his answer, justified his seizure of the lumber by the allegation that he had levied on it as the property of H. W. Steinhelper, it was, of course, competent for the plaintiff to show by Steinhelper himself that he did not own it at the time of the levy. The very best evidence that Steinhelper had sold it to Levering before that time was the bill of sale made and signed by him. It is very clear that his acknowledgment of the execution of this writing was competent to go to the jury as evidence that he had sold the lumber to Levering at its date, and had also delivered it into his possession. This exception cannot be sustained.

2. Having thus produced evidence tending to show that Steinhelper had sold the lumber to Levering before the date of the seizure of it by the defendant, and having theretofore, without objection, introduced a deed of assignment from Levering to him (Sparhawk), conveying to him all his "property, of every kind, real, personal, and mixed," dated after the sale from Steinhelper to Levering, but before the levy by defendant, the plaintiff Sparhawk had furnished evidence which, if believed by the jury, established the affirmative of the issues numbered 1. The fact that, after the commencement of these actions by Sparhawk, he assigned his interest to Lever-

ing, could have no bearing on these issues, and could affect only the finding of issue No. 3; and that issue, as we have said, did not concern the defendant. His objection to evidence addressed solely to that issue was properly overruled, as it could not affect his liability. Hence, there was no error in overruling his objection to the introduction of the reassignment from Sparhawk to Levering.

3. The plaintiff further offered a lease made on the 5th of May, 1891, by Steinhelper to Levering, of the mill yard, for five years, at the rent of \$100 per year. Said lease had not been registered, and defendant objected to its introduction as evidence. The court took a recess, and when it met again the lease had been registered, upon the acknowledgment of its execution by the parties thereto. The court thereupon overruled the defendant's objection, and admitted the lease to be read in evidence, and defendant excepted. The lease was offered for the purpose of showing that the land was leased by Steinhelper to Levering, and that Levering was in possession of the land where the lumber was delivered. This lease, whether registered or not, was competent evidence, its execution being proved or admitted, to show that the place where the lumber was stored was in the possession of Levering when the latter acquired the title to the lumber from Steinhelper, as alleged. The fact that such a lease was made was pertinent to the controverted fact, to wit, the possession of the lumber by Sparhawk, who claimed it as the assignee of Levering.

4. Exceptions relating to the charge to the jury: (1) The defendant asked the court to charge the jury that, Sparhawk's trust not having been registered in this county until October 2, 1891, he did not have such title on September 27, 1891, as would sustain this action. The court declined, remarking that Sparhawk claimed the property by reason of his possession. Defendant excepted. We do not think that, for Sparhawk's purposes in this action, it was necessary that the assignment of the lumber from Levering to him should have been registered. This is not a contest between creditors of Levering and his assignee, but between that assignee and the defendant, whose act in seizing the lumber was wrongful, unless it was the property of Steinhelper, the judgment debtor. This assignment was valid inter partes without registration, as they conceded. Its effect in this action was merely to show that the act of the defendant, if wrongful, was a trespass on the rights of Levering's assignee, and not on the rights of Levering himself. (2) Defendant asked the court to tell the jury that suit having been commenced in October, 1891, the deed from Sparhawk to Levering, of December 19, 1891, did not pass to Levering any title to this suit, or right to prosecute this action. The court declined, and the defendant excepted. This request was properly denied. It contained a correct

statement of a proposition of law, but it was not pertinent to the issues submitted to the jury. (3) The third request was that unless Levering on the 11th of August, 1891, had title and possession, the trust deed of that date did not pass to Sparhawk such title as could support this action. The court gave this instruction, but told the jury, in the course of the charge, that Sparhawk must prove ownership of the lumber levied on and sold at the date of levy and sale, and that he claimed title through Levering, and that, if Levering was not the owner at the date of the assignment to Sparhawk, no title passed to Sparhawk under said deed. Defendant excepted because the court did not give the charge in the language requested. It is not required that the instruction asked for should be given in the language used. It is sufficient if the substance is given. (4) Defendant's fourth request was, that Levering having attempted to show title to May 5, 1891, for such lumber as was then on the yard, and having allowed other lumber made after that time to be mixed with it, or placed on the same yard, and not having proved that the lumber levied on was part of the lumber that was on the yard on May 5, 1891, then he cannot recover. The court gave this charge, but modified it as follows: That Levering having attempted to show title to May 5, 1891, for such lumber as was then on the yard, and having allowed other lumber made after that time to be mixed with it, or placed on the same yard, he cannot recover unless he has proved that the lumber levied on was part of the lumber that was on the yard on May 5, 1891, or that he was the owner of all the lumber on the yard. Defendant excepted, insisting that there was no testimony tending to show that the lumber levied on was in the yard May 5, 1891. This exception was not urged on the argument before us. The question at issue was: Who owned the lumber at the time it was seized? Who was in possession of it? There was evidence that Levering had bought from Steinhelper all the lumber on the yard on May 5, 1891, and had then leased the land where it was piled. It was further in evidence that all the lumber subsequently put upon that yard by Steinhelper was put there by Levering, and into his possession. Levering himself testified that the lumber levied on was Sparhawk's, that he had assigned it to him. (5) Defendant's fifth request was that the deed of trust from Levering to Sparhawk was too indefinite in its description of the property conveyed to include this lumber in Cumberland county, N. C. The court declined to give this instruction, and the defendant excepted. The description in the deed referred to—"all the real estate, and also all the goods, chattels, and effects and property of every kind, real, personal, and mixed, of the said William A. Levering"—is as comprehensive as it could be made. We see no error here.

Having thus disposed of the defendant's exceptions, we conclude that no incompetent evidence was admitted, and no error was committed in the charge, and therefore that the fact is properly established by the finding of the jury that the plaintiff Sparhawk was the owner of the lumber levied on and sold by defendant sheriff. That being true, the plaintiff Sparhawk was entitled to damages. The jury found the amount of such damages, and there was no exception relating to that matter. The third issue did not concern the appellant. No error.

(115 N. C. 242)

**EXUM v. BAKER.**

(Supreme Court of North Carolina. Nov. 20, 1894.)

**FORECLOSURE OF MORTGAGE—WRIT OF ASSISTANCE—TAX SALE.**

1. A purchaser at foreclosure is not entitled to a writ of assistance against one in possession of the land under a tax deed, who was not a party to the action, or privy to any party thereto.

2. Where, during the life of a mortgage, a tax is levied on the land, the assignee of the mortgage, under an assignment for the benefit of the mortgagee's creditors, who bought the land at the foreclosure sale, is not a purchaser without notice, within Act 1891, c. 391, authorizing the sale of land for taxes in arrears for the years from 1881 to 1886, inclusive, but provides that the act shall not affect "purchasers without notice."

Appeal from superior court, Greene county; Brown, Judge.

Action by Josiah Exum against Bryant Baker to foreclose a mortgage. At the foreclosure sale the land was bought by plaintiff, who applied for a writ of assistance to remove Jasper Baker from the possession of the land. The writ was allowed, and Jasper Baker appeals. Reversed.

J. B. Batchelor and Swift Galloway, for appellant. Geo. M. Lindsay, for appellee.

**AVERY, J.** It is found as a fact by the court below, upon petition for a writ of assistance and the answer thereto, with exhibits, that the defendant Jasper Baker bought the tract of land in controversy on the 5th of December, 1894, when sold for taxes due for the year 1886 by Sugg, tax collector, acting under the law of 1891 (chapter 391), and that on failure of the owner to redeem he took title for said land from said tax collector on December 6, 1893, "entered and acquired possession under the same, and has lived thereon ever since." The question of the surrender of possession by the defendant Bryant Baker, or his eviction, is no longer an open one. It appears as a fact that there was a change of possession from Bryant to Jasper Baker. How it was effected, we do not know, and therefore the fact that Bryant Baker has continued to live with the new occupant is not material, nor is it material what relation the two sustain to each other. The controversy hinges up

on the question whether the defendant Jasper is in privity with the original mortgagees of Bryant Baker, Dale Bros., or their assignee, the plaintiff, Exum, or holds adversely to Exum. The lien of the tax on the land, if it be a lien at all, as against a person without notice, is generally superior to the right of either mortgagor or mortgagee. *Wooten v. Sugg*, 114 N. C. 295, 19 S. E. 148. Hence, it is ordinarily the duty of the mortgagee—certainly, on failure of the mortgagor to discharge such lien—to avail himself of the privilege given him by statute (Code, § 3700), and save his security. If the assignee of the mortgagee negligently suffered another to acquire a superior right by purchasing at a tax sale, he cannot complain of consequences which naturally followed. If the lien for tax was superior, Jasper Baker acquired, on the expiration of the time allowed for redemption, and the execution of a deed by the tax collector, a better title, legal and equitable, than that of mortgagor or mortgagee. But whether Jasper Baker, under the circumstances, acquired a better or a worse title, he at all events obtained possession, and is not in privity with mortgagor, mortgagee, or the assignee of the latter, since he was not a party to the original foreclosure proceeding, nor does he claim through or under any such party.

A writ of assistance is only granted (as was said, in effect, by the court in *Knight v. Houghtalling*, 94 N. C. 408) when land has been sold under a decree, and the terre-tenant, or some one holding in privity with him, refuses to surrender possession. Jasper Baker, being a stranger to the original foreclosure proceeding, at least claims, if he does not hold, by another and an adverse right. It does not appear that he acquired the possession from Bryant in such manner as to subject him to the estoppel of the decree. If, therefore, it be conceded that the tax assessed in 1886, after the execution of the mortgage deed in 1875, and before the assignment to the plaintiff, Exum, as trustee for them and their creditors, in 1888, was not, without direct notice to said trustee, a superior lien, under Act 1891, c. 391, to that of the mortgage or decree of foreclosure, the plaintiff would still have failed to establish clearly his right to a writ of assistance against a person who has acquired the possession, and was not a party, or in privity with any party, to the suit for foreclosure. *Knight v. Houghtalling*, supra; *Coor v. Smith*, 107 N. C. 430, 11 S. E. 1089. It seems to be established by the weight of authority in the courts of this country—First, that the writ of assistance can be issued only against parties, or persons in privity with parties, who have been concluded by a decree, and yet refuse, after notice, to let purchasers at a judicial sale un-

der such decree into possession (*Terrell v. Allison*, 21 Wall. 291; *Howard v. Bond*, 42 Mich. 181, 3 N. W. 289; *Howard v. Railroad Co.*, 101 U. S. 849); and, second, that a question of title will not be tried on an application for that writ (*Barton v. Beatty*, 28 N. J. Eq. 412) as against persons in possession, claiming adversely, and not bound by the decree of sale (*Wilson v. Polk*, 51 Am. Dec. 152, note).

It is perhaps sufficient to determine that the writ of assistance was erroneously issued in this case against a stranger to the judgment heretofore rendered in the cause in which it is issued. But, looking solely to the construction of the act of 1891,<sup>1</sup> under which the sale for tax was made, and its effect upon the right of the parties, we must note a marked discrepancy in the facts in this case, and in that of *Moore v. Sugg*, 114 N. C. 292, 19 S. E. 147. The mortgage was executed by Bryant Baker in 1875, and the tax which became due in 1886 constituted a lien superior to that of the mortgage. *Wooten v. Sugg*, supra. The assignee who took for the benefit of the assignors and creditors was in no better condition than Dale Bros., who were affected with notice of the tax falling due while the lien of the mortgage subsisted. If the plaintiff had notice, he did not rid himself of the effect of such notice, or the duty of removing the incumbrance by obtaining a decree of foreclosure. The mortgagee was required to see to the discharge of the tax liens as they fell due, if the mortgagor should make default in the payment, or submit to the consequences of his neglect to do so. He is presumed to have known that the tax for 1886 was not paid when he conveyed to the plaintiff as trustee in 1888, and that it constituted a lien which it was competent for the legislature to revive after it should become dormant. The plaintiff, as trustee, was affected with the same notice, because it was his duty also to see, as it had been that of his assignor, that taxes due on the land were discharged, and he might, by reasonable inquiry, have ascertained that the mortgagor had failed to pay them. He not only failed, we must suppose, to make inquiry before, but after, the sale for taxes, and before the time for redemption had expired. As the controversy as to title is still to be settled, we deem it best for the parties that we should not only declare that it was error to grant the writ as prayed, but that we should pass upon the question which may still arise in another action. The prayer for the writ of assistance should have been denied. Error.

<sup>1</sup>Act 1891, c. 391, authorizes the sale of land for taxes in arrears for the years from 1881 to 1886, inclusive, but provides that the act shall not affect "purchasers without notice."

(115 N. C. 236)

**ELLIOTT et al. v. SUGG.**

(Supreme Court of North Carolina. Nov. 20, 1894.)

**USURY—PENALTY FOR BREACH OF CONTRACT.**

A contract for the shipment of cotton, under which advances bearing full legal interest were made to defendant, and a penalty was to be paid by him on failure to make the shipment, will not be declared usurious, in the absence of evidence showing that the penalty was a device to secure usurious interest.

Appeal from superior court, Greene county; Brown, Judge.

Action by Elliott and another against George W. Sugg on a promissory note executed to plaintiffs for sums due on a contract for the shipment of cotton, and to foreclose a mortgage transferred to plaintiffs as collateral security. The case was heard on report of a referee. Plaintiffs had judgment for the amount of the note, and for foreclosure of the mortgage if the judgment was not paid within 90 days. Defendant appeals. Affirmed.

George M. Lindsay, for appellant.

MacRAE, J. There were numerous exceptions to the report of the referee heard before his honor below, who adopted and affirmed the several findings of fact, and found other and further facts as a foundation of the judgment rendered, but there were no exceptions to the findings of the judge. The simple entry is, "Defendant, Sugg, appealed to the supreme court," and the record is sent up without any assignment of errors as made by his honor. The plaintiffs would be entitled to have the judgment affirmed. We may say that, upon examination of the record and the exceptions before the referee, we find the principal contention to be that it was error to have found that the purpose and intention of the plaintiffs in entering into said contract was the prosecuting their business as cotton factors and commission merchants, and not to evade the usury laws of this state, and obtain a larger rate for the use of money advanced than that fixed by law upon special contract at 8 per cent. And the ground of plaintiffs' contention is that there was no testimony to support this finding. Upon examination of the evidence sent up, we think there is evidence tending to establish the truth of the finding of the purpose of the plaintiffs in making the contracts, in the contracts themselves, which set forth the objects in view. And the evidence tends to establish the second proposition, that there was no intent to evade the usury laws, in the fact that no usury was charged upon the advances made by plaintiffs to defendant, unless it be that the provision in the written contract for the payment of a penalty for failure to ship the cotton which the defendant contracted to ship to plaintiffs had in itself the taint of usury. This point was

incidentally before this court in *Arrington v. Goodrich*, 95 N. C. 462, but was not necessary to be decided. Reference was there made to *Matthews v. Coe*, 70 N. Y. 239, where it is said that: "Such an arrangement was not necessarily usurious, to be so adjudged on the face of the contract; but the intent must be shown to secure a larger interest on the loan, and this a device resorted to to give it effect. In the absence of any such evidence allunde, the contract must be declared legal and valid." And in *Cockle v. Flach*, 93 U. S. 344, where the court held that such provision is not so conclusive that the court ought to have held, as matter of law, that it was usury. Affirmed.

(115 N. C. 417)

**STREET et al. v. ANDREWS.**

(Supreme Court of North Carolina. Nov. 20, 1894.)

**COUNTERCLAIM—INDEPENDENT TRANSACTION—HARMLESS ERROR—DEPOSITIONS.**

1. In an action for damages by maintaining an obstruction on defendant's land, which prevented the free flow of water from plaintiff's land, a counterclaim that plaintiff placed an obstruction on her land whereby water was thrown on defendant's land, to his damage, was properly stricken out.

2. Where a widow and her children sued for damages to her land, and she was permitted to testify as to the ages of her six minor children, such testimony was irrelevant, but its admission was no ground for a new trial.

3. It appearing from the return of a deposition that it was taken on the day, at the place, and by the person designated, that the answers are on a separate sheet attached to interrogatories, but not at the end of each one, if the whole is above the signature of the commissioner, is immaterial.

Appeal from superior court, Rutherford county; Armfield, Judge.

Action by N. M. Street and others against D. W. D. Andrews for damages to realty. Judgment for plaintiffs, and defendant appeals. Reversed.

McBrayer & Durham, for appellant.

CLARK, J. The cause of action alleged was an obstruction placed by the defendant on the upper edge of his land, preventing the free flow of water from the land of the plaintiff just above, and ponding it back. The counterclaim attempted to be set up was that the plaintiff had placed an obstruction on the lower edge of his own land, thus diverting water which was thrown upon and water-sobbed defendant's land. These were two separate and distinct torts. The latter did not "arise out of the transaction set forth in the complaint," nor was it "connected with the subject of the action." Code, § 244 (1). It was the subject for an independent action, and was properly disallowed as a counterclaim. *Bazemore v. Bridgers*, 105 N. C. 191, 10 S. E. 888.

The testimony as to the ages of the minor plaintiffs was at most irrelevant, and, as

such. It is not ground for a new trial, unless it could be seen to have prejudiced the side objecting. It was harmless error. *Glover v. Flowers*, 101 N. C. 134, 7 S. E. 579; *Livingston v. Dunlap*, 99 N. C. 268, 6 S. E. 200; *McGowan v. Railroad Co.*, 95 N. C. 417; *Clark's Code* (2d Ed.) p. 586.

The counterclaim having been properly ruled out, it was not error to reject the evidence offered to show the water-sobbed condition of defendant's land. This evidence could have no bearing upon the allegation of damage to plaintiff's land. The deposition was improperly excluded. The return showed that it was taken by the commissioner on the day and at the place mentioned in the notice. There was no evidence offered that it was not taken between the hours mentioned in the notice, and there is no presumption that it was not. It appearing that it was taken on the day, at the place, and by the person designated, the presumption, in the absence of evidence to the contrary, is that all things were done rightly. *Gregg v. Mallett*, 111 N. C. 76, 15 S. E. 936. Where it appears that the deposition was taken on the day named, the presumption, in the absence of evidence to the contrary, is that it was taken between the hours named. *Dearman v. Dearman*, 5 Ala. 202. If the answers were on a separate sheet attached to interrogatories, but not inserted at the end of each interrogatory, the whole, however, being above the signature of the commissioner, it does not so appear in the record sent here, which must govern us. But, if that were so, and was one of the reasons why the deposition was rejected, such objection was without force, and should have been disallowed. *Downs v. Hawley*, 112 Mass. 237. Since there must be a new trial for the rejection of the deposition, it is unnecessary to consider the exceptions to the charge and for refusal of prayers for instructions, as a somewhat different state of facts may be presented on the next trial. New trial.

(115 N. C. 296)

### McDANIEL v. SCURLOCK.

(Supreme Court of North Carolina. Nov. 20, 1894.)

#### CASE ON APPEAL—REFERENCE—JURY TRIAL.

1. Code, § 550, requiring a copy of appellant's case on appeal to be left with appellee, is complied with by a service of the original instead of a copy.

2. Where appellee's exceptions to appellant's case on appeal were served within the statutory five days, appellant cannot complain that his statement was not returned within five days thereafter, unless his rights were prejudiced thereby.

3. Where appellant failed to apply to the court to settle the case, appellant's statement, as amended by appellee's exceptions, may be taken as the case on appeal.

4. Where reference by consent was vacated without objection, and at the next term the case

was again referred, against the objection of both parties, such reference is compulsory, entitling plaintiff to a jury trial.

Appeal from superior court, Cumberland county; Bryan, Judge.

Action by Tama McDaniel against G. O. Scurlock for an accounting for funds intrusted to defendant as plaintiff's guardian. The case was heard on exceptions to the report of referees. From a judgment for defendant, plaintiff appeals. Reversed.

Saml. H. MacRae, for appellant. Thos. H. Sutton, for appellee.

CLARK, J. The appellee cannot complain that the appellant's original "statement of case on appeal" was served on him instead of a copy. The word "copy," in section 550 of the Code, bears no such restricted meaning. It simply means that a statement of appellant's case on appeal must be left with the appellee, so that he may scrutinize it at his leisure, and make out his exceptions thereto within the five days allowed. Nor can the appellant complain that such statement was not returned to him in five days, when the appellee's exceptions were in fact served within the statutory five days, unless it appear that the appellant was injured in his rights thereby. The essential points are the legal service in ten days of plaintiff's statement on the appellee, and legal service in five days of appellee's exceptions or his counter case (*Horne v. Smith*, 105 N. C. 322, 11 S. E. 873) on appellant, and the latter's application to the judge to settle the case. This diligence is due by each to the opposite party.

The other matters above insisted on do not affect the rights of parties, and would lead us into the realms of "red tape," whither we have no inclination to enter. His honor has found the facts on the controverted question of service of case and counter case, as it was his duty to do. *Cummings v. Hoffman*, 113 N. C. 267, 18 S. E. 170. Upon such findings it appears that the appellant did not apply to the judge to settle the case, and we might take his "statement," as amended by the appellee's exceptions, as the case on appeal. *Russell v. Davis*, 99 N. C. 115, 5 S. E. 895; *Owens v. Phelps*, 92 N. C. 231. Or, if this would be complicated, the court would remand, that the case might be properly settled by the judge. *Arrington v. Arrington*, 114 N. C. 115, 19 S. E. 278; *Hinton v. Greenleaf* (at this term) 20 S. E. 162. But an examination of the record proper, which would control the "case on appeal," shows error which entitles the appellant to a new trial. It is true that a consent to a reference once given cannot be withdrawn. *Armfield v. Brown*, 70 N. C. 27; *Perry v. Tupper*, 77 N. C. 413; *Flemmings v. Roberts*, Id. 415. Here the plaintiff asked originally for a reference and it was made without his excepting thereto. But it appears from the record that at a subsequent term,—July, 1892,—the referees

falling to agree, the order of reference was stricken out by the court. Neither party excepted to this. At November term, 1892, the court re-referred the case to the same two referees named in the first order of reference, adding thereto a third. To this new order of reference both parties excepted. It was, therefore, a compulsory reference. In such case the procedure is thus stated by Bynum, J., in *Armfield v. Brown*, 70 N. C., on page 31: "There will be cases—those involving complicated matters of account, for instance—where, without a reference, there would be a failure of justice, and where, if the parties refuse consent, the reference must be compulsory. In such cases, if demanded, a jury trial must be allowed at some stage of the proceedings. At what period of the trial, must be determined by the court in such way as will be most conducive to the ends of justice and a speedy and final determination of the controversy. In analogy to equity proceedings, it may be found most proper to order a jury upon the coming in of the report, when the material issues will be eliminated by the findings of the facts and the exceptions thereto." The right to trial by jury does not extend to questions of fact passed upon by the referee (*Grant v. Hughes*, 96 N. C. 177, 2 S. E. 339; *Carr v. Askew*, 94 N. C. 194), but only to issues of fact raised by the pleadings and designated by the exceptions (*Yelverton v. Coley*, 101 N. C. 243, 7 S. E. 672). Where there has been a reference by consent, or (which is the same thing) a reference without objection by the party seeking afterwards a jury trial, if the judge sets aside the report in whole or in part, and recommits the case, it is still a consent reference. *Morlsey v. Swinson*, 104 N. C. 555, 10 S. E. 754. But in the present case the order of reference itself was stricken out without objection, and at the next term the court referred the case against the exception of the parties. This made it a compulsory reference. There is error.

MacRAE, J., did not sit on the hearing of this case.

(115 N. C. 187)

**HARRIS v. CARRINGTON et al.**

(Supreme Court of North Carolina. Nov. 20, 1894.)

**CASE ON APPEAL—INSTRUCTIONS.**

1. Where appellee returned a counter case as a statement of his exceptions to appellant's case, and such counter case was adopted by the court, it constitutes the "case on appeal."

2. In an action on a note, where defendant testified that he signed as surety, with the knowledge of the payee, and the payee testified to the contrary, it was error to instruct the jury that if they believed the evidence they should find that the payee knew that defendant signed as a surety.

Appeal from superior court, Granville county; Boykin, Judge.

Action by Henry W. Harris, Sr., against A. S. Carrington and another on a promissory note. Verdict and judgment for defendants, and plaintiff appeals. Reversed.

T. T. Hicks and A. A. Hicks, for appellant. Edwards & Royster and J. B. Batchelor, for appellees.

CLARK, J. The appellee returned a counter case as a statement of his exceptions to appellant's case. This is often convenient, and sometimes it is the only mode in which the appellee can intelligently present his objections. The practice has always been recognized as a substantial compliance with the statute. *State v. Gooch*, 94 N. C. 982; *Horne v. Smith*, 105 N. C. 322, 11 S. E. 373; *McDaniel v. Scurlock* (at this term) 20 S. E. 451. The court adopted the counter case. We must therefore take it as the "case on appeal." The defendant testified that he signed the note as surety, and that fact was known to the payee at the time. He then called the payee (the note having been transferred since maturity to the plaintiff), who testified that he did not know of the suretyship till after this action was brought. The court instructed the jury, if they believed the evidence, to find the issue whether the suretyship of defendant was "known to the payee at the time of signing the note" in the affirmative. There being a conflict of evidence, this was error, for which there must be a new trial.

(115 N. C. 716)

**STATE v. COLLINS.**

(Supreme Court of North Carolina. Nov. 20, 1894.)

**CRIMINAL LAW—MISTRIAL—FORGERY—VARIANCE.**

1. A mistrial in a case not capital is a matter of discretion.

2. The state can show that a witness whose name was W. W. Vass was commonly known as Major Vass.

3. Where the indictment charged that the name forged was Major Vass, evidence that the signature was Maj. Vase was no variance.

Appeal from superior court, Wake county; Bynum, Judge.

Frank Collins was convicted of forgery, and appeals. Affirmed.

J. O. L. Harris, for appellant. The Attorney General and W. J. Peele, for the State.

CLARK, J. A mistrial in a case not capital is a matter of discretion. *State v. Johnson*, 75 N. C. 123. The plea of former jeopardy was therefore properly overruled.

The second, third, and fourth exceptions are without merit. The questions objected to were asked for identification. It was competent for the state to show that the witness whose name was W. W. Vass was commonly known as Major Vass. The charge in the bill was that the name forged in the order was Major Vass. The proof was that the signature was Maj. Vase. This



is idem sonans, and no variance. *State v. Lane*, 80 N. C. 407. There the charge was that the forged order purported to be drawn by J. B. Runkins on Dulks & Helker. The proof was that the name of the party whose signature was forged was J. B. Rankin, and the name of the firm to whom it was presented was Helker & Duts. This was held in an opinion by Smith, C. J., no variance, because "the difference is slight, and creates no uncertainty as to who were meant." As to whether Maj. Vase and Major Vass are idem sonans and immaterial variance we find numerous cases where a greater difference was held immaterial. In this state: *Runkins for Rankin*, and *Dulks & Helker for Helker & Duts*, ut supra; also *Willis Fain for Willie Fanes* (*State v. Hare*, 95 N. C. 682); *Deadema for Diadema* (*State v. Patterson*, 24 N. C. 348); *Michaels for Michal* (*State v. Houser*, 44 N. C. 410); *Anny for Anne* (*State v. Upton*, 12 N. C. 513); *Ha-wood for Haywood* (*State v. Covington*, 94 N. C. 913); *Susan for Susannah* (*State v. Johnson*, 67 N. C. 55). In other states, among many names held idem sonans, and not a variance, the following can be cited at random: *Allesandro and Alexander* (*Alexander v. Com.*, 105 Pa. St. 1); *Anthron and Antrum* (*State v. Scurry*, 3 Rich. Law, 68); *Bobb and Bub* (*Myer v. Fegaly*, 39 Pa. St. 429); *Brearily and Bralley* (*People v. Gosch* [Mich.] 46 N. W. 101); *Bert Samrud and Bern't Sannerud* (*State v. Sannerud*, 38 Minn. 229, 36 N. W. 447); *Barnabas and Barney* (*McGregor v. Balch*, 17 Vt. 562); *Beckwith and Beckworth* (*Stewart v. State*, 4 Blackf. 171); *Burdet and Boudet* (*Aaron v. State*, 37 Ala. 106); *Cuffee and Cuff* (*State v. Farr*, 12 Rich. Law, 24); *Conn and Corn* (*Moore v. Anderson*, 8 Ind. 18); *Colburn and Coburn* (*Colburn v. Bancroft*, 23 Pick. 57); *Doerges and Dierkes* (*Gorman v. Dierkes*, 37 Mo. 576); *Dillahinty and Dillaunty* (*Dillahunt v. Davis* [Tex. Sup.] 12 S. W. 55); *Elliott and Ellett* (*Robertson v. Winchester*, 85 Tenn. 171, 1 S. W. 781); *Fauntleroy and Fontleroy* (*Wilks v. State*, 27 Tex. App. 381, 11 S. W. 415); *Febuary and February* (*Witten v. State*, 4 Tex. App. 70); *Fayelville and Fayetteville* (*U. S. v. Hinman*, Baldw. 292, Fed. Cas. No. 15,370); *Foster and Faster*, (*Foster v. State*, 1 Tex. App. 533); *George Rooks and Geo. W. Rux* (*Rooks v. State*, 85 Ala. 79, 3 South. 720); *Giddings and Gldines* (*State v. Lincoln*, 17 Wis. 597); *Girous and Geroux* (*Girous v. State*, 29 Ind. 93); *Heremon and Harriman* (*State v. Bean*, 19 Vt. 530); *Haverly and Havely* (*State v. Havely*, 21 Mo. 496); *J. D. Hubba and Joel D. Hubbard* (*Gumm v. Hubbard*, 97 Mo. 311, 11 S. W. 61); *Isah and Isiah* (*Ellis' Adm'r v. Merriman*, 5 B. Mon. 297); *Jefferds and Jervals* (*Com. v. Brigham*, 147 Mass. 414, 18 N. E. 167); *Kay and Key* (*Dickinson v. Bowers*, 16 East, 112); *Kealher and Keolhier and Kelhier* (*Millett v. Blake*, 81 Me. 531, 18 Atl. 293); *Kreily and*

*Kreitz and Critz* (*Kreitz v. Behrensmeyer*, 123 Ill. 141, 17 N. E. 232); *Lebering and Lebrum* (*Ketland v. Lebering*, 2 Wash. O. C. 201, Fed. Cas. No. 7,744); *Lawson and Lossene* (*State v. Pullens*, 81 Mo. 387); *Leaphardt and Leap-hat* (*Leaphardt v. Sloan*, 5 Blackf. 278); *T. C. Lucky and C. C. Lucky* (*Brown v. State*, 32 Tex. 124); *Mary Etta and Marietta* (*Goode v. State*, 2 Tex. App. 520); *Minner and Miner* (*Jackson v. Boneham*, 15 Johns. 226); *McLaughlin and McGlof'lin* (*McLaughlin v. State*, 52 Ind. 476); *Marres and Mars* (*Com. v. Stone*, 103 Mass. 421); *Mousuer and Mosuser* (*Ruddell v. Mozer*, 1 Ark. 503); *Nuton and Newton* (*Newton v. Newell*, 26 Minn. 529, 6 N. W. 346); *Pillp and Philip* (*Taylor v. Rogers*, 1 Minor [Ala.] 197); *Petterson and Patterson* (*Jackson v. Cody*, 9 Cow. 140); *Petrie and Petris*, almost this very sound, "e" for "s" (*Petrie v. Woodworth*, 3 Caines, 219); *Preyer and Prior* (*Page v. State*, 61 Ala. 16); *Rae and Wray* (3 U. C. Law J. 69); *Shafer and Shaffer*, also similar to the sound here (*Rowe v. Palmer*, 29 Kan. 337); *Shields and Sheals* (3 Luz. Leg. Obs. 174); *Stafford and Stratford* (*Wilson v. Stafford*, 2 Chit. 355); *Sunderland and Sandland* (*Sandland v. Adams*, 2 How. Pr. 96); *St. Clair and Sinclair* (*Rivard v. Gardner*, 39 Ill. 129); *Storrs and Stores* (*People v. Sutherland*, 81 N. Y. 1); *Sofira and Sofia* (*Owen v. State*, 7 Tex. App. 329); *Tinmarsh and Tidmarsh* (*Homan v. Tinmarsh*, 11 Moore, 231); *Usrey and Usury* (*Gresham v. Walker*, 10 Ala. 370); *Whyneard and Win-yard* (*Rex v. Foster*, Russ. & R. 412); *Zemariah and Zimri* (*Ames v. Snider*, 55 Ill. 490). In *Gooden v. State*, 55 Ala. 178, the name attempted to be forged was Thweatt. The forgery had it Threet. The conviction was sustained. This indictment being for forgery, it was not so necessary that the forgery should have been "calculated to deceive and did deceive." That applies to obtaining goods under false pretenses. The forgery may be awkward or clumsy. The party is guilty if there is the fraudulent intent to deceive by a forged paper, though the forgery is detected. 8 Am. & Eng. Enc. Law, 462. It is not essential that any one should be actually defrauded. In the present case his honor properly charged the jury that "if they believe that the person referred to in the bill as Major Vass was W. W. Vass, and that the order written Maj. Vase was presented by the defendant for the purpose of procuring the ham, and that he was attempting to induce the belief that W. W. Vass was the one who signed the order, the spelling Maj. Vase would not be a fatal variance." No error.

(115 N. C. 324)

## BENBOW v. COOK.

(Supreme Court of North Carolina. Nov. 20, 1894.)

ORGANIZATION OF CORPORATION — VALIDITY. — STOCKHOLDERS' MEETING—NOTICE—VALIDITY OF PROCEEDINGS—CORPORATE POWERS.

1. The acceptance of a franchise conferred by statute is sufficiently evidenced by the sig-

natures of all the stockholders to the articles of agreement.

2. Compliance with Code, § 665, requiring the first meeting of a corporation to be called by notice signed by one or more of the incorporators, is unnecessary if the meeting is attended by all the stockholders.

3. The proceedings of a meeting not called in the manner prescribed by law may be ratified by all the absent stockholders.

4. The proceedings at a meeting attended by all the stockholders and officers are valid, though the minutes were not recorded and signed until after the meeting.

5. A corporation composed of three stockholders will be estopped to disaffirm a deed executed by one stockholder as secretary and signed by one other stockholder.

6. When a corporate deed recites that it is sealed with the corporate seal, it will be presumed that what purports to be a seal, placed after the officer's name, was the seal of the corporation.

7. A private corporation may dispose of its property without express authority from the legislature.

8. A mortgage deed of corporate property is not an executory contract within the meaning of Code, § 683, limiting the liability of corporations under executory contracts.

Appeal from superior court, Guilford county; Sherford, Judge.

Action by D. W. C. Benbow against John W. Cook to recover possession of personal property. From a judgment for defendant, plaintiff appeals. Reversed.

L. M. Scott, for appellant. Schenck & Schenck and W. W. Fuller, for appellee.

EVERY, J. If the corporation never had any lawful existence, as the defendant contends, of course it did not authorize the execution of a mortgage some months after it is claimed that it was duly organized. The statute (Code, § 677) provides that "any number of persons not less than three, who may be desirous of engaging in any business not unlawful, except building railroads or banking or insurance, at any place within the state, may if it please them become incorporated in the manner following," etc. It seems that three persons,—Amos Ragan, O. S. Causey, and R. E. Causey,—as the sole incorporators of a manufacturing company, having 10 shares each, signed articles of agreement before the clerk of the superior court of Guilford county, which were duly recorded. Having complied with the requirements as to the form of the articles of agreement, and caused the proper record to be made, the three persons named as sole incorporators became a body politic for the purposes set forth in the agreement. *Id.* §§ 678, 679. When corporate powers are granted by a special instead of a general act of the legislature, there must be evidence of acceptance by the corporators, and compliance with all conditions precedent prescribed by law, in order to show affirmatively that the corporation is lawfully organized. But in our case every corporator affixed his hand and seal to the articles of agreement recorded, and by such signature and the recording of the instrument be-

came invested with all of the powers which it was contemplated by law to confer in such cases. *Id.* § 679. Private corporations are formed when the necessary contractual relations are created between the persons clothed by law with the powers of a body politic. 1 Mor. Corp. 24. The existence of the company depends upon the fact of the acceptance of the privilege (1 Mor. Corp. 26); and it was evidently the intent of the legislature that the signature to the articles should be deemed an acceptance, leaving no other condition precedent to be performed, except the recording, this being a substantial compliance with the requirements of the law. 1 Mor. Corp. 32, 33, 27 et seq. In such cases the corporators are usually constituted only a quasi corporation, "whose sole function is to bring into existence the corporation consisting of the real body of stockholders." But in our case the signers of the certificate, as appears from the recorded articles of agreement, were not only the sole corporators, but the only stockholders, and as between themselves constituted a corporate body, wanting only formal organization in order to transact business with the public.

The law intending to protect the rights of minorities requires that notice of the meetings of the stockholders of a corporation shall be given to every person who holds a share of stock, and, if no other mode of notification be provided in the charter or by-laws of a company, or by statute, express notice must be given. The owner of every unit of interest constituting a part of the aggregate body of stock is entitled to the opportunity which due notice affords him of protecting it by being present and participating in meetings. 1 Cook, Stock, Stockh. & Corp. Law, § 574. The reason for this rule is plainly met, so far as the organization of the company is concerned, when it appears that all of the stockholders assented to the call of the meeting, participated in it, and acquiesced in its consequences afterwards. The state has not complained or taken any steps to question its rights or annul its powers as a body politic. If we concede that section 665 of the Code was intended to apply in such a case as this, the only purpose of the legislature in enacting it was to provide that every corporator should have notice of the time and place of a meeting for organization. There was no necessity for proving a compliance with the statute when every person interested had express notice and participated in the meeting. Ang. & A. Corp. § 492. The strict requirements as to notice, being intended to protect stockholders, may be waived by them, and when they do waive them "the meeting and all proceedings are as valid as they would be had the full statutory notice been given." 1 Cook, Stock, Stockh. & Corp. Law, § 599. It is always presumed that notice is given, and that any meeting of which

a minute is found in the proceedings of the stockholders of a corporation was regularly and lawfully held. *Id.* § 600. When a party assumes the burden of showing irregularity, and actually shows that the meeting for organization, or any subsequent one, was not called in the manner prescribed by law or the by-laws of the company, the action of the meeting will nevertheless be declared valid, when it appears that every stockholder who did not participate in the meeting ratified its action afterwards. *Stutz v. Handley*, 41 Fed. 531; *Nelson v. Hubbard*, 96 Ala. 238, 11 South. 428; *Campbell v. Mining Co.*, 51 Fed. 1. If the three directors—Amos Ragan, O. S. Causey, and R. E. Causey—met at High Point without notice, they being also the holders of all the stock, it was a waiver of the requirement of the by-law that such meetings should be called by the president or a majority of the directors. *Nelson v. Hubbard*, *supra*; *Jones v. Turnpike Co.*, 7 Ind. 547. Whether the directors met at Greensboro or High Point, and whether in pursuance of previous notice or not, is immaterial, if in fact they met together and agreed to create the indebtedness and authorize the execution of the mortgage to secure it. They, as stockholders and directors, constituting, as they did, the whole of each body, waived objection to the want of the notice prescribed by the by-law, and the failure to make a record of their proceedings at that time does not affect the validity of their action. *Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. 530. The signing of the minutes at another time would not affect the validity of the action of the board, if in fact all three met, discussed the question of executing the mortgage, and agreed to what was afterwards entered on the minutes and signed by them. It is true that the assent of each of the three, obtained at different times or places, to a certain course of proceeding, would not bind them, because it would not be the action of the directors as a collective body; but if as a body they assembled together and conferred, in taking certain action, they waived all objection to irregularities, though the meeting may have been informal, and the minutes may not have been then recorded. The case of *Duke v. Markham*, 105 N. C. 131, 10 S. E. 1017, is clearly distinguishable, in that there the stockholders at no time assembled as a body, but the assent of each individual was asked and obtained separately. It is not contended that the consent of each individual has the same force as the concurrence of all assembled together, given after an opportunity to discuss their proceedings, interchange views, and to acquire benefit of such consultation.

A corporation must at least affix its seal to such instruments as would be invalid if executed by a natural person without a seal. 1 Mor. Priv. Corp. § 338. It was therefore essential that the seal should be affixed to

the mortgage. If R. E. Causey, the secretary and treasurer, was authorized to sign the instrument, as agent, it will be presumed that what purported to be a seal (and would have been declared sufficient if attached to his signature as an individual) was the seal of the corporation, affixed in accordance with the recital in the attestation clause. 2 Cook, Stock, Stockh. & Corp. Law, § 722. That clause is as follows: "In testimony whereof, the said party of the first part has caused this deed to be signed by its secretary and treasurer and two stockholders, and sealed with its corporate seal. [Signed] R. E. Causey, Secretary and Treasurer. [Seal.] O. S. Causey. [Seal.] R. E. Causey. [Seal.]" The deed was made in the name of the corporation (Crown Mills), inserted in the body of it, as the grantor, and if it can be shown that R. E. Causey, the secretary and treasurer, was the agent of the company, clothed with authority from the corporation to execute a mortgage of its property, the form of attestation adopted would be practically that approved by Cook, Stock, Stockh. & Corp. Law, § 723, note. But it is contended that the secretary and treasurer was empowered only "to execute the company's obligation to the amount of \$12,000, and to secure the same by executing a mortgage on machinery now owned by the company," whereas the mortgage was in fact given to secure a debt incurred previously by O. S. Causey for money loaned by the plaintiff to buy the machinery, afterwards turned over to the corporation to be used in the mills, the seizure of which on several executions by the defendant, as sheriff, gave rise to this controversy. The authority given was to execute the company's obligation, without specifying for what purpose or for what consideration. The property was in fact conveyed to secure the payment of the money with which the property in controversy was bought. O. S. Causey had obtained the money from the plaintiff to buy the machinery for a company to be thereafter organized, and had attempted to transfer the title to the machinery, as purchased, to the plaintiff. After the formation of the corporation, this property was turned over to it, and the purpose in executing the mortgage was to secure the money advanced to buy it. If we admit that it is questionable whether there was any obligation on the part of the corporation to pay the debt, it must nevertheless be conceded that every director and stockholder had notice of the execution of the instrument by the secretary and treasurer, claiming to be acting as agent of the company. It might have been sufficient to estop them to show that with notice of the execution they took no steps to disaffirm the mortgage deed (2 Mor. Priv. Corp. § 631); but it seems clear that they cannot disavow the act of the agent when the signatures of two are appended, purporting to

act as stockholders, while the agent himself is the only remaining stockholder. This is not a question as to the validity of a mortgage deed. It is conceded that the subsequent ratification by the directors or stockholders of an invalid deed, or one not in form a mortgage, would not validate it so as to create a lien superior to any other lien attaching in the interval between the execution or registration and the ratification. But in our case the ratification is accomplished by signing before the delivery or registration of the deed, and it is registered in such shape that its validity as a lien can only be questioned by showing, in rebuttal of the presumption of authority, that the agent purporting to act was not in fact empowered to do so. There was no seal attached to the paper offered in *Duke v. Markham*, supra, and purporting to be a deed, and ratification would not have made it a mortgage deed, while no act of the company, by amendment or otherwise, could have made it relate back, so as to give it the force of a lien, from registration, superior to such liens as attached when it stood upon the record in its original form. A private corporation, not charged with any duty to the public, and not quasi public in its character, may dispose of its property (as certainly distinguished from its franchise) without express authority from the legislature, by virtue of the general right of alienation that is an incident of ownership by natural or artificial persons. 4 Am. & Eng. Enc. Law, p. 238; *Antietam Paper Co. v. Chronicle Pub. Co.* (at this term) 20 S. E. 366. We do not think that this is a case in which the statute limiting the liability that may be incurred by executing contracts of corporations (Code, § 683) applies, if that statute be still in force as to existing suits. Laws 1893, cc. 84, 388. There was no executory contract in this case. The corporation executed, if anything, a mortgage deed conveying its property.

For the reasons given, we think that the judge below erred in ruling that the plaintiffs are not entitled to recover in any aspect of the evidence, and we must therefore grant a new trial.

(115 N. C. 746)

#### STATE v. KIGER.

(Supreme Court of North Carolina. Nov. 27, 1894.)

#### LARCENY—EVIDENCE—ARGUMENTS OF COUNSEL—NEW TRIAL.

1. In a prosecution for larceny of liquor, testimony as to marks upon the barrels containing the liquor is competent to prove its identity.

2. It is not improper for the prosecuting counsel to comment on the fact that defendant had failed to introduce witnesses summoned by him, or to comment on the fact that defendant had failed to call his brother, though summoned by the state, to prove his innocence.

3. The refusal of a trial judge to set aside a verdict on the ground that there was no evidence to support it is not reviewable unless the point of no evidence was raised before the case was submitted to the jury.

Appeal from superior court, Forsyth county; Whitaker, Judge.

Samuel L. Kiger was convicted of larceny, and appeals. Affirmed.

The state offered the following evidence: Asa Dunkins testified about the 16th of January, 1894, he had seven barrels of brandy stolen from his place in Yadkin county, about three miles beyond the Shallow Ford, on the Yadkin river. That the brandy was "blockade." He had it concealed near the house, in a piece of woods, part of it in a hole in the ground, about 22 miles from Winston. That the day before the brandy was stolen, about noon, he met defendant and one John Bolin about one mile from Winston, going towards the Shallow Ford in a two-horse wagon. That the brandy was taken that night. That the next day, when he missed the brandy, he instituted search, and found that two two-horse wagons had crossed the Shallow Ford, left the main road, which passed through the village of Huntsville, and turned off along a byroad through Conrad's plantation, stopped near where the brandy was concealed, and there were signs of the brandy having been rolled out to the wagons and loaded. That near the place, in Conrad's field, he saw where the team had started, and near by found a plow handle had been broken off of a plow. That he followed the track back to the main road at Shallow Ford, coming towards Winston, where other vehicles had obliterated the track. That the next day he came to Winston, procured a search warrant, and searched defendant's house, his brother Thomas Kiger's house, and found an empty barrel with a sourwood stopper, that he thought was his, in Thomas Kiger's house. That afterwards he searched the premises of Jack Kiger, a brother of defendant's, and Thomas Kiger, and found six barrels of his brandy concealed in a gully near Jack Kiger's house, covered up with pine trees, that had been cut across the gully, with prints showing that barrels had been rolled from Kiger's house through the old field pine. That Jack Kiger lived one-fourth of a mile from the Shallow Ford road, between Winston and Shallow Ford, about nine miles from Winston and three miles this side of Lewisville. That he knew the barrels by private marks upon them. They were his barrels, and were filled with peach and apple brandy, as his were. This evidence was objected to by defendant on the ground that the indictment did not describe the barrels. Exception overruled. (Exception 1.) Defendant excepted. Defendant Thomas Kiger and Thomas Bolin and William Bolin were indicted together, but the other three defendants had not been taken, and S. L. Kiger was alone in trial. William Bevil testified that the evening before the brandy was taken he saw defendant and John Bolin pass along the Shallow Ford road, going toward Shallow Ford, in a two-horse wagon. Sev-

eral witnesses testified that all four of the defendants passed through Lewisville about 8 o'clock of the night the brandy was taken. Stopped at a store. Left the wagon in the road. Bought crackers and sardines, and had a bottle and took a drink, and left. There was evidence that two wagons passed a house about 100 yards from Shallow Ford, coming towards Winston, about 1 or 2 o'clock at night, same night brandy was stolen. That two men were walking. The wagon appeared to be loaded, and was covered with sheets or quilts. That one of the parties walking called to the driver of the front wagon to hurry up; it was getting d—d late. A wagoner testified that two wagons appearing to be loaded passed his camp near Lewisville, on the Shallow Ford road, going towards Winston, about 2 o'clock, on the night of the theft, with four men, two driving and two walking behind with guns. Norman Whitman testified that he lived on the Shallow Ford road, between West Bend and Jack Kiger's, and about 12 miles from Winston. That about 4 o'clock the morning of the theft the defendant came to his door, woke him up and got a lantern, a hammer, and some nails, telling him he was from Davie county, and had broken a wagon, and wanted to mend it. That he saw him go out into the road where the wagon was standing. That he fixed it, and came back with the lantern and hammer. That the next day he went to the place where the wagon was, and saw where they had apparently been working on the wagon, and then picked up a piece of a plow handle, which he gave to Asa Dunkins. Dunkins testified that he took the piece of plow handle back to Conrad's field, near where his brandy was stolen, and fitted the broken handle together in the plow, and it was the piece which had been broken off and carried away. It was in evidence that all four of the defendants lived in the suburbs of Winston, but that John Bollin had worked for the prosecutor in Yadkin, and knew where he kept his "blockade" liquors, and helped to dry the corn. The defendant introduced no testimony. One of the counsel for the prosecutor, in addressing the jury, said the defendant had called 10 witnesses, and had them present himself, but that he had failed to show by any witness where he was that night. To this the defendant objected, and asked his honor not to allow the comment of counsel. His honor stated that counsel was about to get on dangerous grounds, but that he did not comment on what the defendant did, or did not do, but as to the other witnesses it was admissible to thus comment. Another one of the state's counsel, while addressing the jury, turned and faced the defendant, sitting near his counsel, and said: "Your brother, Jack Kiger, knows whether you brought that brandy to his house. He is here in the courthouse. Why, if you did not carry it there and conceal it, did not you show it by him?"

Defendant's counsel here interrupted the comment, and said that Jack Kiger had been summoned as a state witness and sworn, but not tendered to the defendant, and asked the court to stop the counsel. His honor stated that he could not see that the comment was improper, and directed counsel to proceed. Defendant excepted. Counsel continued on that line of argument, saying to the jury: "His honor does not say that I am off the track." There was no instruction prayed by either party. There was a verdict of guilty. Motion for new trial for errors excepted to, and on the additional ground that there was not evidence sufficient to go to the jury, and to justify a verdict; but no such point was made before verdict. Motion overruled. Judgment and appeal. [Signed] Spier Whitaker, Judge Presiding.

E. B. Jones, for appellant. The Attorney General, for the State.

CLARK, J. The evidence as to the marks upon the barrels was competent to identify the packages. It was sufficient to charge the larceny of so many gallons of brandy, and as a matter of evidence to show that it was in barrels, and identify them. *State v. Harris*, 64 N. C. 127. If the state had charged the larceny of barrels of brandy, it would have been held to proof of its having been in barrels when stolen. *Sutton v. Moore*, 33 N. C. 70. It was not improper for the counsel for the prosecution to comment on the fact that the defendant had witnesses present, summoned by him, but had not introduced them. *State v. Jones*, 77 N. C. 520. Nor was there any impropriety in asking why defendant did not prove by his brother where he was that night. It made no difference that such brother had been summoned by the state, or had not been summoned at all. The defendant could have summoned his brother as his witness in either event. *State v. Johnston*, 88 N. C. 623. In fact, in this case the state had tendered the witness to the defendant, who declined to put him on the stand. It is too late, after the verdict for the defendant, to raise the point that there was no evidence to go to the jury. *State v. Braddy*, 104 N. C. 737, 10 S. E. 261; *Sugg v. Watson*, 101 N. C. 188, 7 S. E. 709. That is a point which must be made in apt time. The defendant cannot lie by and thus take "two bites at the cherry." This would be trifling with the court. Treated as an omission to charge, it is not ground for exception, in the absence of a prayer for instruction. See numerous cases collected in *Clark's Code* (2d Ed.) pp. 382, 394. Treated otherwise than as an exception for omission in the charge, it is waived if not taken at the time. *Taylor v. Plummer*, 105 N. C. 56, 11 S. E. 266. Still less could such an exception be made for the first time in this court. *State v. Bruce*, 106 N. C. 792, 11 S. E. 475, and *State*

v. Glisson, 93 N. C. 506, which hold that it must be taken "by a request to instruct the jury." The attorney general, however, waives the objection that the exception was not taken before verdict, and by consent we consider it as if it had been made in apt time. If there is not any evidence sufficient to permit the case to go to the jury, as a matter of law the court may so rule, and withdraw the case from the jury. But if it is merely weak evidence,—not such as the presiding judge, himself sitting as a juror, might perhaps convict upon,—he has no such authority. The 12 jurors are the triers of fact, designated and provided for by the constitution. If the presiding judge deems that the verdict is against the weight of evidence, or that the evidence was insufficient in his judgment to justify conviction, he is vested with the power to set aside the verdict and grant a new trial. This is a matter of discretion, and his granting or refusing a new trial on such ground is not subject to review here. The fact that 12 men have convicted on the evidence will often, and properly, make him less sure of his own opinion to the contrary. Nor should even he give a new trial merely because, if a juror, he might have voted for an acquittal. Many things give color to the correctness of the verdict; the bearing and manner of the witnesses, shades of meaning dependent upon tone and emphasis, and the like. These cannot be presented in the record on appeal. The judges of the superior courts are humane and intelligent men, in whose hands this discretion has always been wisely vested, and we have no disposition to infringe upon their limits. It is only when there is no evidence sufficient to be submitted to the jury, duly excepted to in apt time, that an appeal has ever been permitted. In some other states, the appellate court, reaching out after jurisdiction, has so abused this rule that it has caused provision to be placed in the state constitution—notably in the constitution just adopted by the state of New York—prohibiting the court of appeals to grant a new trial, even upon the ground that there was no evidence whatever to go to the jury. If there is any abuse, it can be corrected by the pardoning power, and is more easily remedied than that, seen in many states, of the appellate court sitting as a revisory jury upon the facts, out of sight of the witnesses and those accompanying circumstances of which the jury and presiding judge had the benefit. Without going into a detailed consideration of the evidence in this case, it is sufficient to say that there was sufficient evidence to warrant the case being submitted to the jury. Of the weight to be given it, the jury were the sole judges, subject to the supervisory power of the presiding judge to set aside the verdict, if in his judgment it was not warranted. His refusal to do so is not reviewable on appeal. This has always been settled law in this state. No error.

(115 N. C. 308)

**NASH v. FERRABOW et al.**

(Supreme Court of North Carolina. Nov. 27, 1894.)

**ASSUMPSIT—COMPLAINT.**

A complaint which states that plaintiff made a contract with an association, through its authorized officers, whereby it agreed to remunerate him for services rendered, and that the association had not made the payments agreed upon, and that the officers were liable for the amount due, does not state a cause of action against the officers personally.

Appeal from superior court, Granville county; Shuford, Judge.

Action by H. A. Nash against D. C. Ferrabow and others to recover for services performed. From a judgment in favor of defendants, plaintiff appeals. Defendants moved to dismiss, on the ground that the complaint did not state a cause of action. Granted.

The following is a copy of the complaint: "The plaintiff complains and alleges: (1) That on the 1st day of April, 1890, the plaintiff and the defendants entered into an agreement in writing of which the following is a copy, to wit: 'This agreement, made this 11th day of April, 1890, between the properly authorized officers of the Stem Citizens' Association, whose names are appended, of the county of Granville and state of North Carolina, of the first part, and Dr. H. A. Nash, of the county of Wake and state aforesaid, of the second part, witnesseth: The said Citizens' Association agree to pay unto the said Dr. Nash for professional services rendered unto the various families composing the said association the sum of fifteen hundred dollars per annum, quarterly in advance, and the said Dr. H. A. Nash agrees to furnish such medicines as are usually furnished by country physicians, and to give prompt attention to patients belonging to the said association; and, in the event that parties belonging to the association and those not belonging to the same should send for him at the same time, he agrees to give the citizens of the association the preference. As to fees charged by the physician for practice, these are arranged entirely by the association as to its membership. As to outside parties, the association has nothing to do. We have already \$1,000 subscribed, and we pledge ourselves to use our best efforts to secure the remaining \$500. D. C. Ferrabow, Chairman. John C. Hudgins, M. C. Washington, Committee. H. A. Nash, Doctor. J. W. Brown, Secretary.' (2) That the defendants were, at the time of their entering into said agreement with the plaintiff, who is the Dr. H. A. Nash mentioned in said agreement, members of said Stem Citizens' Association, and thereby became and are liable to plaintiff for the payment to him of said sum of \$1,500, according to the stipulations contained in said agreement. (3) That plaintiff faithfully performed his part of said agreement according to the stipulations contained therein. (4) That said defendants

have paid to plaintiff, in part satisfaction of their said liability, the sum of \$472 only. (5) That said defendants are indebted to plaintiff, after crediting them with said sum of \$472, in the sum of \$1,028, with interest thereon from the 1st day of April, 1891. Wherefore plaintiff demands judgment against said defendants for said sum of \$1,028, with interest thereon from the 1st day of April, 1891, until paid, and for such other or further relief, etc."

J. B. Batchelor and Edwards & Royster, for appellant. A. W. Graham, for appellees.

CLARK, J. The defendant moves to dismiss in this court, because the complaint does not state a cause of action. This is one of the two objections which can be taken in this court when not made below. Rule 27 of this court (12 S. E. vii.). Indeed, the court could take it *ex mero motu*. *Hagins v. Railway Co.*, 106 N. C. 537, 11 S. E. 590, and other cases cited in *Clark's Code* (2d Ed.) p. 698. We are of opinion that the objection is well taken. The paper writing relied on as the foundation of the action is too vague and indefinite to fix the defendant with liability. It recites that the agreement is made with them as "the properly authorized officers of the Stem Citizens' Association." If contracted with as officers, clearly the association, and not the officers personally, was to be liable. Besides, it further provides, as if to guard against personal liability, "\$1,000 is already subscribed, and we pledge our best efforts to secure the remaining \$500." It does not appear whether the association was incorporated or not. As the writing was signed by "the properly authorized officers" of the "Stem Citizens' Association," it would seem that it was. If so, the corporation, and not these defendants, should have been sued. If not incorporated, there is no proper averment that it was a partnership. A mere allegation that the defendants were "members of said Stem Citizens' Association, and thereby became liable," is not a sufficient allegation of partnership; and without such it is difficult to see how liability could be incurred, in the absence of allegation of incorporation and of fraud in the conduct of defendants, as officers of such corporation. Furthermore, the paper writing specifies no term other than "\$1,500 per annum, payable quarterly." The complaint does not aver service for any specified time, nor, indeed, any service beyond what might be inferred from the allegation that "plaintiff faithfully performed his part of said agreement." For how long a time is not stated. If for a quarter, then the payment he admits in the complaint has overpaid him, and he has stated no cause of action. There is no presumption of law based upon the terms of the alleged agreement that he has served beyond the minimum stipulation of a quarter. If the plaintiff has rendered service to these defendants or oth-

ers belonging to said association, there is nothing to defeat his recovery upon a quantum meruit against each for the services rendered him. The attempted contract, being too vague and indefinite, is simply a nullity, and is in the way of neither the plaintiff nor the defendants. Action dismissed.

(115 N. C. 284)

#### SCARLETT et al. v. NORWOOD.

(Supreme Court of North Carolina. Nov. 27, 1894.)

#### SEDUCTION—ACTION BY FATHER.

Under Code, § 177, providing that every action must be prosecuted in the name of the real party in interest, a father may bring an action for damages resulting from the seduction of his infant daughter,—the loss of her services, the expenses of her illness, her death, and the consequent injury to his affections.

Appeal from superior court, Orange county; Bynum, Judge.

Action by Thomas Scarlett and others against James Norwood for damages. Judgment for defendant, and plaintiffs appeal. Reversed.

John W. Graham, for appellee.

CLARK, J. This is an action brought by the father, alleging seduction of his infant daughter, loss of her services, expenses of her illness, her death, injury in his affections, etc. It is the common law action of seduction, and we know of no statute depriving the father of his remedy in such cases. If an action on such facts can be maintained for wrongful act causing death under the provisions of Code, § 1498, it could be brought only by the personal representative, as is rightly contended by defendant's counsel. But the plaintiff is entitled to any relief to which the facts stated in his complaint, if proven, entitle him. *Patrick v. Railroad Co.*, 93 N. C. 422; *McNeill v. Hodges*, 105 N. C. 52, 11 S. E. 265; *Clark's Code* (2d Ed.) pp. 150, 151. Here the allegation of death caused by wrongful act of defendant is only a circumstance in aggravation of damages in the action for seduction. *Hood v. Sudderth*, 111 N. C. 215, 16 S. E. 397, relied on by defendant, has no application. That case held that when the woman seduced is of age, there being no loss of services to the father, the only cause of action in such case is the tort,—the fraud and deceit causing injury to her person and good name. It held that the woman herself can in such case maintain the action, being the party injured. But here, the girl being a minor, the father was entitled to her services, it was incumbent upon him to pay the expenses attendant upon her illness, and the jury, upon common law and immemorial precedent, might add punitive damages for the wrong done him in his affections and the destruction of his household. He is the party in interest, and can maintain the ac-

tion, under Code, § 177, and, it has been ruled, could have the defendant held in arrest and bail. *Hoover v. Palmer*, 80 N. C. 315. Whether, when an action for seduction of a minor is brought by the parent, another action can be brought by the girl herself for the injury to her person, suing by next friend, as in *Smith v. Richards*, 29 Conn. 232, or after her arrival of age, is an interesting question not before us. It is settled that this can be done when an infant has been injured by the negligence of another. *Bottoms v. Railroad Co.*, 114 N. C. 699, 708, 19 S. E. 730. It is such action if it can be brought by the minor, which would die with her person, under Code, § 1491(2). *Hannah v. Railroad Co.*, 87 N. C. 351. That section does not apply to this action brought by the father, which is not for the injury to the person and good fame of the daughter, but for loss of services, expenses incurred by him, and injury to his affections; hence it does not abate at her death. *Wilton v. Webster*, 32 E. C. L. 491; *Ingerson v. Miller*, 47 Barb. 47. In overruling the demurrer there was error.

**SHEPHERD, C. J.** (concurring). I concur in the conclusion that the father can maintain the action for loss of services, etc., but I do not concur in the reasoning of the opinion, and especially in that part which approves the doctrine laid down in *Hood v. Sudderth* (N. C.) 16 S. E. 397, that a woman can maintain an action for her own seduction, *volenti non fit injuria*.

**BURWELL, J.** I concur in the opinion of the Chief Justice.

(115 N. C. 198)

**MORTON et al. v. CAROLINA MANUFACTURING CO.**

Appeal of **RAGAN**.

(Supreme Court of North Carolina. Nov. 27, 1894.)

#### REVIEW ON APPEAL.

The conclusions of a trial court on conflicting evidence will not be reviewed.

Appeal from superior court, Guilford county; **Bryan**, Judge.

Petition by **Alfred Morton** and others, creditors, against the **Carolina Manufacturing Company**, for receivers. Receivers were appointed, and, at a sale conducted by them, **W. H. Ragan** bid in certain property. On hearing of an order to show cause why he should not pay the amount of his bid, the court adjudged that he should pay it, and he appeals. Affirmed.

**Dillard & King**, for appellant. **L. M. Scott**, for appellee.

**BURWELL, J.** There is a dispute between the appellant, **Ragan**, who was a bidder at

a sale made by receivers, and those receivers, as to what property was offered for sale by them when he made his bid,—as to what was sold by them and bought by him at that time. No exception was taken because his honor did not set out the facts found by him as a basis of his decree, but we take it that he found the statements made by the receivers and their witnesses to be true. We have no authority, we think, to review his conclusions upon such a matter. The judgment must be affirmed.

(115 N. C. 310)

**WELCH v. CHEEK.**

(Supreme Court of North Carolina. Nov. 27, 1894.)

**MALICIOUS PROSECUTION — DETERMINATION OF CRIMINAL PROCEEDINGS—PROBABLE CAUSE — BURDEN OF PROOF.**

1. Dismissal of a warrant by a justice with the consent of the party prosecuting is a sufficient determination of the proceeding to authorize an action for malicious prosecution.

2. Where a prosecution is dismissed under an agreement between the parties by which the party prosecuted is to pay part of the costs, the burden, in an action for malicious prosecution, of showing probable cause, is not on defendant.

Appeal from superior court, Randolph county; **Battle**, Judge.

Action by **C. H. Welch** against **Josiah Cheek** for malicious prosecution. Judgment for plaintiff. Defendant appeals. Reversed.

**J. T. Morehead** and **J. N. Wilson**, for appellant. **L. M. Scott**, for appellee.

**PER CURIAM.** The dismissal of the warrant by the justice of the peace with the consent of the defendant was a sufficient determination of the proceeding to authorize the plaintiff to sustain this action, and ordinarily such a determination would place the burden upon the defendant to show probable cause. Where, however, the proceeding is dismissed by virtue of an agreement between the parties, the principle does not apply. There was testimony in this case tending to show some arrangement between the parties under which the plaintiff paid a part of the costs, and was discharged. In *Massachusetts* it is held that "where a nolle prosequi is entered by the procurement of the party prosecuted, or by his consent, or by way of compromise, such party cannot have an action for malicious prosecution." *Langford v. Railroad Co.*, 144 Mass. 481, 11 N. E. 697, and the cases cited. It is unnecessary to go to this extent in the present appeal, but we are of the opinion that, in view of the testimony as to the agreement, there was error in charging the jury, without qualification, that the burden of showing probable cause was on the defendant. New trial.



(115 N. C. 318)

**HARRIS v. FISHER et al.**

(Supreme Court of North Carolina. Nov. 27, 1894.)

**VIOIOUS DOGS—INJURY TO PASSER-BY—LIABILITY OF OWNER OF PREMISES.**

The owner of premises who, having knowledge of the vicious and dangerous character of a dog owned by his agent, permits the agent to retain him, and allow him to run at large on the premises, is liable for any damage he does to a passer-by.

Appeal from superior court, Randolph county; Bryan, Judge.

Action by John T. Harris against B. J. Fisher and others for damages caused by dogs. Judgment for plaintiff, and defendants appeal. Affirmed.

J. N. Wilson, for appellants. L. M. Scott, for appellee.

CLARK, J. The evidence objected to was properly admitted. It was corroborative of the evidence as to the bad character of the dogs, and also tended to confirm plaintiff's version of the manner of the accident. Defendants, however, further excepted to the addition by the court to the fifth prayer for instruction. By that addition the court, in effect, charged the jury that the defendants were liable if the injury was caused by dogs belonging either to the defendants or their agent, living on the place, if said dogs were ferocious and mischievous, and so known to be by the defendants. The defendants placed much stress on the fact that one of the dogs (the colley) belonged, not to defendants, but to their agent's wife; and, the ownership of the colley being not within the scope of his agency, his knowledge of the character of the colley owned by his wife was not the knowledge of the defendants. But that point is not presented by the addition to the charge, which is that if the dogs were ferocious and mischievous, and that fact was known to the defendants, whether the dogs were owned by them or their agent, living on the place, the defendants would be liable. This must be so. If the defendants, knowing the dog was vicious and dangerous, permitted their agent to retain him, in company with their other dogs, at a place on the side of the road, where he would be likely to commit damage to passers-by, and he does so, the principal is liable. 1 Am. & Eng. Enc. Law, 584. It would be otherwise if the agent owning the dog knew he was dangerous, but the owner of the premises did not; for the knowledge of the agent, not in the scope of the agency, is not the knowledge of the principal. The ownership of the dog in such case is not within the agency. Here, however, the instruction excepted to is that if the owner of the premises, having knowledge of the vicious and dangerous character of a dog owned by his agent, permits said dog to run at large on his premises, said

owner of the premises is liable. As to the third exception the court charged in substance as prayed by defendants. No error.

(115 N. C. 737)

**STATE v. MALLOY.**

(Supreme Court of North Carolina. Nov. 27, 1894.)

**CRIMINAL LIBEL—SLANDERING INNOCENT WOMAN**

1. In a trial for slandering an innocent woman (Code, § 1113) by charging her with having had sexual intercourse with defendant, where it was admitted that the charge was made, the only issue is whether prosecutrix was an innocent woman.

2. An innocent woman; within Code, § 1113, is one who has never had sexual commerce with any man.

Appeal from superior court, Rockingham county; Battle, Judge.

Thomas A. Malloy was convicted of slandering an innocent woman, and appeals. Affirmed.

Indictment for slandering an innocent woman, under section 1113 of the Code, tried before Battle, J., and a jury, at July term, 1894, of Rockingham superior court. The defendant is charged with attempting in a wanton and malicious manner to destroy the reputation of the prosecutrix, an innocent woman, by speaking words in substance as follows, to wit, that he, the defendant, had on several occasions had sexual intercourse with the prosecutrix. Testimony was offered by the state tending to prove that defendant spoke the words, as alleged, to one Kallam, and the prosecutrix testified that she was an innocent woman, and had never had sexual intercourse with any man. The defendant, as a witness in his own behalf, testified in detail that on three occasions he had had sexual intercourse with the prosecutrix; that prosecutrix afterwards informed him that she was pregnant, and that he was the father, and that he must marry her, or go to jail; that he was frightened, and consulted his brother-in-law as to what he should do; told him of his intercourse with the prosecutrix, of her telling him she was pregnant, and he must marry her, and of the advice he received from his brother-in-law. There was testimony on each side, in corroboration, and that the character of the prosecutrix was good, and that of the defendant was fair. The defendant insisted that the state should satisfy the jury that the prosecutrix was an innocent woman, that the words were false, and that they were spoken with intent to destroy the reputation of the prosecutrix, wantonly and maliciously. His honor instructed the jury that the burden was on the state to make good its charge. The principal question is, is the prosecutrix an innocent woman? If defendant uttered the words, and they were false, the law presumed malice, as in murder, when deadly weapons are used, and as lewdness and

lasciviousness were presumed in fornication and adultery. The defendant having admitted speaking the words, the only question is, is the woman an innocent woman? The defendant excepted. There was a verdict of guilty, judgment, and appeal. The error assigned is in the charge, to wit: "That since, if the law presumed the malice from the speaking of the words (which was not correct), the judge should have further instructed that the presumption could be rebutted." "That the innocence of the woman was not the only question for the jury."

The Attorney General, for the State.

**MacRAE, J.** The defendant admitted speaking words charging the prosecutrix with incontinency. If these words were false, their natural effect and consequence were to destroy the reputation of the prosecutrix. "Where a slanderous charge is made, the law, *prima facie*, implies malice from the publication, unless in the case of a privileged communication, which appears when the party is acting under a legal or moral duty towards the person to whom it is made, and in such cases malice must be proved." *State v. Hinson*, 103 N. C. 374, 9 S. E. 552. In no view of the case could the words spoken, as admitted by the defendant, have been privileged if they were not true. An innocent woman, in view of this statute, is one who has never had sexual commerce with any man. *State v. Brown*, 100 N. C. 519, 6 S. E. 568. When the jury were required to pass upon the question whether the prosecutrix was an innocent woman, there was necessarily involved an issue as to the truth or falsity of the words spoken; for if those words were true she could not be innocent. The defendant admitted having used words which amounted to a charge of incontinency, and attempted to justify by proving their truth. The only question for the jury was bound up in the innocence or otherwise of the prosecutrix. If she were innocent, the charge was false; and, if false, it was in that case, from its nature, malicious. **Affirmed.**

(115 N. C. 115)

#### BURGWIN v. DANIEL

(Supreme Court of North Carolina. Nov. 27, 1894.)

#### ACCOUNTING BY EXECUTOR—ACTION ON BOND—LIMITATIONS.

1. An administrator's account was labeled "Annual Account," was so styled by the clerk in approving it, was filed in his "Record of Accounts," and not in the book entitled "Final Settlements," and merely showed a balance struck and in the hands of the administrator. **Held**, that it was not a "final" account.

2. Where an administrator neither resigns nor files a final account, the lapse of six years from the filing of his last annual account does not bar an action by the administrator *de bonis non*, when appointed, against the administrator.

3. An action against the sureties of an administrator is barred by the lapse of three years after the taking out of the letters of administration *de bonis non*.

Appeal from superior court, Northampton county; Whitaker, Judge.

Action by the state on the relation of J. A. Burgwyn, administrator *de bonis non* of J. M. Rogers, against W. E. Daniel, administrator of J. W. Grant, and others, on J. W. Grant's bond as administrator. There was a judgment for relator, and defendant Daniel appeals. **Affirmed.**

W. H. Day and R. B. Peebles, for appellant. W. W. Peebles & Son, for appellee.

**CLARK, J.** The account is entitled on its face an "Annual Account." It is so styled by the clerk in approving and filing it, and it is recorded by him in his "Record of Accounts," and not in the book entitled "Final Settlements." The court properly instructed the jury that it was not a final account, and that the six-years statute of limitations did not apply. In *Vaughan v. Hines*, 87 N. C. 445, the account held to be a final account showed that all the debts and expenses of the estate had been paid, and that there was a net balance which had been found "due the heirs" at a date more than a year previous. The present account merely shows a balance struck and in the hands of the administrator for the exigencies of the estate. The court also correctly told the jury that, there being no final account, the trust was not ended, and the statute did not begin to run till the resignation of the administrator. In *Glen v. Kimbrough*, 58 N. C. 173, it was held that the lapse of 34 years did not bar an action by the administrator *d. b. n.* against the representatives of the first administrator, when there was no administrator *d. b. n.* during that period. Whether the ten-years limitation in section 158 of the Code now applies in such cases, it is not necessary to decide in this case, as that period has not elapsed. The defendant cannot complain that the judge held that ten years would have been a bar. The sureties would have been protected by the lapse of three years from the taking out of letters of administration *d. b. n.* *Brawley v. Brawley*, 109 N. C. 524, 14 S. E. 73. It may be noted that that case has been sometimes misunderstood. It does not change the construction placed upon section 164 of the Code,—that an action must be brought by the representative of a creditor within one year after his death, and against the representative of a debtor in one year after taking out letters of administration, when it would otherwise have become barred. *Benson v. Bennett*, 112 N. C. 505, 17 S. E. 432; *Coppersmith v. Wilson*, 107 N. C. 81, 12 S. E. 77. *Brawley v. Brawley* held that the statute of limitations did not run to bar an action by an administrator *d. b. n.* against the representative and bondsmen of a deceased administrator

while there was no administrator d. b. n.; no one in esse who could bring such action. This would not apply to an action brought by the creditor, or a distributee or legatee, directly against the representative of the deceased executor, administrator, or guardian, and their sureties, for breach of the bond. Of course, after the death of the first administrator an action to establish a disputed debt could be brought only against the administrator d. b. n. Affirmed.

(115 N. C. 260)

**MEDLIN v. BUFORD et al.**

(Supreme Court of North Carolina. Nov. 27, 1894.)

**VALIDITY OF MORTGAGE—FRAUD—BONA FIDE PURCHASER.**

Where a person who has a good education executes a mortgage without reading it, or requesting that it be read, supposing that it is a "lien" of some kind different from a mortgage, and is induced to execute it by the false representation of a third person that it is not a mortgage, and that they "could do away with it in 30 days," the mortgage is not void in the hands of an innocent purchaser.

Appeal from superior court, New Hanover county; Connor, Judge.

Action by J. T. Medlin against Mary Buford and others to foreclose a mortgage. From a judgment for defendants, plaintiff appeals. Reversed.

J. D. Bellamy, Jr., for appellant. T. W. Strange, for appellees.

**SHEPHERD, C. J.** The first question to be considered is whether the mortgage executed by the defendants to the plaintiff is absolutely void by reason of fraud in the factum. If such be the case, it would be immaterial whether the plaintiff is an innocent party, since, the deed being a nullity, no rights could be asserted under it in favor of any person whomsoever. It is this very serious consequence which influences the courts to adhere strictly to the old and well-settled principle applicable to cases of this character, and, tested by these, we have but little difficulty in reaching the conclusion that the fraud in the present instance was in the representation or treaty, and not in the factum. A deed made by reason of this species of fraud is often said to be void, but it will be found upon examination that this term is indiscriminately used in connection with any deed that may be avoided either at law or in equity. But, as is said in *Somes v. Brewer*, 2 Pick. 191, the distinction between void and voidable deeds becomes highly important in its consequences to third persons, "because nothing can be founded upon a deed that is absolutely void, whereas from those which are only voidable fair titles may flow." The distinction is clearly drawn in *McArthur v. Johnson*, Phil. (N. C.) 317. In that case a person proposed to convey a tract of land in trust, and his brother undertook to have

the deed drawn, but, without the knowledge of the vendor, inserted therein a conveyance also of another tract in trust for himself, and upon presenting the deed for execution, in reply to a question by the vendor, said that it was "all right," whereupon the latter executed it without reading it or hearing it read. It was held that the conveyance was valid at law, there being no fraud in the factum. The court, after giving the surreptitious substitution of one deed for another, and the false reading of a deed upon request to a blind or illiterate person, as examples of fraud in the factum, then proceeds to speak of what is meant by fraud in the representation or treaty. "In all of the cases it will be seen that the party knowingly executes the very instrument which he intended, but is induced to do so by means of some fraud in the treaty, or some fraudulent representation or pretense. In this category is included the case of a man who can read the instrument which he signs, seals and delivers, but refuses or neglects to do so. Such a man is bound by the deed at law, though a court of equity may give relief against it." The opinion quotes with approval the following language from 1 Shep. Touch. 56: "If the party that is to seal the deed can read himself, and doth not, or, being an illiterate or a blind man, doth not require to hear the deed read or the contents thereof declared, in these cases, albeit the deed be contrary to his mind, yet it is good and unavoidable at law, but equity may correct mistakes, frauds," etc. In 3 Washb. Real Prop. 262, it is said: "But, if the party can read, it is not open to him after executing it to insist that the terms of the deed were different from what he supposed them to be when he signed it. \* \* \* And one who executes a deed cannot avoid it on the ground of ignorance of its legal effect. The rule on the subject is thus stated: 'A deed cannot be avoided in a court of law except for fraud in its execution, or other fraud or imposition practiced upon the grantor in procuring his signature and seal,—a fraud which goes to the question whether the deed ever had any legal existence.' The law does not reach the cases of deeds procured by undue influence over the grantor, if he be of legal capacity. The only relief in such cases is in equity." Applying these principles to the facts of this case as related by the defendants, who testified in their own behalf, it would seem clear that the mortgage in question is not void, but voidable only in a court of equity. The defendant Mrs. McGirt stated that she had a good common school education, and it appears that neither she nor the other defendant read the deed, or requested that it be read. They knew that the object of the deed was to raise \$1,000, which was to be invested together with the \$2,000, which it appears had already been invested by Davis. It is true that Davis deceived them by stating that the deed was not a mortgage, and

that they "could do away with it in thirty days"; but they admit that they knew they were executing a "lien" upon their house for \$1,000, although they say they did not know it was the same as a mortgage. If they had read the deed, they would have discovered that it was a mortgage to the plaintiff, securing \$1,000, which she afterwards advanced upon the faith of the mortgage through her attorney, Mr. Cutlar. These and other circumstances relied upon by the defendants were not sufficient, in our opinion, to establish fraud in the factum. Indeed, the case does not seem to have been tried upon this theory, as the issue itself appears to have been framed for the purpose of presenting the proper view of the tendency of the testimony, which is that the deed was procured by fraud in the representation or treaty. To hold otherwise would, it seems to us, be productive of the most alarming results as to the security and stability of titles in the hands of innocent purchasers, who have acted upon the faith of conveyances actually executed by the owners, and, as in this case, openly and freely acknowledged before the proper authority to be their act and deed.

The deed then being voidable only in a court of equity, and the jury having found that neither the plaintiff nor her attorney had notice of the fraudulent conduct of Davis in procuring the execution of the same, it becomes necessary to determine whether the instruction asked by the plaintiff should not have been given. This instruction relates to the issue involving the agency of Davis in making the transaction with Mr. Cutlar, the plaintiff's attorney, and must be considered in connection with the facts admitted in the testimony of the defendants. Could the defendants, under these circumstances, be permitted to say that they were not bound by the acts of Davis? "It is a general and just rule that, when a loss has happened which must fall on one of two innocent persons, it shall be borne by him who is the occasion of the loss, even without any positive fault committed by him, but more especially if there has been any carelessness on his part which caused or contributed to the misfortune. A man can scarcely be cheated out of his property, especially of real estate, in such manner as to give an innocent purchaser a right to hold according to the principles which have been mentioned, without a degree of negligence on his part which should remove all ground of complaint. Suppose him to be prevailed upon by fraudulent representations to execute a deed without asking advice of friends or counsel, he has *locus penitentiae* when he goes before a magistrate to acknowledge it." *Somes v. Brewer*, supra. These general principles are well sustained and illustrated by several decisions of this court and the numerous authorities therein cited, and are applicable, we think, to the question under consideration. *Railroad Co. v. Kitchin*, 91 N.

C. 39; *Vass v. Biddick*, 89 N. C. 6; *State v. Lewis*, 73 N. C. 138. According to the statements of the defendants, they intended to give a lien upon their property for \$1,000. This money, it must necessarily be inferred, was to be raised on the faith of the lien, and it was to be submitted to Davis, who was "to put it out" with the \$2,000 he had already invested, so that the defendants could get \$25 per month. The defendants, without reading the mortgage, executed the same, and it remained in the hands of Davis. Davis came the next day with the clerk of the court (Taylor), and the defendants acknowledged the due execution of the said mortgage, and it cannot be doubted that it remained in the hands of Davis in pursuance of the arrangement agreed upon. As we have said, had they read the instrument, they would have discovered that it was a mortgage to the plaintiff for the sum of \$1,000; and, so far as this case is concerned, it must be assumed that they were aware of its contents. At any rate, they admit that they knew that it was a lien for that amount, and, under these circumstances, they permit the said Davis to take away the instrument obviously for the purpose of raising the money. In other words, by their gross negligence and blind confidence in Davis, they invested him with all the indicia of agency to obtain the money of the plaintiff upon the faith of this mortgage; and as between the plaintiff and these defendants, who are all innocent parties, it cannot be a question as to who should bear the loss. We think the instruction should have been given, and that, because of its refusal, there should be a new trial. Of course, if, upon another trial, it should appear that Mr. Cutlar had notice of facts sufficient to put him upon inquiry, the plaintiff would be affected by such notice, and the defendants be entitled to relief. We have examined the authorities cited by the counsel for the defendants, and see nothing in them which seriously conflicts with the principles we have declared in this opinion. The fact that the note was not executed by the defendants does not in itself prevent a foreclosure of the mortgage. 1 Jones, *Mortg.* 353. New trial.

(115 N. C. 274)

**DIXON v. WILMINGTON SAVING & TRUST CO. et al.**

(Supreme Court of North Carolina. Nov. 27. 1894.)

**CANCELLATION OF MORTGAGE—FRAUD—BONA FIDE PURCHASER.**

The fact that a mortgagor is induced by fraudulent representations to sign a mortgage without reading it renders it voidable merely, and therefore cannot be avoided in the hands of a person who in good faith advances money thereon.

Appeal from superior court, New Hanover county; Boykin, Judge.

Action by Nancy Dixon against the Wilmington Saving & Trust Company and others to cancel a mortgage. From a judgment for defendant, plaintiff appeals. Affirmed.

T. W. Strange, for appellant. Geo. Rountree, for appellee.

SHEPHERD, C. J. However much we may sympathize with the plaintiff, who, like the defendants in the case of *Medlin v. Buford* (decided at this term) 20 S. E. 463, has been cheated and defrauded by reason of her perfect confidence in the rectitude and piety of John C. Davis, we are unable to see how we can grant her the relief prayed for. To do so would amount to the abrogation of some of the plainest principles of jurisprudence, and so unsettle the law that but little confidence could hereafter be placed in those solemn assurances of title so necessary to the welfare and repose of society. The grave results of holding a deed, executed under the present circumstances, to be void, and not voidable merely, are mentioned in the case of *Medlin v. Buford*, supra, in which will also be found an enunciation of the principles which apply to this appeal. There is no pretense here that the plaintiff did not intend to sign and deliver the instrument in question. She alleges that she consented to do so, and executed the same without reading or having it read to her. In addition to the authorities cited in *Medlin's Case*, supra, we will add the case of *Commissioners v. Kesler*, 67 N. C. 448, in which it was held that if a grantor, although an illiterate man, executes a deed without demanding that it be read, or elects to waive a demand for the reading, the deed will take effect. See, also, 1 Devl. Deeds, 225, where it is said: "It is at the peril of the party to whom the deed is made that the true effect and purport of the writing be declared if required; but, if the party who should deliver the deed doth not require it, he should be bound by the deed, although it be penned against his meaning." It being very clear, then, that the deed is not void by reason of fraud in the factum, it must follow that it can only be avoided in equity; and, for the reasons given in *Medlin's Case*, that court will never grant relief against an innocent party, who has been induced to part with his money on the faith of a mortgage duly executed according to law. By the gross negligence of the plaintiff, she allowed herself to be imposed upon by the fraudulent representations of Davis, and executed a mortgage directly to the defendant trust company. She delivered this mortgage to Davis, and upon the faith of this deed, acting presumably as her agent, he obtained the money. This is one of those "hard cases" that are sometimes called the "quicksands" of the law, but the imprudence of the few should not tempt the courts to depart from those well-settled principles upon which depend

the safety and security of the many. The judgment sustaining the demurrer is affirmed.

(115 N. C. 579)

**GWALTNEY v. SCOTTISH CAROLINA  
TIMBER & LAND CO., Limited.**

(Supreme Court of North Carolina. Nov. 27, 1894.)

**FISH TRAP IN NONFLOATABLE STREAM — INJURIES  
FROM FLOATING LOGS—EVIDENCE.**

1. In an action for damage to a dam and fish trap, caused by logs floating on a stream which is not "floatable," plaintiff need not show that defendant was negligent in handling the logs.

2. An exception that an instruction was too general will not be considered on appeal where no request for a specific instruction was made.

3. In an action for damages to a dam and fish trap by floating logs, evidence of the value of the fish caught is admissible to show the amount of the damage.

4. Where one in possession of personal property, while not the owner thereof, sues for an injury thereto, the damages will be estimated with reference to his interest in the property.

5. There is no objection to the use by counsel, in summing up, of the stenographic notes of the evidence.

Appeal from superior court, Buncombe county; Graves, Judge.

Action by Jesse A. Gwaltney against the Scottish Carolina Timber & Land Company for damages to a dam and fish trap by floating logs. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

Civil action for damages alleged to have resulted to the plaintiff's dam and fish trap by floating logs placed in the French Broad river by the defendant, tried at spring term, 1893, of Buncombe superior court before Graves, J. The following were the issues: (1) Was plaintiff the owner of the dam and fish trap at the time of the alleged injury? (2) Was plaintiff in the possession of the dam and fish trap at the time of the injury alleged in the complaint? (3) At the time of the alleged injury, was the French Broad river, at the point of the alleged injury, such a stream that business men may calculate that, with tolerable regularity as to the seasons, the water will rise to and remain at such a height as will enable them to make it profitable to use it as a highway for transporting logs to market or mills lower down? (4) Was the dam and fish trap destroyed by the conduct of defendant? (5) At first the court made the fourth issue as follows: "Was the dam and fish trap destroyed by the negligent conduct of defendant?" but in charging upon that issue struck out the word "negligent." The case is sufficiently stated in the opinion. Verdict and judgment for plaintiff. Appeal by defendant.

Chas. A. Moore and J. B. Batchelor, for appellant. Thos. A. Jones and F. A. Soudley, for appellee.

MacRAE, J. The complaint and answer are set out in full in 111 N. C. 547, 16 S. E.

692. On the former trial, after the testimony was closed, his honor, the presiding judge, intimating the opinion that, assuming the facts as testified to be true, the plaintiff was not entitled to recover, he submitted to a nonsuit and appealed. In the opinion of this court, delivered by the chief justice, it was held that there was testimony proper to be submitted to the jury in order that they might determine whether the French Broad river, at the point of the alleged wrong and injury, was what is now called a "floatable stream." It was there said: "It is not necessary, in order to establish the easement in a river, to show that it is susceptible of use continuously during the whole year for the purpose of floatage, but it is sufficient if it appear that business men may calculate that, with tolerable regularity as to the seasons, the water will rise to and remain at such a height as will enable them to make it profitable to use it as a highway for transporting logs to market or mills lower down." There was entire unanimity in this court as to what constituted such a stream, for Mr. Justice Avery, in a very able dissenting opinion, used the same words, with the addition: "When prudent business men may regulate their expenditures with reference to the anticipated rise, the stream becomes a factor in conducting the commerce of the country." The divergence of views was then upon the relative rights of the persons floating timber down, and the riparian proprietors along such streams. When the case was tried the second time, his honor submitted to the jury an issue framed upon the language above quoted, as follows: "(3) At the time of the alleged injury, was the French Broad river, at the point of the alleged injury, such a stream that business men may calculate that, with tolerable regularity as to the seasons, the water will rise to and remain at such a height as will enable them to make it profitable to use it as a highway for transporting logs to market or mills lower down?" In his instructions to the jury on this issue his honor said: "It is not necessary that the stream is of such volume all the year, or all the season, but it might be for a time long enough to be beneficially used. I cannot say how long a time the stream must be capable of floating in each year, but a stream which is only capable of floating logs in occasional freshets is not in law a floatable stream. Now, whether the French Broad was such a stream becomes a question of fact for you to determine from all the evidence, and I can give you no further assistance on this point. The burden rests upon the defendant." Again, his honor charged: "Upon the question whether the French Broad is floatable, you look to the testimony of all the witnesses; all the evidence bearing on that question; the size of the stream, the country it drains, the size of the valley; that witnesses testify that it was floatable above Asheville; but it does not necessarily follow from the fact that it is

floatable above Asheville that it is floatable below." In answer to an oral request from defendant's counsel the court charged: "If the freshet should arise from natural rainfall for a sufficient period to make it useful to the public, it would be considered a floatable stream. Temporary rise, passing quickly down, is not sufficient to make a stream floatable, and would not be sufficient if the freshet should continue up for even two or three days and be reasonably expected every year." This question was so examined and discussed by us upon the former hearing that we deem it only necessary now to give our unqualified approval to the issue and the instructions thereon, and thus dispose of all of defendant's exceptions to this part of the charge. The issue itself was not excepted to; indeed, there were no exceptions to the issues, but to the striking out of the word "negligent" from the fourth issue, so as to make it read, "Was the dam and fish trap destroyed by the conduct of defendant?" and to the fifth issue, "What damage, if any, has the plaintiff sustained?" We think that the contentions of the parties were carefully and fairly presented by the issues, and that, if there was an injury to plaintiff's property by reason of floating logs, it was of no moment in this action, certainly after the jury found that the river was not a floatable stream, whether the injury was caused by the negligence of defendant or otherwise, if it in truth were caused by the act of defendant.

We will next address ourselves to the exceptions of the defendant to the charge of the court upon the measure of damages: "If the river is not a floatable stream, and the dam was destroyed in consequence of its [defendant's] acts, the defendant is liable to plaintiff for such actual damages as naturally resulted from its acts." "The measure of damage would depend on the right the plaintiff had in the fish trap and dam. This damage should be for the injury to his property in the dam and trap, and would be greater for the destruction of property to which he had a title in fee simple than to a mere property in possession." "Upon the question of damages the jury were further instructed that in no view was the defendant liable for vindictive damages; that the measure of damage, if the plaintiff were entitled to any, was the actual value of the injury done. The cost of building the dam was not the measure, nor was the cost of rebuilding the measure of damage; but the jury must, from all the evidence, fix the amount of the loss actually sustained by plaintiff as the measure of damage, if plaintiff is entitled to any damage." These instructions cut off from the jury any consideration of prospective or speculative damages, and confined them to compensation for the injury. The loss actually sustained was to be determined by the jury. *Suth. Dam.* §§ 1011, 1012. It was a very general proposition,

which his honor should, and doubtless would, have explained and elaborated, if he had been so requested; but, "if the parties desire more specific instructions, they must ask for them at the proper time." *Morgan v. Lewis*, 95 N. C. 296. Several exceptions embrace testimony as to the annual "output" of the fishery. Plaintiff testified: "I caught large quantities of fish. I cannot say how much. Supplied my family and laborers. Went to the traps twice a day. Sold \$500 worth a year. The yearly value of products of traps was \$1,000." Witness Morrison testified: "Gwaltney, during my stay, sold a great many fish at the hotel. I can't say how often." We think all of this testimony was competent, not for the purpose of showing prospective or speculative damages, or as to what he might have made later but for the injury, for in this view it would not have been admissible, but "all the facts and circumstances constituting or proximately connected with the trespass, tending to show its character and immediate consequences, may be proved, both to show the amount necessary to a just compensation for the injury and the motive of the defendant, to enable the jury to determine whether the wrong is such that punitive damages should be given, and, if so, how much. In the absence of facts warranting such damages, the principle of compensation governs, and to ascertain the amount the mode of proof must be adapted to the facts of each case." "Where the trespass suspends or impairs the enjoyment of the premises, compensation may be given on the basis of the rental value, in the absence of any ground for special damages, or in addition to such damages; and, if the premises are put out of repair, the cost of repair will be an additional item." The defendant who destroyed the sluiceway to a mill was held liable for the sluiceway and consequential damages to plaintiff for having his mill stopped. *Suth. Dam.* § 1015. Where defendant wrongfully destroyed part of plaintiff's milldam, damages were assessed for the cost of repairing the dam, and also for interruption to the use of the mill or diminution of profits. "Per Curiam: The question is raised as to consequential damages. The interruption to the use of the mill, and the diminution of the plaintiffs' profits on that account, were alleged in the declaration and proved on the trial; and we think this was right. The plaintiffs are entitled to recover all the damages they suffered by reason of the trespass." *White v. Mosely*, 8 Pick. 356. Consequential damages, to be recovered in an action of tort, must be the proximate consequence of the act complained of; therefore the tortious conversion of plaintiff's mule would not authorize damages for loss of crop thereby. If the action were for damage for breach of contract, the rule would be to give such damage as, being incidental to the breach as a natural consequence thereof, may be reason-

ably presumed to have been within the contemplation of the parties. *Sledge v. Reid*, 73 N. C. 440. No such contemplation could have been in the minds of these parties. The measure is the actual damage, not the cost of rebuilding, nor the original cost of building; but, taking into consideration these things, and the value of the property by reason of its production, the actual damage is to be estimated. In this view the testimony was entirely competent. *Willis v. Branch*, 94 N. C. 242. There were several instructions asked upon the first issue, "Was the plaintiff the owner of the dam and fish trap at the time of the injury alleged in plaintiff's complaint?" and to the second issue, concerning plaintiff's possession. It is unnecessary for us to examine closely into plaintiff's title. His possession was undisputed, and it is certain that an action will lie for trespass and injury to the possession. *Horton v. Hensley*, 1 Ired. 163; *Smith v. Ingram*, 7 Ired. 175; *Aycock v. Railroad Co.*, 89 N. C. 321. And his honor charged the jury substantially that the plaintiff could only recover according to his interest. "Of course, plaintiff's right to recover in any event depends upon his title or upon his possession. If he have neither, he can not recover; if he have either, he can, if the defendant was guilty of doing him a wrong by reason of his wrongful conduct. The measure of damage would depend on the right the plaintiff had in the fish trap and dam. This damage should be for the injury to his property in the dam and trap, and would be greater for the destruction of property to which he had title in fee simple than to a mere property in possession." As we have seen, if the defendant had desired more specific instructions on this point, he should have asked them. As a general proposition, the court was correct.

It was contended that the damage, if done at all, was by an independent contractor, and therefore the defendant is not liable. It is sufficient to say that we do not think there was evidence to that effect. The defendant is a corporation, and must of necessity act through its agents and managers, and there was nothing to show that the person moving the logs was other than defendant's agent.

Not to protract the discussion, many of the prayers for instruction and exceptions being based upon the theory that the French Broad was a floatable stream, and the jury having found to the contrary, will not need to be examined.

We see no objection to counsel's using the stenographic notes in rehearsing parts of the testimony to the jury, when they are read as aids to his memory, and are according to his recollection. They derive no additional weight from being such notes, but are simply counsel's statements, not under oath, but in the course of the argument as to his understanding of the testimony. We have given careful consideration to all the exceptions of defendant, and the very able ar-

gument of counsel, and to the authorities cited by them, and we are of the opinion that the case was very carefully and conscientiously tried below, and there is no error.

(115 N. C. 337)

**CALL v. TOWN OF WILKESBORO.**

(Supreme Court of North Carolina. Nov. 27, 1894.)

**POWERS OF TOWN—LAYING OUT STREET—AUTHORIZATION BY SPECIAL ACT.**

1. Since by Act March 6, 1893, § 1, the general assembly authorized the town commissioners of Wilkesboro to lay out a street, one whose land is condemned for that purpose cannot complain that the street is not a public necessity.

2. An act authorizing the laying out of a certain street is not affected by a prior judgment of the superior court that such street was not necessary for public purposes.

3. Act March 6, 1893, § 2, provides that the street provided for by said act "shall be located under the law providing for the location of streets and rights of way, as provided in the charter of said town." *Held*, that the section was not intended to restrict the town to the powers existing under the charter, but to regulate the procedure in ascertaining the most practical way of laying out the street.

Appeal from superior court, Wilkes county; Boykin, Judge.

Action by M. C. Call, executor, against the town of Wilkesboro, to restrain the laying out of a street. Judgment for defendant, and plaintiff appeals. Affirmed.

W. W. Barber, for appellant. Watson & Buxton, for appellee.

**SHEPHERD, C. J.** On the 6th of March, 1893, the general assembly passed the following act:

"Section 1. That the board of town commissioners of the town of Wilkesboro are hereby authorized to lay off, locate and establish a public street in the town of Wilkesboro not less than sixteen feet wide, commencing at the southeast approach of the iron bridge across the Yadkin river between Wilkesboro and North Wilkesboro, thence down the bank of said river, the most practical way, to Garrett Vines' saw and lumber mills.

"Sec. 2. That said street shall be located under the law providing for the location of streets and rights of way, as provided in the charter of said town.

"Sec. 3. All laws and clauses of laws in conflict with this act are hereby repealed.

"Sec. 4. This act shall be in force from and after its ratification."

The first section of the above act expressly authorizes the laying off the street which is the subject of this controversy, and it is not open to the plaintiff to say that the said street is not necessary for public purposes. The constitution provides that private property shall not be taken except for public use, and it is well settled "that whether a particular use is public or not, within the

meaning of the constitution, is a question for the judiciary." Lewis, Em. Dom. 158; Mills, Em. Dom. 10, 11. It cannot be doubted that a public highway like the one under consideration is a public use; and, this being determined, the question as to its necessity or expediency is a matter which rests entirely with the legislative department. Lewis, Em. Dom. 238; Mills, Em. Dom. 10, 11. According to these principles, the plaintiff is, as we have said, precluded from denying the necessity for the street; and the fact that, previous to the passage of the act of assembly, the superior court had adjudged that no such necessity existed, cannot defeat the express grant of authority by the legislature. The act (section 1) in its terms substantially locates the street; and there is nothing in the plaintiff's contention that section 2 has the effect of so qualifying the provisions of section 1 as to restrict the town authorities to the same powers, only, that existed under the charter of 1889. The act explicitly grants the authority to lay off the street, and section 2 was intended simply to regulate the procedure as to ascertaining "the most practical way," and other incidents attending the exercise of the right of the power of eminent domain. The judgment of the court below is affirmed.

(115 N. C. 741)

**STATE v. REID. (No. 323.)**

(Supreme Court of North Carolina. Nov. 27, 1894.)

**FORMER JEOPARDY.**

A prosecution for selling liquor without a license, contrary to a city ordinance, does not bar a prosecution under the state law for the same selling.

Appeal from superior court, Forsyth county; Whitaker, Judge.

J. A. Reid was indicted for selling liquor without a license, and from a judgment acquitting him the state appeals. Reversed.

The Attorney General, for the State. Glenn & Manly, for appellee.

**BURWELL, J.** The defendant was tried upon an indictment found against him for retailing spirituous liquors without a license so to do. The special verdict finds that he sold the liquor as charged, and that he had no license either from the county or from the city of Winston. Upon the facts found, he should have been adjudged guilty, for the fact that he had been prosecuted before the mayor of the city of Winston for a violation of its ordinance, adopted pursuant to authority given to that municipality by section 53 of the Private Laws of 1891, and forbidding the selling of spirituous liquors within that city without having first obtained a license from the city, was no bar to this criminal action. The offense charged against the defendant here, and of which the special ver-



dict convicts him, is distinct from that with which he was charged before the mayor. *State v. Stevens*, 114 N. C. 873, 19 S. E. 861. Reversed.

**STATE v. REID. (No. 324.)**

(Supreme Court of North Carolina. Nov. 27, 1894.)

Appeal from superior court, Forsyth county; Whitaker, Judge.

J. A. Reid was indicted for selling liquor without a license, and from a judgment acquitting him the state appeals. Reversed.

The Attorney General, for the State. Glenn & Manly, for appellee.

**BURWELL, J.** Upon the special verdict the defendant was properly adjudged guilty. *State v. Stevens*, 114 N. C. 873, 19 S. E. 861, and *State v. Reid* (at this term) 20 S. E. 468. Affirmed.

(115 N. C. 323)

**HILL v. DAVIS et al.**

(Supreme Court of North Carolina. Nov. 27, 1894.)

**TRUST DEED FOR CREDITORS—CONSTRUCTION.**

Where an insolvent executes a trust deed of his property to secure creditors, and directs the trustee to settle, "without discount," a claim specified in the deed as an "incumbrance," and as "secured," such claim being for the purchase price of land, though he is mistaken in believing the claim secured, his intention should be carried out, and the land treated as security for the claim.

Appeal from superior court, Surry county; Whitaker, Judge.

Action by Nancy A. Hill against B. F. Davis, an insolvent, and others, to recover upon two promissory notes given for the purchase price of land, and to have a lien on the land decreed therefor. From a judgment in favor of defendants, plaintiff appeals. Reversed.

The trust deed executed by Davis mentioned plaintiff's claim as follows: "The following creditors are not included in the above enumeration, for that their claims are secured and referred to as existing incumbrances: M. K. Gray, \$135; Craddock & Terry, \$275; Nancy A. Hill, \$500,—and the trustee is authorized and directed to make settlement of the same without discount."

R. L. Haymore, for appellant.

**PER CURIAM.** The deed in trust explicitly authorizes and directs the trustee to settle the claim of the plaintiff, "without discount." Here is an express trust in favor of the plaintiff, and its efficacy is not destroyed because the trustor was mistaken in believing that the claim was already secured. It was clearly his intention that this claim should be preferred, at least to the extent of the value of the land which constituted its consideration. While the plaintiff was not entitled to the specific relief asked, there was sufficient in the complaint to have warranted

a judgment declaring that the claim of the plaintiff was secured in the deed, and that it should be paid by the trustee as directed. Reversed.

(115 N. C. 370)

**SPRINGER et al. v. SHEETS et al.**

(Supreme Court of North Carolina. Nov. 20, 1894.)

**REMOVAL OF CAUSES—SEPARABLE CONTROVERSY—DIVERSITY OF CITIZENSHIP—REARRANGEMENT OF PARTIES—FORECLOSURE SUIT—CANCELLATION OF DEED—JOINDER OF ACTIONS.**

1. Where there are several mortgages and a subsequent trust deed on the same property, the mortgagor may bring one combined action for the cancellation of the mortgages and the foreclosure of the trust deed.

2. When complete relief cannot be granted without the presence of all the defendants to an action by a mortgagor against his junior and senior mortgages for an adjustment of their rights, there is not a separable controversy, though separate suits for the desired relief might be brought against the different mortgagees.

3. In an action by a mortgagor to cancel certain mortgages and to foreclose a subsequent trust deed to the same property, although the cestuis que trustent have a common interest with plaintiff in showing the discharge of said mortgages, they are nevertheless his adversary parties as to the other matters in controversy, and will not be rearranged as parties plaintiff, so as to show diversity of citizenship.

4. A beneficiary under a trust deed is a necessary party to an action by a mortgagor to cancel certain mortgages on the land described in said deed, and to foreclose said trust deed, although the trustee has been made a party to the action.

5. It is not sufficient ground for removing a cause to the federal court that plaintiffs might have brought separate suits, or omitted certain defendants, though if they had done so the cause would properly belong in said court.

6. In an action for the cancellation of certain mortgages and the foreclosure of a subsequent trust deed to the same land, the mortgagor may join with him, as parties plaintiff, the cestuis que trustent under such deed.

Appeal from superior court, Beaufort county; Armfield, Judge.

Action by L. W. Springer and E. D. Springer against Howes & Sheets and others for an accounting under, and the cancellation of, certain mortgages and trust deeds, and the foreclosure of a certain other deed of trust. From an order denying their motion to remove the cause to the federal court, defendants appeal. Affirmed.

The plaintiffs, citizens of North Carolina, commenced this action against Howes & Sheets, citizens of Pennsylvania, who are the owners of four certain mortgages and trust deeds executed by plaintiffs, and joined in the action as defendants the heirs at law of one of the mortgagees, citizens of Pennsylvania, New Jersey, and Florida, and also L. R. Mayo and L. M. Herring, of North Carolina, and L. H. Lapp, of Pennsylvania, the first of which last three persons was the trustee, and the latter two were cestuis que trustent, under a certain trust deed executed by plaintiffs subsequent to said mortgages, and em-

bracing the same land. The relief applied for was the cancellation of the deeds held by *Howes & Sheets* on the ground of payment, and the foreclosure of the *Mayo* trust deed, which was claimed to be the only lien on the property in question. Defendants *Mayo*, *Herring*, and *Lapp* admitted the material allegations of the complaint, and defendants *Howes & Sheets* moved for a removal of said cause to the federal court on two grounds, viz.: (1) That there exists a separable controversy; and (2) that, after arranging the other defendants with the plaintiffs, the requisite diversity of citizenship would appear.

*John W. Hinsdale* and *W. B. Rodman*, for appellants. *Pruden & Vann* and *J. H. Small*, for appellees.

**AVERY, J.** The plaintiffs could have brought and maintained in the state courts any one of these suits growing out of the transactions covered by the complaint.

1. They might have filed their complaint against the trustee, *Mayo*, and his cestuis que trustent, asking an account or an adjudication of the amount of their claims, and a sale to satisfy them, and pay over any balance to the plaintiffs, acting on the assumption that the older mortgage debts were satisfied.

2. They might have instituted an action against the first mortgagees solely for the purpose of effecting a settlement and having the court to formally declare the mortgage debt satisfied.

3. They had the right to demand that all of these questions be settled by one action, in which, if they should prevail, the older mortgage debts would be declared satisfied, the property sold to pay the later mortgage debts to *Mayo*, and freed by the decree of the court from the clouds of the other claims, and the residue of the purchase money above the amount required to discharge the debts of the mortgagees under the *Mayo* deed, if any, adjudged to belong to the plaintiffs.

The fact that the plaintiffs and those claiming under the last mortgage deed have a common interest in showing that the debts secured by the older mortgage deeds have been discharged makes them none the less adversary parties as to the other matters involved in this controversy. *Louisa M. Herring*, one of the cestuis que trustent secured under the last or *Mayo* deed, and the trustee, *L. R. Mayo*, are, and were at the institution of the suit, citizens and residents of the state of North Carolina. Supposing that the plaintiffs' purpose is in good faith to first relieve the property of the cloud which the apparent incumbrance of the first mortgages casts upon it, and to satisfy a purchaser at a foreclosure sale that the junior mortgagee *Louisa M. Herring*, among others, will be concluded from setting up any further claim, and thereby to secure a large price, with possibly the incidental advantage of securing a consider-

able surplus after discharging debts out of the purchase money, there can be no doubt about the necessity and propriety of making both of these residents of this state parties to this proceeding in order to obtain the complete relief desired. It is not our province to act upon a suspicion of improper motives, or, indeed, to impute to parties invoking the aid of the court anything but good faith, in the absence of plenary proof of a wrongful intent. *Wilson v. Oswego Tp.*, 151 U. S. 56, 14 Sup. Ct. 259. Looking at the controversy in this view, and taking the allegations of the complaint to be true, *Louisa M. Herring* is a necessary adversary party, notwithstanding the fact that she admits the material allegations of the complaint; and it would be manifestly unjust,—perhaps ruinous,—to the interests of the plaintiffs to have the questions involved adjudicated separately by different tribunals and at different periods of time. *Desty, Removal*, § 95, g. k. *Louisa M. Herring* is not a mere formal party, but a beneficiary under the trust deed which plaintiffs seek to have foreclosed, and the summons was served on her within two days after it was issued, on January 17, 1894. It is not material, therefore, to discuss the question whether the trustee, *L. R. Mayo*, is a necessary party, though he is at least not an improper party. We have one beneficiary under the *Mayo* mortgage deed whose presence is indispensable in order to the granting of a conclusive decree, such as that which the plaintiffs seek, and whose interests are in some respects antagonistic to both parties to the older deed. It is true that a separate suit might have been prosecuted against *Howes & Sheets* for an account and cancellation of the mortgage deed, but complete relief could not have been granted in such an action without the presence of the cestuis que trustent under the later mortgage deed, if not the trustee; and, such being the case, this is not a separable controversy. *Hinson v. Adrian*, 86 N. C. 61; *Jones v. Britton*, 102 N. C. 178, 9 S. E. 554; *Faison v. Hardy*, 114 N. C. 429, 19 S. E. 701; *Safe-Deposit Co. v. Huntington*, 117 U. S. 280, 6 Sup. Ct. 733. The plain principles which make the mortgagees under the *Mayo* deed proper parties, and indispensable to the accomplishment of the end aimed at by the plaintiffs, were—First, that they would not be concluded, if not parties, and that they were interested in the settlement of the prior incumbrances upon which their own security depended, and were to that extent adversaries to the other defendants; second, that plaintiffs could not have complete relief except by a decree declaring what amount secured by each of the mortgages was still due, and enabling them to ascertain what residue would be left for them, as mortgagees. *Safe-Deposit Co. v. Huntington*, supra.

This suit, therefore, was brought for a complete adjustment of priorities and equities between all of the parties in interest. If the plaintiffs, having the right to elect that they will

have such a complete adjustment of all liens and equities affecting certain property, bring in all parties interested in one action, instead of suing separately, when some of the defendants are from the same and others from a different state from that in which the plaintiffs reside, a portion of the defendants cannot demand a rearrangement of parties according to residence because some of the defendants from the state in which the plaintiffs reside admit the material allegations made by the plaintiffs. It is not a sufficient reason for removal that the plaintiffs might have brought separate suits, or without associating other joint plaintiffs with them. 2 *Fost. Fed. Pr.* §§ 382, 384; *Wilder v. Iron Co.*, 46 Fed. 682. It would be impossible, in our case, to rearrange the parties plaintiff and defendant on the one side and the other so as, in that way, to show the existence of a separable controversy. If the parties should be classified according to common interest, it would result in placing L. R. Mayo and L. M. Herring, of North Carolina, together with L. Hassell Lapp, of Pennsylvania, with the plaintiffs, on the one side, as seeking to show that nothing remains due on the mortgages for the benefit of Howes & Sheets, while on the other side would be some of the present plaintiffs, residents and citizens of North Carolina, associated with several citizens of Pennsylvania, two of New Jersey, and one each from New York and Florida. So that by no conceivable rearrangement on the basis of common interest could the appellants show (as it is essential to show, in order to establish the right to an order of removal) the existence of a separable controversy wholly between citizens of North Carolina on the one side and citizens of another or other states on the other. *Brown v. Trousdale*, 138 U. S. 389, 11 Sup. Ct. 308; *Wilson v. Oswego Tp.*, *supra*; *Desty, Removal*, § 960. We are of the opinion that the plaintiffs had a right to elect between two remedies which the law afforded,—between combining two causes of action when lawful to do so, or prosecuting separate actions, and between prosecuting the suit alone or joining proper parties plaintiff with them.

Having chosen to have all parties whose presence is indispensable to obtaining the full measure of relief sought before the court in one suit, that suit cannot be cut up into two and removed, so as to try in piecemeal, against the will and to the possible detriment of the plaintiffs, on the suggestion that some of the indispensable parties, having apparently adverse interests to those of plaintiffs, are really in collusion and making common cause with them. Had the remedy against Howes & Sheets been in no wise connected with or dependent upon the demand against the parties to the Mayo deed, or had no relief been asked that would conclude Mayo, Herring, and Lapp,

the contention that they were not adversary to the plaintiffs, and that as to Howes & Sheets there is a separable controversy with citizens of North Carolina, might have been more plausible. *Vinal v. Continental, etc., Co.*, 34 Fed. 228. Even on that supposititious state of facts, other difficulties might arise, growing out of the presence of other parties plaintiff, from other states, joined in the alleged exercise of a right of election by the plaintiffs. *Desty, Removal*, § 96j. The rule is that, for the purpose of testing the right of removal, the allegations of the bill must be taken as true. *Id.* § 96m. We think that, conceding the truth of the allegations of the complaint, the plaintiffs could not get the complete relief demanded against all of the parties whose presence is indispensable to that end, and at the same time so arrange the parties, according to interest, that all on one side would be citizens of different states from those on the other. *Id.* § 96l. In refusing to grant the motion to remove, we think there is no error.

(115 N. C. 105)

## YOUNG v. YOUNG.

(Supreme Court of North Carolina. Nov. 13, 1894.)

## ASSUMPSIT—EVIDENCE.

In an action for money had and received it appeared that plaintiff, wife of W., as residuary legatee, was the owner of a store building occupied by B., S. & Co.; that defendant, as agent of Y., the executrix, collected rent for the store, which accrued after testator's death, and to which plaintiff was entitled; and that afterwards plaintiff deeded the store to Y. There was evidence that about the date of the deed there was a settlement and compromise of differences between the beneficiaries under testator's will, and defendant claimed that by such settlement it was agreed that such past-due rent should belong to Y. *Held*, that it was not error to admit in evidence a paper signed by Y. only, and delivered at the time to plaintiff's attorney, which recited in effect that tenants of such store and other lands were to account to and deal with W. and wife for past-due rents, "and from and after this date one-half the rents of the H. 607 acres for this year to go to W.; B., S. & Co.'s store excepted"; the evidence being conflicting as to whether such paper was signed before such final settlement was concluded or soon afterwards.

Appeal from superior court, Vance county; Battle, Judge.

Action by James M. Young, trustee of the property of Ann Eliza Young, against James R. Young, for money had and received by defendant to plaintiff's use, commenced in justice's court, and taken on appeal to the superior court. From a judgment for defendant, plaintiff appeals. Affirmed.

Plaintiff alleged: That R. E. Young died March 14, 1892, leaving a will. That at the time of his death he owned a storehouse and lot, tenanted by Barnes, Stainback & Co., who were paying \$27.50 per month from February 27, 1892, and who furnished about the burial of said R. E. Young, and other dis-

bursements to his use, \$23.50, which should be applied as a credit upon said rent. That plaintiff Ann Eliza Young is sister and next of kin named in R. E. Young's will, and James M. Young, her son, is trustee of her property for her. That the debts of R. E. Young and the legacies under his will had been paid, and his executrix filed her final account on October 19, 1892; and said Barnes, Stainback & Co.'s storehouse ceased to be a part of R. E. Young's estate on October 18, 1892, the executrix never having received or accounted to the residuary legatee for the rent. That the defendant, claiming to be agent or manager for said executrix, collected \$75 or more of the said rent in the summer of the year 1892, and that Barnes, Stainback & Co. made an assignment to A. O. Zollicoffer in December, 1892, preferring the defendant for the balance of the said rent up to October 18, 1892, and that said Zollicoffer paid the same to the defendant in April, 1893. That plaintiffs, by their agent, demanded the said money of the defendant about November 1, 1893, and again March 15, 1894, and that he refused to pay the same. The defendant denied the alleged indebtedness, and that he had received the money as alleged; and he denied that the plaintiffs were or are entitled to recover or collect the said rent at all, and also claimed that in the settlement of the estate of R. E. Young the plaintiffs surrendered and abandoned all claim to said rent.

The plaintiffs, in support of their contention, offered evidence as follows: It was admitted that demand had been made upon defendant for the amount of rent alleged to be due, and the demand was not complied with. It was admitted also that Mrs. Ann E. Young, the plaintiff, had conveyed all her property in trust to her son and coplaintiff, James M. Young. Mr. T. T. Hicks was then introduced as a witness for plaintiffs, and testified as follows: "On October 18, 1892, Mrs. W. W. Young and her then husband, Dr. Young, raised the money, and paid off the legacies under the will of R. E. Young, and also his debts, except some small debts personally paid by his executrix, and embraced in account that day filed. Two-thirds of the legacy in favor of the executrix, Pattie F. Young, was paid in land, including the Barnes-Stainback storehouse at \$3,750. Up to that time neither the feme plaintiff nor her husband had exercised any control over the real estate of R. E. Young. At once, after that settlement, Mrs. Pattie Young, through her agent, J. R. Young, turned over to me, as attorney for Mrs. Ann Eliza Young, a large pocketbook containing a number of evidences of debt,—notes, bonds, chattel mortgages, etc. There was a judgment of record against W. T. Cheatham, Jr., which it was then stated would be assigned of record to the feme plaintiff. That settlement was made in my office, October 18, 1892, the day Judge Furches spoke here. This storehouse was a part of R. E. Young's estate, owned by

his estate up to that time, when it became the property of his wife. She made a will next day, and devised it to J. R. Young, subject to certain provisions in the will, and died about a week later. Very soon after December 21, 1892, when Barnes, Stainback & Co. assigned (at the instance of Dr. Young), I called on the defendant for this rent. He did not then deny that he had received the rent, nor affirm that he had. Again, in March, 1894, I made written demand on him in behalf of plaintiffs for that rent." Cross-examined, he says: "This rent was not discussed; never discussed by me with any one prior to settlement of October, 1892,—this past-due rent. No other matter except this was kept open, but I don't think the pocketbook was delivered till a day or two later, but agreed on that day to be delivered. All that was agreed on has been done. I wrote the paper marked 'A.' When I made demand on Jas. R. Young he said all that had been settled,—'that matter has all been settled,' and I understood he insisted rent belonged to Mrs. Pattie Young because she had bought the house. The date of first demand was about March 1, 1893. It was before March 11th,—date of Dr. Young's death. March 15, 1894, was date of next demand. There was a violent lawsuit going on over the will of Mrs. Pattie Young, which will was established in February, 1894, by withdrawal of appeal." Here the paper marked "A" was shown the witness for identification,—the paper in handwriting of Mr. T. T. Hicks, and signed by J. R. Young, agent; and the paper was at this time offered in evidence by defendant. Plaintiffs objected to the introduction of the paper, because of its incompetency and irrelevancy as testimony, and because it was a declaration of defendant in his behalf, which objection was overruled.

Exhibit A was as follows: "The tenants of all the lands of D. E. Young, I. J. Young, and R. E. Young, lately in charge of R. E. Young, and also the store and town property, are to account to and deal with Dr. W. W. Young and wife for past-due rents; and from and after this date one-half the rents of the Harris 607 acres for this year to go to W. W. Young,—Barnes, Stainback & Co.'s store excepted. October 18, 1892. Pattie F. Young, by J. R. Young, Agent."

The plaintiffs objected to the introduction of this document by the defendant at all, and insisted (1) that it was nothing more than a declaration in defendant's favor made by defendant; (2) that it did not appear to have been brought to the knowledge or attention of the feme plaintiff or her husband; (3) that no evidence was offered to show that the attorney in whose handwriting the paper is had any authority to make it, or to yield to the defendant impliedly, by accepting it, the then past-due rents in the Barnes, Stainback & Co. stores; (4) that it had no bearing on the issue, the Barnes, Stainback & Co. stores being expressly excepted from the operation of

the paper; (5) that there was no consideration shown for the alleged release of such past-due rents.

Plaintiff Ann Eliza Young was the wife of Dr. W. W. Young.

T. T. Hicks, for appellant. Walter A. Montgomery, for appellee.

MacRAE, J. There is no dispute about the fact that the feme plaintiff was the residuary legatee and devisee of the estate of R. E. Young, deceased, and it is made to appear that all of the debts and legacies have been paid or secured to the parties entitled, and the estate settled. Now, these past-due rents, accrued after the death of the testator, had ceased to be rents, or in any wise incident to the land, and had become a debt due from Barnes, Stalnback & Co. personally to the owner of the said store. *Jolly v. Bryan*, 86 N. C. 457. The owner of the store was the residuary devisee, the feme plaintiff. By deed dated October 14, 1892, but, by the testimony, not delivered until the 18th of said month, the feme plaintiff conveyed said land in fee to Mrs. Pattie Young, and the rent in arrear did not pass by said deed. The only question raised by the exceptions is whether by the final settlement and compromise of differences between the beneficiaries under the will of R. E. Young it was agreed that these sums past due for rent of the said store should belong to Mrs. Pattie Young, and whether by the said settlement they were so assigned. This paper writing alone, signed by Mrs. Pattie Young through her agent, the defendant, in which she agreed that certain other rents were to be paid to the feme plaintiff, could not, by force of the exception, amount to an assignment to herself of money then due and owing to the feme plaintiff. But there was evidence tending to show that the deed of compromise and settlement executed on September 30, 1892, was supplemented by a further and independent agreement on the 18th of October, when the arrangement was concluded, and the deed from the feme plaintiff and her husband was delivered to Mrs. Pattie Young. The testimony tends to prove that Mr. Hicks on the one side, as attorney for the feme plaintiff, and the defendant on the other side, as agent for Mrs. Pattie Young, were authorized to and did make the settlement. Whether in that final settlement there was an agreement that Mrs. Pattie Young was to have these past-due rents, which otherwise belonged to the feme plaintiff, was the principal question. His honor submitted but one issue to the jury, "Is the defendant indebted to the plaintiff? If so, in what sum?" And under this issue all matters in controversy could be easily presented. The defendant contended that by the agreement between the parties through their attorney and agent these past-due rents were to be paid to Mrs. Pattie Young. The testimony was conflicting as to whether the paper in question was signed

before the final settlement was concluded or soon afterwards. It was not in itself, as we have said, an assignment of said past-due rents, even when accepted by the feme plaintiff; but in connection with all of the other testimony we think it was competent evidence to be submitted to the jury, if the jury were satisfied that said paper was a part of the settlement. His honor placed the burden where it belonged—on the defendant—to show that the feme plaintiff had parted with or waived her right to the money in controversy. He explained the contention of the parties, and submitted the same, with all the evidence, to the jury. There were no prayers in writing for special instructions, and the exception to the admission of the paper writing, and that to the testimony of the defendant as to his disposition of the rents collected by him, were both based upon the theory that there was no evidence proper to be submitted to the jury to satisfy them that the feme plaintiff had given up her right to the said past-due rents. There is no error.

(115 N. C. 678)

#### BURGIN v. RICHMOND & D. R. CO.

(Supreme Court of North Carolina. Dec. 4, 1894.)

#### ACTION AGAINST CARRIER—INJURY TO PASSENGER—ALIGHTING FROM MOVING TRAIN.

The mere fact that a train fails to stop, as is its duty to do, or as the conductor has promised, does not justify a passenger in jumping off from it while moving, unless notified to do so by the carrier's agent, and the attempt is not obviously dangerous.

Appeal from superior court, McDowell county; Allen, Judge.

Action by R. M. Burgin against the Richmond & Danville Railroad Company. There was a judgment for defendant, and plaintiff appeals. Affirmed.

The complaint and demurrer were as follows:

Complaint: "(1) That defendant is a corporation, etc. (2) That as such corporation it became and was a part of its duty to run over its road trains or cars for the accommodation of passengers traveling over its road, and was at the time and date hereinafter mentioned. (3) That on the 17th of July, 1892, the plaintiff, wishing to travel from Greenville siding on said road, which is only a flag station and has no ticket office, to Round Knob, got on defendant's train, and paid his fare of thirty cents to the conductor, stating to him that he desired to get off at Round Knob, which is one of the stations on defendant's road in the county of McDowell, where it was the duty of defendant to stop its train to let off passengers, and especially this plaintiff; but defendant, through its officers and agents in charge of said train, negligently and carelessly failed and refused to stop its said train at said station, so that plaintiff, who was compelled to stop at said

station, being at the time on his way home to the bedside of one of his children, who was at the time in a dying condition, jumped from said train as it was passing said station of Round Knob, and in so doing was painfully and seriously injured in both his legs, arm and side, breaking one or more of his ribs, which said injury the plaintiff avers was caused by the gross negligence of defendant, through its officers and agents, as aforesaid, failing to stop its train as it had undertaken and promised plaintiff to do at the time of receiving his fare; and plaintiff avers that he was without fault in receiving said injuries. (4) That, by reason of said injuries caused by the gross negligence of defendant, the plaintiff has been greatly and seriously damaged, to wit, in the sum of \$1,500. (5) That defendants [naming the receivers] were by order of the United States circuit court appointed receivers of defendant, and as such, as the plaintiff is informed and believed, have taken charge of defendant's road, and are, and were at the time of the injuries above mentioned, controlling and operating the same for defendant. Wherefore plaintiff prays judgment against defendant and receivers for \$1,500 damages," etc.

Demurrer: "The defendants demur to the complaint of plaintiff on the ground that it does not set forth facts sufficient to constitute a cause of action, in that it shows on its face [clause 3] that the proximate cause of plaintiff's alleged injury was his jumping from defendant's train while the same was in motion, without any invitation or command so to do given by defendant, or any officer, agent, servant, or employé of theirs, and thereby, by said jumping from such moving train, contributing by his own negligence to his injury."

The court adjudged that the demurrer be sustained, and the action be dismissed, etc., and plaintiff excepted and appealed.

F. H. Busbee and G. F. Bason, for appellee.

SHEPHERD, O. J. This action is brought for the recovery of damages sustained by the plaintiff in jumping from the defendant's train while it was in motion. It appears from the complaint that the plaintiff informed the conductor that he desired to get off at Round Knob, a station on the defendant's road where it was the duty of the defendant to stop its train, but that defendant "negligently and carelessly failed and refused to stop its said train at said station, so that plaintiff, who was compelled to stop at said station, being at the time on his way home to the bedside of one of his children, who was at the time in a dying condition, jumped from said train as it was passing said station of Round Knob, and in doing so was painfully and seriously injured," etc. We think there can be no question as to the correctness of the ruling sustaining the demurrer. "The general rule is that passengers who are injured

while attempting to get on or off a moving train cannot recover for the injury." *Browne v. Railroad Co.*, 108 N. C. 34, 12 S. E. 958; *Hutch. Carr.* § 641. In *Lambeth v. Railroad Co.*, 66 N. C. 494, it was said: "If the intestate, without any direction from the conductor, voluntarily incurred danger by jumping off the train while in motion, the plaintiff is not entitled to recover." In addition to these authorities, there are a great number to be found in other jurisdictions, which abundantly sustain the proposition that it is contributory negligence to "attempt to alight from a moving vehicle, although, in consequence of the refusal of the carrier to stop, the passenger will be taken beyond his destination, unless he is invited to alight by some employé of the carrier whose duty it is to see to the safe egress of the passengers from the conveyance. The mere fact that the train fails to stop, as was its duty, or as the conductor promised to do, does not justify a passenger in leaping off, unless invited to do so by the carrier's agent, and the attempt was not obviously dangerous." *Walker v. Railroad Co.*, 41 La. Ann. 795, 6 South. 916; *Jewell v. Railway Co.*, 54 Wis. 610, 12 N. W. 83; *Railroad Co. v. Morris*, 31 Grat. 200; *Nelson v. Railroad Co.*, 68 Mo. 593; 2 Wood, Ry. Law, 1133. To the same effect are the cases cited in defendant's brief from Pennsylvania, Tennessee, Iowa, Texas, Georgia, Michigan, Mississippi, and other states. It is true, as stated in the Cases of *Browne* and *Lambeth*, supra, that there may be exceptions to the general rule that it is contributory negligence to alight from a moving train; but there is nothing in this complaint to bring it within any of the exceptions indicated in those cases or other authorities. The anxiety of the plaintiff to see his child does not relieve him from the legal consequences of his reckless conduct. *Railway Co. v. Bangs*, 47 Mich. 470, 11 N. W. 276. It was clearly the proximate cause of the injury, and bars a recovery. Affirmed.

(115 N. C. 352)

McMILLAN v. GAMBILL et al.  
(Supreme Court of North Carolina. Dec. 4, 1894.)

PLEADING—ADMISSIONS—FAILURE TO DENY.

An allegation by plaintiff in ejectment as to the execution and loss of a deed which forms a link in his chain of title is admitted by a failure to deny it.

Appeal from superior court, Ashe county; Allen, Judge.

Ejectment by James McMillan against R. H. Gambill and others. There was a judgment for defendants, and plaintiff appeals. Reversed.

R. A. Daughton, for appellant.

BURWELL, J. This is an action to recover land. The case states that "the plaintiff showed a regular chain of title covering that

in dispute from the state to John McMillan, and from the heirs of Meredith Ballou to himself." If he could have shown a deed from John McMillan to Meredith Ballou, his chain of title would have been complete. Upon an examination of the pleadings, we find that it is alleged in the third section of the complaint that "John McMillan, who was then the owner of said land, conveyed the same in fee to Meredith Ballou; that the deed made to Ballou has been lost or destroyed"; and these allegations are not denied in the answer. Failure to deny is equivalent in such case to an admission. By this admission the plaintiff's chain is therefore made as complete as it would have been if he had produced the deed so alleged to be lost.

It seems evident that the fact that there was no denial of these allegations, was not called to the attention of the judge below. New trial.

(115 N. C. 335)

### TRIPLETT v. FOSTER.

(Supreme Court of North Carolina. Dec. 4, 1894.)

#### NEGOTIABLE NOTE—SUIT BY PLEDGER—LIMITATIONS.

1. Where the answer in a suit on a note does not state facts sufficient to constitute a plea of illegality or fraud in the inception or transfer thereof, the production of the notes by the plaintiff is prima facie evidence of his ownership thereof.

2. The holder of a promissory note taken as security may maintain an action thereon.

3. The statute of limitations begins to run from the maturity, and not from the date of execution, of a promissory note.

Appeal from superior court, Wilkes county; Winston, Judge.

Action by Joel Triplett against John T. Foster on a promissory note. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

W. W. Barber, for appellant. Cranor & Buxton and C. B. Watson, for appellee.

SHEPHERD, C. J. The answer does not state facts sufficient to amount to a plea of illegality or fraud in the inception or the transfer of the notes sued upon, nor is there any evidence tending to sustain such a defense. This being so, the production of the notes by the plaintiff was prima facie evidence of ownership, and it devolved upon the defendant to rebut the presumption. Jackson v. Love, 82 N. C. 406; Holly v. Holly, 94 N. C. 670; Ballinger v. Cureton, 104 N. C. 474, 10 S. E. 664; Bank v. Burgwyn, 108 N. C. 65, 12 S. E. 952. Apart from this, however, the evidence of the defendant, who was examined in his own behalf, shows that the payee of the notes transferred them to the plaintiff as collateral security. This gave the plaintiff a right to maintain the action. There was no error, therefore, in the charge of the court as to the third issue. Neither is there error in holding that the notes were not barred by the

statute of limitations. The statute commenced to run, not from the date of the execution, but the maturity, of the said notes. Upon the whole record, we think there is no error. Affirmed.

(115 N. C. 306)

### ROYSTER v. FARRELL et ux.

(Supreme Court of North Carolina. Dec. 4, 1894.)

#### MORTGAGE—STATUTE OF LIMITATIONS—ACKNOWLEDGMENT OF DEBT.

Where a mortgagor pays his mortgagee \$10, and gives his acceptance for \$350, payable June 25th, "in compromise of all claims," and the mortgagee, at the request of the mortgagor, postpones sale under the mortgage until July 8th, and they stipulate that no further advertising shall be required, and that upon payment of the acceptance the mortgage should be canceled, such an agreement, being an express and unconditional promise to pay, takes the mortgage debt out of the operation of the statute of limitations.

Appeal from superior court, Chatham county; Hoke, Judge.

Action by V. O. Royster, as receiver of Ellington, Royster & Co., against F. M. Farrell and wife, to foreclose a mortgage. From a judgment in favor of defendants, plaintiff appeals. Reversed.

This is a civil action tried before Hoke, J., and a jury at fall term, 1894, of Chatham superior court, for the foreclosure of the mortgage described in the complaint. Among other defenses, the defendants pleaded the statute of limitations. The following issues were submitted to the jury: "(1) Was plaintiff duly and properly appointed and qualified as receiver of Ellington, Royster & Co.? (2) Has there been a payment by defendant on the note and mortgage at any time within ten years next before action brought? (3) Has there been any binding acknowledgment in writing of said note and mortgage at any time within ten years before action brought? (4) Has the note and mortgage been paid off? (5) What amount is still unpaid on claim?" To repel the statute of limitations, the plaintiff introduced the following paper writing, after having proved its execution by the parties thereto, viz: "F. M. Farrell pays Ellington, Royster & Co. ten dollars, and gives his acceptance for \$350, payable on the 25th June, at Florence, Alabama, National Bank, in compromise of all claims against him; Farrell guarantying that M. T. Arnold did not ship Ellington, Royster & Co. any lumber through him, and that said Arnold is not entitled to recover for any lumber shipped by him (Farrell) to said Ellington, Royster & Co., and said Ellington, Royster & Co., at the request of Farrell, postpones sale under mortgage until Tuesday, July 8, 1894. No further advertising is required by Farrell, and, upon payment of said acceptance, mortgage to be canceled, and this to be a settlement in full, except as to the above guaranty. The mill

to be the property of Ellington, Royster & Co. June 4, 1884. F. M. Farrell. Ellington, Royster & Co."

There was evidence, and it was admitted by plaintiff and defendants, (1) That the property described in the mortgage had been advertised to be sold under the mortgage on the 7th day of June, 1884, and in pursuance of the above paper writing the sale was postponed until July 8, 1884, the said acceptance not having been paid, and the property was bid off by Ellington, Royster & Co.; (2) that the defendants, F. M. Farrell and wife, have been in the continued possession of the property described in the mortgage ever since its execution; (3) that the summons in this action was issued on April 14, 1884; (4) that on June 4, 1884, Ellington, Royster & Co., claimed an account against defendant Farrell, growing out of the mill mentioned in the paper writing, and defendant claimed to have made a payment of \$200 on the mortgage in February, 1883, which plaintiff claimed was on the mill account. The witness Ellington, for the plaintiff, testified that the \$10 referred to in the above paper writing were paid on the mortgage, and the defendant F. M. Farrell testified that the said \$10 were paid for postponing the mortgage sale, and the costs thereof. His honor instructed the jury that there was no evidence of any binding acknowledgment in writing of said note and mortgage at any time within 10 years next before action brought, and directed the jury to find the third issue "No," to which charge the plaintiff excepted, and assigns error.

H. A. London, for appellant. T. B. Womack, for appellees.

**BURWELL, J.** The writing set out in the record seems to us to be an acknowledgment that the relation of mortgagor and mortgagee existed between the parties who signed it; that F. M. Farrell was at its date the mortgagor of Ellington, Royster & Co. The admission of the fact that that relation existed was, of course, an acknowledgment on Farrell's part that the debt secured by the mortgage had not been paid. It is also, as it seems to me, a promise to pay the mortgage debt. At the time this writing was signed, the mortgagor gave to the mortgagee an acceptance for \$350 (a sum that exceeded the mortgage debt), payable on a day fixed before the date to which the sale under the mortgage was postponed under the agreement, and it was therein stipulated that "upon payment of said acceptance" the mortgage should be canceled. We think this writing, especially if considered in connection with the acceptance spoken of, constituted an express and unconditional promise to pay the mortgage debt, and an explicit acknowledgment of the mortgage, and that there was error in the charge excepted to.

It was argued before us that, while a written acknowledgment of the debt would take

it out of the operation of the statute of limitations, only a payment could have that effect on the right to foreclose a mortgage. A written acknowledgment is as effective in the one case as in the other. The Code has not altered at all the effect of a new promise or acknowledgment. Section 172 (Lord Tenderden's Act) is merely a rule of evidence enacted to prevent fraud and perjury. The original statute of limitations (21 Jac. I., c. 16) had no provision as to new promises and acknowledgments. The courts made the law on this subject, and made it apply to all causes of action that rested on a promise. Before the adoption of the Code, proof of a promise or acknowledgment would rebut the presumption of the satisfaction of a mortgage, as is shown by numerous decisions. *Brown v Becknall*, 5 Jones, Eq. 423; *Ray v. Pearce*, 84 N. C. 485; *Hughes v. Edwards*, 9 Wheat. 489; *Simmons v. Ballard*, 102 N. C. 105, 9 S. E. 495. And now the bar of our present statute of limitations may be overcome by proof of a promise or acknowledgment, but the proof must be in writing, unless the new promise be one that the law implies from a part payment. *Hill v. Hilliard*, 108 N. C. 34, 9 S. E. 639. New trial.

(115 N. C. 382)

#### BLACK v. ORE KNOB COPPER CO.

(Supreme Court of North Carolina. Dec. 4, 1884.)

CORPORATE RECEIVER — ORDER FOR SUIT AGAINST STOCKHOLDERS — GROUNDS FOR REVERSAL.

On appeal by an insolvent corporation alone from an order directing the receiver to sue the stockholders for the amount of their unpaid stock subscriptions, it is no ground for reversal that the stockholders are not in fact liable, they not being parties to the proceedings.

Appeal from superior court, Ashe county; Allen, Judge.

Action by J. E. Clayton and others against the Ore Knob Copper Company for the appointment of a receiver. After the appointment of receivers, Daniel Black, a creditor, was made a party plaintiff. From an order on report of a referee directing the receivers to sue the stockholders of the defendant corporation for the amount of their unpaid stock subscriptions, defendant appeals. Dismissed.

For opinion on prior appeal, see 109 N. C. 385, 14 S. E. 36.

J. W. Todd and Strong & Strong, for appellant. J. W. Hinsdale and A. P. Massey, for appellee.

**BURWELL, J.** Upon the argument before us, all the defendant's exceptions were abandoned, except the last one; and that is intended to raise a question that should not be considered and determined upon this appeal, which is taken and is prosecuted by the defendant corporation alone. It has no assets, it seems, out of which what it owes the



plaintiff may be paid, unless it be, as the referee has found, that some amounts are legally due to it from its stockholders, or some of them, for stock issued, but not fully paid for. The order appealed from merely directs the receivers to collect enough of these unpaid subscriptions to satisfy the plaintiff's judgment against the appellant corporation. The liability of the stockholders to the corporation on account of these alleged unpaid subscriptions should not be prejudged. It is the duty of the receivers to obey the order, and endeavor, by suits, if necessary, to enforce their alleged liability. If their individual interests are antagonistic to their duty as officers of the court, they may be removed, and others put in their place, who will endeavor to perform it. In actions thus brought, it will be properly determined whether or not the stockholders, or any of them, are indebted to the corporation as the referee has found; and his conclusions of law can then be reviewed, the parties really concerned in their correctness being before the court. Appeal dismissed.

(115 N. C. 354)

**BRADDY et al. v. NEW YORK BOWERY FIRE INS. CO.**

(Supreme Court of North Carolina. Dec. 4, 1894.)

**INSURANCE—AGREEMENT TO ARBITRATE—UNREASONABLE DELAY—EVIDENCE.**

1. Where two arbitrators, appointed by the insurer and the insured, under a written agreement, for the purpose of choosing a third, and together determining the amount of a fire loss, fail to agree on the third, through the unreasonable conduct and demands of the one appointed by the insurer,—the latter adopting this means to indefinitely delay any adjustment,—the agreement is terminated.

2. Insurer and insured each appointed an arbitrator, those two to select a third, and, with him, determine the amount of damage under a fire loss. The one appointed by the insurer suggested a name objected to by the other as being already an appraiser on the same loss. Each then presented three names. Those of the arbitrator for the insured were objected to without cause, and he objected to those proposed by the other because they were nonresidents of the state. *Held*, that the failure of arbitration was due to the unreasonable conduct of the arbitrator for the insurer.

Appeal from superior court, Forsyth county; Whitaker, Judge.

Action by Braddy & Gaylord, a copartnership, against the New York Bowery Fire Insurance Company, to recover on a policy of insurance. Defendant had judgment, from which plaintiffs appeal. Reversed.

Watson & Buxton and Jones & Patterson, for appellants. Glenn & Manly, for appellee.

**AVERY, J.** While it is well settled that an agreement in a policy of insurance to submit to arbitrators the single question of the amount of loss by fire sustained by the person insured is not invalid (Manufacturing

Co. v. Phoenix Assurance Co., 106 N. C. 28, 10 S. E. 1057; Carroll v. Insurance Co., 72 Cal. 297, 13 Pac. 863), it is equally well understood that a contract which would oust the jurisdiction of the courts, by leaving all of the matters involved in any controversy that might arise between insurer and assured to such arbitrament, is void, as against public policy (Ang. Ins. 431; Scott v. Avery, 20 Eng. Law & Eq. 327; Old Saucelito Land & Dry-Dock Co. v. Commercial Union Assurance Co., 66 Cal. 256, 5 Pac. 282; 2 Biddell, Ins. § 1154). If a stipulation in the policy to submit all controverted questions that may arise, in case of loss, to arbitrators, cannot be enforced, will the courts allow a contract making the submission of the single question of the amount of loss sustained, to deprive a plaintiff of the opportunity to try the issues of fact involved, or his right to recover before a jury by reason of the misconduct of the parties or of the arbitrators? If either party acts in bad faith in order to defeat the real object of the arbitration, the other is absolved from duty in regard to it, and from any obligation to enter into a new agreement for arbitration. 2 May, Ins. § 498b; Uhrig v. Insurance Co., 101 N. Y. 362, 4 N. E. 745; Wood, Ins. § 230. "A claimant under such a policy," said the court in Uhrig's Case, *supra*, "cannot be tied up forever, without his fault and against his will." Citing that case to sustain the proposition, Biddle, in his work on Insurance (section 1162), says: "Where each party duly selects an arbitrator, but the umpire fails of selection, it is said there need not be a new arbitration." The supreme court of Pennsylvania, in Insurance Co. v. Hocking, 115 Pa. St. 416, 8 Atl. 589, held that, where two arbitrators appointed under an agreement like that in the policy sued on failed to agree, then a suit brought by the plaintiff should be deemed a revocation of such agreement. The parties can contract that, at the written request of either of them, they will each select an arbitrator, and empower them to choose an umpire; but if the courts should give their sanction to any course of conduct on the part of the insurer, or of the arbitrator selected by the defendant, that might be repeated in any case which might arise, and operate to indefinitely delay the precedent arbitration, and prevent the bringing of an action, it would manifestly enable the insurer, by appointing an interested and corrupt appraiser, to accomplish indirectly what the law declares shall not be done directly, by virtue of a stipulation or agreement.

By the terms of the contract to submit to the appraisers, they were when appointed to meet in the town of Winston on the 1st day of December, 1892, and the parties were to waive all further notice of the meeting on that day, or their subsequent meetings. The plaintiffs named one L. G. Cherry, of Winston, and the defendant elected one Westbrook, of Atlanta, Ga. When the two met,

we must assume that the defendant, having waived all claim to further notice, was cognizant of all that was done by the arbitrators selected. The first proposition, emanating from Westbrook, was to select one Wilson, a resident of Winston. Cherry objected, and assigned as a reason that Wilson had already been suggested by another insurance company, liable for the same loss, as a suitable appraiser to act for it in estimating the very same loss. This objection was not an unreasonable one, since, supposing that Cherry's object was to secure the services of not only honest but unprejudiced men, he did what any cautious lawyer would have advised his client to do in reference to a juror, when he objected to having the rights of the plaintiffs passed upon by a man who might be biased by the fact of his selection by another company, which was antagonistic to the plaintiffs, to represent it in passing upon the very same question. The next move was also made by Westbrook, when he proposed that each appraiser should nominate three men for umpire, and the two should try to agree upon one of the six so selected. Cherry named three business men of the town of Winston, to all of whom Westbrook objected, but it does not appear that he assigned any cause. Westbrook named three persons, all residents of the state of Georgia. Cherry objected, and stated as a reason for so doing that they all lived in the state of Georgia, and, as we assume, were unknown to him. The trial of the question of the amount of loss was to be left for decision to appraisers, instead of to a jury, to whom, but for the agreement, the plaintiff might have demanded that it be submitted. We do not think it unreasonable for an appraiser, acting with a view to secure the services of an unprejudiced, competent, and an honest associate, to insist that only the names of persons living in the vicinage or in the state, or in some way known to him, at least by reputation, should be tendered to him, to take the place and discharge the functions of a juror. The failure of the arbitration was evidently due to the unreasonable conduct of the appraiser selected by the defendant, and they had notice of all that was done by him. It is not necessary for us to follow the ruling of the court of Pennsylvania in holding that, in any failure of arbitrators selected to agree, the plaintiff is left at liberty to sue, though good reasons could be given for so doing. But in this particular case, where the defendant permitted the appraiser chosen by it to leave for Georgia, giving his address to Cherry, after acting so unreasonably, and hold its peace then and thereafter till the 10th of February, 1893, when the summons was issued, it is manifest that if the company did not intend or consent, by dilatory measures, to defeat the bringing of an action altogether, the success of the stratagem adopted by Westbrook, if approved, might point out the way for an unscrupulous agent, in future,

designedly to accomplish what the law would declare unlawful if it were attempted by means of the enforcement of a contract.

The court instructed the jury, if they believed the evidence, to find, by an affirmative response to the first issue, that the arbitration was still in force. In this ruling we think that there was error. As another trial will be had, and other additional evidence may be brought out, bearing on the other questions involved, we deem it unnecessary to advert to any other exception. New trial.

(115 N. C. 353)

GRAYSON et al. v. ENGLISH.

(Supreme Court of North Carolina. Dec. 4, 1894.)

PUBLIC LANDS—VALIDITY OF ENTRY—SUFFICIENCY OF DESCRIPTION—NOTICE.

An entry described the land as 640 acres lying on both sides of H. mountain, extending from the north end, along the summit and down both sides, to deeded lands adjoining lands of certain persons (naming them). An entry on the same day by the same person described the land as 640 acres adjoining the above, the lands of certain persons (naming them), extending along the summit of H. mountain, and down both sides, to deeded land. *Held*, that the description in the second entry was sufficient notice to a subsequent enterer of the location of the land intended to be appropriated.

Appeal from superior court, McDowell county; Allen, Judge.

John W. Grayson and others and J. L. English submitted an agreed statement of facts, under Code, § 567, to determine the question of the title to certain lands. Judgment was rendered for English, and Grayson and others appeal. Affirmed.

Justice & Justice, for appellants. Morris & McCall, for appellee.

EVERY, J. The question that gives rise to this controversy is whether the plaintiff is the owner of the equitable as well as the legal estate of the land in controversy. If the description contained in the older entry of the defendant so identified the land intended to be covered by it that the plaintiff could, upon reading it, and prosecuting any inquiry as to boundaries suggested by its terms, have ascertained that it was the same land for which he subsequently obtained a grant under the junior entry, then the latter, as junior enterer, took with constructive notice of the inchoate equity of the senior enterer. It is not to be understood that any description in an entry not void upon its face for uncertainty, however imperfect as a means of identification it may be, operates as constructive notice to all persons making subsequent entries of the land that such description was intended to embrace. The rule in reference to the validity or sufficiency of the descriptions in entries, as between the state and the enterer, is much more liberal than that applicable to

deeds and to contracts for sale of land between individuals. In *Harris v. Ewing*, 1 Dev. & B. Eq. 374, Chief Justice Ruffin said: "It appears to the court, therefore, that a vague entry is not void, as against the state, but gives the enterer an equity to call for the completion of his title by the public officers." In the subsequent case of *Johnston v. Shelton*, 4 Ired. Eq. 91, the same learned judge, in speaking of the validity of an entry, and its sufficiency as notice, said: "Its vagueness renders it void, as against a subsequent enterer, who surveyed and paid his money before the plaintiffs had made their entry more specific, if the expression may be allowed, by a survey identifying the land they meant to appropriate." As between the state and the enterer, the inchoate equity created by making an entry not containing a specific description, that confines it to a particular place, is, "in some degree, a floating right to have a certain quantity of unappropriated land, anywhere the enterer may select within two years, on a certain stream or mountain in the county." *Johnston v. Shelton*, *supra*. While, therefore, an entry containing a description that would be altogether insufficient in a contract for sale or a conveyance of land was not void, as between the state and the enterer, it was nevertheless not notice to subsequent enterers until its location had been made certain by an actual survey. Constructive notice might be given to one desiring to enter the same land in two ways, and, whenever given by either method, the junior enterer, being affected by it, would hold under any grant taken out by him, subject to the right of the person holding the older entry to take out a grant also, and have the senior grantees declared a trustee, and ordered to convey to him. *Nunn v. Mulholland*, 2 Dev. Eq. 383. The two methods of affecting all subsequent enterers with constructive notice are: (1) By making a survey of a floating or vague entry, or one containing an indefinite description, and thus identifying that which was before uncertain. *Currie v. Gibson*, 4 Jones, Eq. 25; *Munroe v. McCormick*, 6 Ired. Eq. 85; *Johnston v. Shelton*, *supra*; *Harris v. Ewing*, *supra*. (2) By making the description "so explicit as to give reasonable notice to a second enterer of the first appropriation." *Johnston v. Shelton*, *supra*, at page 92; *Harris v. Ewing*, *supra*, at page 372. "The object of description is to identify the thing for which the contract is made, and whatever means will affect that end must be all-sufficient." *Harris v. Ewing*, *supra*.

The statement sent up by the parties as the foundation of a controversy without action contains a description which is certainly not so vague as to affect the validity of an entry. Indeed, upon its face, it seems probable that it may have pointed to extrinsic proof, such as would have made the identification complete. If it does, then it was

constructive notice, and the plaintiff holds in trust for the defendant. The equity of the defendant depends upon this question. Two entries were made on the same day, in the following terms: "No. 2,252. R. Don Wilson enters 640 acres of land lying on both sides of Huntsville or (or and) Haney mountain, extending from the north end, along the summit and down both sides, to deeded lands adjoining lands Mills Higgins, Dr. Gilbert, Jno. Jarrett, the Prices, and others. This 25th November, 1868." And on the same day a like writing on the entry taker's book was made in the following language, to wit: "No. 2,253. R. Don Wilson enters 640 acres of land adjoining the above, the lands of Early Gurly, Chas. Dixon, Butler, the Powell place, Jason Allen's Dealsville tract, extending along the summit of the Huntsville mountain, and down both sides, to deeded land. This 25th of November, 1868." On December 30, 1870, R. Don Wilson procured a grant to be issued to him by the state of North Carolina on the last-mentioned writing in entry taker's book. It would seem that the description contained in entry No. 2,252 was so drawn that it must include all vacant land on the summit of Haney mountain, at the north end, and extending down from the summit, on the east and west sides of the summit, to deeded land, or land for which claimants, several of whom are mentioned, had titles. The second entry, No. 2,253, upon which the junior grant through which plaintiff claims, was issued, is located, by its terms, so as to adjoin the other entry on the south, include the summit further south, and to extend from said summit, on either side, so as to join the deeded land of Early Gurly and the others mentioned. The land intended to be appropriated must have been surveyed so as to join the lands of the persons named on either side of the summit, and on the south and on the north, so as to extend to any vacant land surveyed under the preceding entry, or, if none should be found, to the lands of adjacent owners named in said entry. Though the more advisable practice in such cases is to locate the bounds of the entry by means of an actual survey, and thus make the sufficiency of the description appear more clearly by proof of extrinsic facts, to which it points, yet, in this particular case, we must hold, without any parol proof, that the land entered appeared upon its face to lie between the tracts of the persons mentioned therein, or, in case no vacant land was found to constitute the northern boundary, then by the lands of persons named in entry No. 2,252. Instead of specifying a beginning corner in a certain line, and lying on the headwaters of a particular creek, as in *Horton v. Cook*, 1 Jones, Eq. 273, the entry in our case is declared to include the summit of a certain mountain,—in effect, to lie between the deeded lands of certain owners, and to lie south of certain other deeded tracts, or any vacant

land that might be found between them, along the northern end of said summit. While we would have been saved from some hesitancy by incorporating into the affidavit, as a part of the statement of facts agreed, some proof of the location of the lands of the adjacent owners, we conclude that the senior entry contained upon its face a sufficient description to affect subsequent enterers of the same land with notice of the equity of Wilson. We deem it proper to say, however, that it must almost necessarily be more advisable for one or the other of the parties, in any case where the right to recover in an action or on a counterclaim depends upon the question whether an entry is so definite as to affect subsequent enterers with constructive notice of its location, to offer testimony, if the facts are in dispute, and have a finding by a jury, or by consent by the court, of the developments made by an actual survey. For the reasons given, the judgment of the court below is affirmed.

(115 N. C. 662)

**TILLETT v. LYNCHBURG & D. R. CO.**  
(Supreme Court of North Carolina. Dec. 4, 1894.)

**CARRIERS—INJURY TO PASSENGERS—REVERSAL OF JUDGMENT—EFFECT.**

1. Where a passenger, after being warned by the conductor not to do so, entered a car standing at the usual place at a station, and open so as to receive passengers, and which was designed for the train on which he was about to leave, but which was not then coupled to said train, he was guilty of contributory negligence as to any injury sustained by him by reason of boarding said car.

2. In an action for personal damages against the lessor and the lessee of a certain railroad, jointly, where the lessee company is granted a new trial on appeal, the judgment is thereby vacated as to both defendants.

Appeal from superior court, Person county; Shuford, Judge.

Action by James W. Tillett against the Lynchburg & Durham Railroad Company and the Norfolk & Western Railroad Company for personal damages. Judgment for plaintiff, and defendant the Lynchburg & Durham Railroad Company appeals. Reversed.

Plaintiff boarded one of defendant's passenger cars while it was standing at the station, but before it had been coupled onto the rest of the train; and while he was walking down the aisle of said car the coupling was attempted, and the resulting shock threw plaintiff down and injured him.

W. A. Guthrie, for appellant. Jones & Tillett and W. W. Kitchin, for appellee.

**PER CURIAM.** Among other instructions asked by counsel for defendant were the following: "(8) If the jury believe, and should find from the evidence that Walker, the conductor, told the plaintiff to wait at the platform of the station, and he would have the passenger car pulled up in front of the station

for him to get on, and the plaintiff disregarded what the conductor said to him, and went aboard the car before it was coupled, then he took upon himself all the risk incident to so doing,—contributed to his own injury; and in this aspect of the case plaintiff cannot recover." "(16) If the jury find from the evidence that the conductor, before the plaintiff boarded the train, told the plaintiff that the passenger car would be pulled up in front of the station for him and other passengers to get aboard before leaving, then, whether the plaintiff had procured his ticket beforehand or not, he had no right to get aboard the car until the passenger car had been pulled up to the front of the station; and it was contributory negligence for plaintiff to do so, and the jury should so find. The court interlined the former of the two paragraphs by inserting, after the word "coupled," the words "and when it was standing at an usual place to receive passengers," and the latter paragraph by inserting, after the word "leaving," the words "and directed the plaintiff to wait." Where a person comes upon the premises of a railroad company at the station with a ticket, or with the purpose of purchasing one, he becomes a passenger, and may usually enter an open passenger car standing on the track, and provided for passengers going on the train on which he proposes to take passage. But while the conductor may, on the one hand, excuse a debarking passenger from contributory negligence by advising him to get off a car before it has ceased to move, he may, on the other hand, make the passenger's conduct culpable when he gives him an unheeded warning not to enter such open car till it can be removed to another point. There seems to have been some evidence tending to show that the conductor told the plaintiff to step off the side track, and wait for the passenger car to be drawn up to the station, though as to this the testimony was conflicting. The defendant was entitled to the unqualified instruction that if the car designed for the train on which the plaintiff embarked was open so as to receive passengers, whether at the usual or an unusual point on the track, the plaintiff would have been negligent in entering it after being warned not to do so. This proposition would hold good if in one paragraph of the instructions given the qualification was inserted, while in another it was omitted, thus leaving the jury at liberty to be misled by the erroneous view of law, rather than guided by the statement of the correct principle. The jury are not supposed to be capable of determining when the judge states the law correctly and when incorrectly. But the finding of the jury upon the fourth issue as well as on the third, drawn as it was, depended upon this very question. The plaintiff was not rightfully on the car, but was himself negligent in entering, if in fact he had been warned by the conductor not to do so. The findings upon the third and fourth issues must therefore be set aside, and a new trial grant-

ed as to the questions involved in those two, leaving the verdict upon the other issues undisturbed. We take this course because after careful consideration we have concluded that there was no error in any of the other rulings of the court excepted to, and embraced in the assignments of error. As to the third and fourth issues, the defendant is entitled to a new trial. The necessary effect of our ruling giving to the lessee company a new trial on certain issues is to vacate the judgment both as to the lessor and lessee corporations; hence it is unnecessary to determine the liability of the lessor company for the negligence of the lessee company. New trial.

(42 S. C. 543)

**SOUTHERN RY. CO. v. SHEPPARD.  
SAME v. JACOBS. SAME v.  
LILLARD.**

(Supreme Court of South Carolina. Nov. 27, 1894.)

**ATTACHMENT—SALE PENDING APPEAL.**

A return to an order of a justice of the supreme court to show cause why the sale of attached property under an order of the circuit court should not be enjoined pending an appeal, which shows that the property consists of horses, whose keep for 100 days will exceed their value, is sufficient, and the order will be discharged.

Appeal from common pleas circuit court of Greenville county; R. C. Watts, Judge.

Actions by the Southern Railway Company against Morgan P. Sheppard and against William C. Jacobs and against Charles T. Lillard. Judgments for plaintiff. Defendants appeal. Applications by defendants to Justice Y. J. Pope of the supreme court for an order restraining the sale of certain property attached pending appeal. On hearing the return to an order to show cause why such relief should not be granted, the order was discharged. The following are the rule to show cause and the return thereto:

POPE, J. It appearing that the defendant in each of the above-named cases has given notice of his appeal from the order of his honor, Judge Richard C. Watts, dated the 21st day of November, 1894, in each of the above-named cases, and the return having been filed in the office of the clerk of the supreme court of the state of South Carolina this day, as appears from the telegram of Albert M. Boozer, Esq., as clerk of said court, and the petition of each of said appellants having been presented to me praying that an order to stay all proceedings in the court below pending such appeals may be made, and especially that the sale of the horses of the defendant by the sheriff may be stayed by my order until the hearing of said appeals on their respective merits. I am not satisfied to grant the order absolutely, under rule 21 of the supreme court, but it seems that the right of appeal will be seriously

jeopardized by a refusal of relief under said rule. Therefore, I now order a rule to issue requiring the plaintiff, respondent in each of the above-named cases, to show cause before the justices of the supreme court, on Tuesday the 27th inst., in the city of Columbia, S. C., in the conference room of said court, at 10 o'clock a. m., or as soon thereafter as counsel can be heard, why an order should not be made restraining the enforcement of the order appealed from until the cause in appeal can be heard on its merits; but in the meantime, and until the hearing of said rule, all sales or other proceeding to enforce the order of Judge Watts now appealed from shall be stayed. Let copies of the papers presented to me and a copy of this order be served upon the plaintiff, respondent, and the sheriff of Greenville county, and this original order exhibited to them. And thereafter let the originals be filed with the clerk of the supreme court of South Carolina. At chambers at Newberry, S. C., 22d day of November, 1894.

**Return to the Rule to Show Cause.**

The plaintiff above named, in obedience to a certain rule issued by his honor, Y. J. Pope, one of the justices of the supreme court of said state, on Thursday last, the 22d instant, for cause shows as follows:

1. That on November 16, 1894, the plaintiff, respondent, sued out in the court of common pleas for Greenville county certain warrants of attachment against the several defendants above named upon the several causes of action set out in the complaint hereto attached, said attachments being based upon the affidavit of O. E. Watson, agent of the Southern Railway Company at Greenville, S. C., setting forth the said causes of action, and the further fact that the several defendants were nonresidents of the state, and had property within this state.

2. That said warrants of attachment were duly executed by the sheriff of Greenville county, who on the 16th November, 1894, levied upon 156 horses belonging to the defendants, at the livery stable of Pates & Allen, in the city of Greenville; that due return of his action in the premises was made by said sheriff, and on the 17th November, 1894, application was made by plaintiff to his honor, R. C. Watts, circuit judge, presiding in the Ninth circuit at Greenville, for an order of sale of said horses, upon the ground that the same were perishable property. Whereupon an order was signed by Judge Watts in each of said cases adjudging said horses to be perishable property, and directing the sheriff to advertise the said horses for sale, and to sell them on Thursday, November 22, 1894, for cash, the proceeds of sale to be retained in the hands of said sheriff, as provided in section 356 of the Code.

3. That on November 17th the several defendants' attorneys served upon plaintiff's attorney notice of a motion to be made before

Judge Watts at Greenville, on November 21st, to dissolve said attachments, and to vacate such order of sale, said motion being based upon the complaints and certain affidavits served by defendants' attorneys at that time.

4. That said motion was heard by Judge Watts on the date fixed, and other affidavits by both parties were submitted. After argument by counsel, Judge Watts refused both the motions to dissolve the attachments and to vacate the order of sale. Thereupon the defendants' attorneys moved for an order suspending the sale pending an appeal from said orders, notice of which was immediately given. This motion was refused.

5. The defendants then served exceptions to said orders, and filed their returns with the clerk of the supreme court, and thereupon moved his honor, Y. J. Pope, one of the associate justices of this court, on November 22d, for an order restraining further execution of the orders of Judge Watts pending the appeal. Thereupon, Judge Pope signed an order requiring the plaintiff to show cause on this day why an order should not be passed by this court restraining further proceedings under said orders until said appeal was determined, and to this rule the plaintiff now makes return.

7. The respondent insists that under rule 21 of the supreme court his honor, Justice Pope, had authority of law to make the order of November 22d hereinbefore referred to.

8. That under rule 21 the justices of this court have no authority of law to make the proposed order.

9. That the order of Judge Watts refusing to dissolve the attachments, and refusing to vacate his previous order of sale, was an interlocutory order, and as such not appealable until the final determination of the cause upon its merits.

10. That the Code provides for supersedeas in case notice of appeal has been served only when judgment has been obtained.

11. That the order of Judge Watts directing the sale of the horses was eminently proper under the circumstances; the horses answering the description of perishable property under Code, § 356.

This return is based upon the papers mentioned in the agreement of counsel herein, upon the affidavit of P. D. Gilreath, and upon the order of Judge Watts refusing motion to suspend order of sale, which are hereto attached.

Personally appeared Perry D. Gilreath, and, having been first duly sworn, deposes and says:

1. That he is the sheriff for Greenville county, and was such on the 16th November inst.

2. That as such sheriff he served upon the defendants above named, on that day, certain summonses and complaints in above-stated cases, and three several writs of attachment, under which he seized 156 horses belonging to said defendants.

3. That, pursuant to law, he had the same appraised, and the value of the horses was fixed at \$50 per head by the appraisers.

4. That under an order of his honor, R. C. Watts, then presiding, the court of common pleas at Greenville directing deponent, as sheriff, to advertise and sell said stock, he began to sell the same on Thursday morning, the 22d inst., at 11 o'clock a. m., and sold 22 horses, at an average price of \$31.05 per head. The horses so sold were about a fair average, in value, of the whole lot. That, owing to the fact that said horses have never been broken, great difficulty was had in making delivery of the same to purchasers; hence the small number disposed of.

5. That by an order of Hon. Y. J. Pope served upon deponent on the following day, to wit, on Friday, before 11 o'clock a. m., the sale of the horses was suspended.

6. That deponent found that said horses were being kept by Pates & Allen, livery stable keepers, at the rate of 40 cents per head per diem, which is the usual price for temporary board; but, in view of the fact that their keep was likely to be of longer continuance than at first supposed, the present rate for the same has been fixed at 33 $\frac{1}{4}$  cents per day per head, which deponent believes to be a reasonable price.

7. That deponent is advised that it is his duty by law to safely keep said stock, and to provide feed for the same. That, at the rate of \$50 per day, deponent avers that at the prices such horses are selling for in the present depressed condition of the country, and the glut of such stock in the market, that it will not require more than 100 days for the expense of their keep to exceed their market value, when the burden of keeping the same will fall ruinously upon this deponent.

WATTS, J. After the motions in this case to dissolve the attachment and to vacate the order of sale were made before me and refused, the attorneys for the defendants made a motion to suspend the order of sale pending the appeal, upon the ground that the notice of appeal from said order refusing said motions acted as a supersedeas. I held that under section 346 of the Code, even if my order could be considered a judgment, the court has a right to order a sale of perishable property, which I adjudged the character of the property seized to be. It is therefore ordered that said motion be refused, and that the order of sale be continued of force.

Earle & Mooney, for appellants. J. S. Cothran, for respondent.

McIVER, J. Upon hearing the return to the rule in the above-stated case, and the observations of counsel thereto, on motion of J. S. Cothran, attorney for the respondent, it is ordered that the return made to the said rule be, and the same is, adjudged to be sufficient. It is further ordered and adjudged that the

rule to show cause granted by his honor, Y. J. Pope, at Newberry, on the 22d instant, be, and the same is hereby, discharged.

(95 Ga. 502)

**POWELL v. STATE.**

(Supreme Court of Georgia. Oct. 15, 1894.)

**HOMICIDE—INSTRUCTIONS—HARMLESS ERROR.**

In view of the evidence, there was no substantial error committed by the court, and no error at all in denying a new trial. (Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Lorenzo Powell was convicted of murder, and brings error. Affirmed.

The following is the official report:

Powell was indicted for the murder of Tiggs, and was found guilty, with a recommendation to life imprisonment. His motion for new trial was overruled, and he excepted. The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also, because the court erred in charging: "To justify a conviction in this case of any offense, the evidence shall satisfy you of the defendant's guilt of such offense to a moral and reasonable certainty, and beyond a reasonable doubt. This doubt is such a one as its name imports,—a reasonable doubt. Not a mere belief in a possibility of the defendant's innocence, not a vague uncertainty or conjectural doubt, but a doubt formed and remaining in an impartial mind, honestly seeking the truth, and which doubt rationally arises out of the evidence, or the want of sufficient evidence in the case,—a doubt you can give a reason for." Alleged to be error, as misleading and "confusing" the minds of the jury "to a certainty of defendant's innocence"; and especially as to that part of the charge in the words, "a doubt you can give a reason for," as restricting the minds of the jury to the certainty of innocence, and taking away from defendant the safeguards thrown around him by law, and presumptions of his innocence. Error in charging: "The defendant is not a witness, nor is his statement evidence, but his statement goes to you under the rule I have given you; and you may consider it, in connection with the evidence in the case, in determining what the truth in the case is, and determining what your verdict ought to be." Alleged to be error because qualifying the weight of the statement, and not leaving the minds of the jury free to judge of its weight, and as rather throwing a suspicion on the statement; in the body of the charge there being a great deal said about the jury deciding the case on the evidence, this left the jury to infer they were to give little or no weight to defendant's statement, and put the statement in bad odor with the jury. Error as follows in the recharge: The jury requested the court to charge on voluntary

manslaughter, and before defining voluntary manslaughter, and confining its recharge to the request of the jury, the court gave them a long recharge on malice which was done by the court of its own motion and without any request from the jury and was illegal, misleading, and calculated to concentrate the minds of the jury more especially upon the inquiry of malice, and lead them away from an impartial review of the facts of the case. Error in the recharge, in response to request of the jury for a recharge on the law of what constitutes voluntary manslaughter, in charging as follows: "From a note which I have just received, I understand that you desire to be recharged on the subject of voluntary manslaughter. In order that you may understand what I charged you specifically and directly on the law of manslaughter, I will again instruct you as to what constitutes legal malice. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances, capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart. Malice, as used there, does not necessarily mean hatred or ill will towards the object of the malice, though it may include either or both of those things. It means here simply a deliberate intention unlawfully to take human life, and that deliberation need not extend over any considerable length of time. I say it may do so, but the deliberation there spoken of means such deliberation, although it may occupy a short interval of time or only such interval of time as results in definitely forming the intention to take human life. That is malice. Manslaughter is the unlawful killing of a human creature without malice, either express or implied, and without any mixture of any deliberation whatever, which may be voluntary, upon a sudden heat of passion. In all cases of voluntary manslaughter, there must be some actual assault upon the person killing, or an attempt by the person killed to commit a serious personal injury on the person killing, or other equivalent circumstances, to justify the excitement of passion and to exclude all idea of deliberation or malice, either express or implied. The killing must be the result of that sudden, violent impulse of passion supposed to be irresistible, for if there should have been an interval between the provocation given and the homicide, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge, and be punished as murder. Voluntary manslaughter shall be punished by confinement and labor in the penitentiary for a term of not less than one nor more than twenty years. What the facts are, you will determine, and what the provocation, if any, upon which the homicide occurred in this case was, and its extent, and whether it is equivalent to the circum-

stances enumerated here, you will determine from the evidence in the case. Those are questions for you to determine." Alleged to be error because the court, of its own motion, and without any request from the jury, recharged as above set forth, mainly on the question of malice, and it was of such a nature as to lead their minds to the question of malice, and not to take into consideration the full definition of voluntary manslaughter.

Wright & Hamilton and W. W. Vandiver, for plaintiff in error. W. J. Nunnally, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

(94 Ga. 555)

WOLFF v. GEORGIA SOUTHERN & F. R. CO.

(Supreme Court of Georgia. June 18, 1894.)

RAILROAD COMPANY — OCCUPATION OF STREET — DAMAGES TO PROPERTY — PROCEEDING TO ASSESS — INSTRUCTIONS — EVIDENCE.

1. In this case there were three elements of possible damage to be considered: First, the physical change made in the street by grading the same, and the difference which this produced in the flow of surface water upon the owner's land, and in the adjustment of the land to the surface of the street; second, the location, construction, and use of the railway in the street; third, the actual invasion of the owner's land, and cutting steps in the same to render it accessible from the street, damage to the owner's fence, and apparently the deposit on a narrow margin of some of the owner's land of earth constituting a part of the embankment, or the base or support of it, by which the grade of the street was changed. On the second of these elements evidence was admissible in behalf of the company tending to show that neither the owner's land, nor any other on the same street, was damaged, but that the market value of all of it was enhanced thereby. If any enhancement of the market value of the owner's land resulted from this cause, the same could be set off against any damage to it occasioned by either of the other causes, the present proceeding, under the statute providing for the same, being confined to the assessment of damage to the property, and not extending to any alleged taking as such.

2. The case of *Streyer v. Railroad Co.*, 15 S. E. 637, 90 Ga. 56, rules the question as to the right to open and conclude. Though there were some slight errors in admitting evidence, this did not affect the substantial merits of the case. The charge of the court, taken as a whole, was free from material error as against the landowner, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Bibb county; C. L. Bartlett, Judge.

Proceeding by Georgia Southern & Florida Railroad Company to assess damages, if any, to land of E. Wolff through the operation of its railroad. Judgment was rendered that defendant sustained no damage, and he brings error. Affirmed.

The following is the official report:

The railroad company instituted a proceeding for the assessment of damages, if any

there were, to the property of Edward Wolff, situated on Oglethorpe and Fifth streets and on Hawthorn and Fifth streets in the city of Macon, caused by the occupation of Fifth street by the railroad company with its tracks, and the operation of its cars and machinery thereon. By his plea Wolff admitted that the railroad company had the right to occupy with its tracks Fifth street, and for that purpose to grade the street so as to be suitable for its tracks, and to run its engines and cars along the street; and that the use of the street, or such portions thereof as it had laid its tracks upon, was necessary to the railroad. But he claimed that by the grading of that part of the street which it did not occupy, and of the sidewalk, his property had been much damaged, diminishing its rental value, injuring it for residence purposes, rendering necessary the building of walls, etc.; and also that it had gone upon his land, and made cuts therein, to his damage, and by building an embankment in the street had diverted the natural flow of surface water, and forced it through his lot. The jury found that the property had not been damaged, and, defendant's motion for new trial being overruled, he excepted.

The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also because the jury found, contrary to all the evidence, that a portion of the property had been actually taken by the railroad.

Error in allowing Elkin, a witness for plaintiff, to testify, over the defendant's objection: "There was more grading done that was not necessary to lay the track. We were compelled by City Engineer C. W. Hendrix to grade down the street and sidewalk not covered by the track. My instructions from the railroad was only to grade a sufficient space in the street for the track, but we were compelled by instructions of Mr. Hendricks, city engineer, to grade the whole street and sidewalk on both sides of the track. There was no necessity for grading the balance of the street and sidewalk for the purpose of the railroad." The objection was that the action of the city in the premises could only be shown by its minutes, and not by the instructions from Mr. Hendricks. Also that the railroad, having graded the street to place a track along it, was responsible, irrespective of whether it was necessary for the purpose of laying its tracks or not. Also because the evidence was irrelevant to the issue on trial.

Error in admitting, over objection of defendant, the following testimony of Lane, a witness of plaintiff: "The grading of the street outside of the track was done by the direction of the city engineer. We objected to grading the sidewalk down there on the grounds that we did not think it was necessary to do it to comply with the contract. The city engineer directed that the side-



walk be brought to a proper grade with the street. It was 12 or 15 feet above the street." The objection was the same as that urged to the testimony of Elkin set out in the first objection to Elkin's testimony.

Error in admitting, over defendant's objection, the testimony of Small, a witness for plaintiff: "The property on that street has been increased in value in consequence of the road going there. The market value has increased on that street, I should say, from 25 to 50 per cent., according to the location of it, extending from one end to the other, and in consideration of the fact that the street has been largely improved, and is more desirable for store purposes than before." The objection was that the evidence of the increase of value other than the property in question was irrelevant and inadmissible.

Error in admitting, over defendant's objection, the following testimony of Small: "My property on said street was situated on an elevation, somewhat like Wolff's property, but not quite so high. I think they cut down  $3\frac{1}{2}$  feet on Fifth street. My houses were good five-room houses, and were generally rented. I lived in one of them myself a couple of years, and I rented it at one time for \$30 a month to good people, white people, and afterwards rented it out to negroes, before the railroad went there, at \$15 a month. Placing the railroad there in said street, and the building thereof, had no effect whatever on the rental of my property. Mine were better houses than Wolff's." The objections were that the damage or injury to Small's property was not an issue, but Wolff's; that whether or not it injured Small's property was irrelevant to the issue; and that from Small's evidence his property was differently improved from Wolff's, and the grade of the street was less than at Wolff's, therefore was not similarly situated, and the evidence could not illustrate the issue being tried.

Error in admitting, over similar objections of defendant, the following testimony of Wilder, a witness for plaintiff: "The effect of the railroad being laid in said street upon my property, I think, enhances it considerably in the value, according to the way the assessors assessed me, and I would not take what I would before the railroad was there. Laying the railroad on this street had no effect at all on my property. Mine rented for the same."

Error in admitting, over similar objections of defendant, the following testimony of Craig, a witness for plaintiff: "The rents of the property belonging to the Georgia Southern & Florida Railroad, of which I had charge, increased after the laying of the track upon this street. I got more rent after than before."

Error in admitting, over similar objection of defendant, the following testimony of Ellis, a witness for plaintiff: "The effect on

the market value of property on Fifth and Elbert streets since the construction of the railroad has been to increase it."

Error in allowing Lane, a witness for plaintiff, to testify over defendant's objection: "That there had been a side track run from the Georgia Southern road across Fifth street into the Reynolds manufacturing building." The objection was that this evidence was irrelevant, and, if such a track had been laid, it was done without authority of law.

Error in allowing Lane to testify, over objection of defendant: "That the running of the side track into Reynolds' foundry and machine shop enabled those people to get their heavy stuff into their yard without draying it; it enabled them to get locomotives in there that do a great deal of work which they have a specialty of; and the value of that property has been materially increased thereby." The objections were the same as those urged to the evidence of Small.

Error in allowing Lane to testify, over objections of defendant: "That the reason no improvements has been made on Fifth and Elbert streets since the laying of the track was simply from the fact that there had been no money in Macon to invest in anything." The objection was that the evidence was irrelevant and speculative, was a mere opinion, and no data were given.

Error in admitting, over objection of defendant, the following testimony of McGolrick on cross-examination: "A year before the railroad was laid on this street I bought a lot on it, paying one thousand dollars for it; and between six and seven months before I bought another lot, paying eleven hundred dollars for it; and placed upon them seven or eight hundred dollars' worth of improvements; and the property, I think, is worth three thousand dollars, and is rented for \$27 a month." The objection was that this testimony was irrelevant, that it was not contiguous to the property in issue, not similarly situated, and that it was purchased at a time before the railroad was laid along there, and could not illustrate the issue on trial.

Error in admitting, over objection of defendant, the following testimony of Willingham on cross-examination: "The effect of building the railroad on this street upon other property located on this street was to benefit it from 50 to 200 per cent." The objections were the same as were urged to the testimony of Small.

Error in refusing to rule out the following testimony of Hall, in answer to a question, propounded by plaintiff's attorney on cross-examination, as to what the part of Wolfe's property on Oglethorpe and Fifth streets was worth: "At the time that before the railroad was built there the assessment was \$5,500, and in arriving at that we put the property as near as we could, sometimes over and sometimes under, but the average was about 75 per cent. In 1891, I think, they raised the property to somewhere about \$7,000. These

assessments for taxation were made between January and the 1st day of April." The objection was that the assessment for taxation was illegal evidence, and did not illustrate its value, because not voluntary conduct on the part of the owner, and depended on the action of third people, and was not made at the instance of either party to this issue, and not usually at the market value.

Error in admitting, over defendant's objection, the following testimony of Wolff on cross-examination: "The property on Oglethorpe and Fifth streets I purchased four or five years before the railroad was built there for \$6,800 or \$6,900, and the one on Hawthorne street, two or three years before, for \$2,000 or \$2,100." The objection was that the price paid for the property years before the road was laid in the street could not illustrate its value at the time, or the damage and injury done thereto.

Error in admitting, over defendant's objection, the following evidence of Wolff: "Since the building of this road I met Mr. Erminger, who was city assessor, and assessed that piece of property. He asked me if I would take ten thousand dollars for it, and I told him it was not on the market." The objection was that offers for property made by third persons were irrelevant.

Error in admitting, over objection of defendant, the following evidence of Wolff: "Since the railroad has been laid on this street I have bought another lot there of a half acre, with a three-room house on it, for which I receive 11 dollars a month rent. I paid three thousand dollars for it." The objection was that the evidence was irrelevant, and did not illustrate the issue.

Error in overruling defendant's objection to the following questions to Wolff and the answers thereto: "Q. Would you have taken \$14,000 for this property two years ago? A. I think I would. Q. Would you have taken \$13,000? A. I would take a great deal less now. I cannot say that. Property changes and fluctuates like everything else, and I cannot remember what I would do two years back." The objection was that the question was illegal, in that it did not fix either the appreciation or depreciation of the market value, but was speculative, and the answer was susceptible to the same objection.

Error in sustaining the objection of plaintiff to the following question, propounded to Lane: "Don't you know it to be a fact that Mr. Sparks said that people who resisted the laying of the track in this street never should have a side track into their property?" Plaintiff's objection was that this evidence would be mere hearsay, while defendant contended that Sparks was president "of the Construction Company Railroad," and the witnesses who testified to the appreciation of the value based their "appreciation" on the grounds that defendant could obtain a side track.

Error in sustaining objection made by plaintiff that it was irrelevant to the follow-

ing question propounded to Crockett: "The establishment of a fancy house contiguous to property, does it improve or damage the property?"

Error in charging: "If the property is worth as much after the improvement or change of grade of the street as it was before, then you could not be authorized to find there was any damage done to the property." Alleged to be error, in that it was contended by defendant's counsel that under the evidence other causes enhanced the value of the property, and by this charge the railroad was given the benefit of this enhancement.

Error, after charging the following request of defendant's counsel: "The road is not entitled to the benefits beyond a fair enhancement of the property by the improvements then being made, by any consideration of changes, or the probability that in the future the right might be acquired from the city to put in side tracks to this property,"—by adding thereto: "If this is a bare possibility, then a speculative increase of the value of the property, then you would not be authorized to consider it. If it has been shown that it was reasonably probable, but not speculative; that it has an actual enhancement of the value of the property, and these things could reasonably and naturally come,—no speculation,—then you would consider it; otherwise not."

Error, after charging the following request of defendant: "Any benefits which may depend upon the action of the third parties or the public are too remote and speculative, and should not be considered by the jury in arriving at the benefits caused by the construction of this road,"—by adding: "Applying the same rule I have just given you with reference to what would be speculative damages."

Error, after charging the following written request of defendant: "By a statute of this state, the Georgia Southern & Florida Railroad was authorized to lay its track along this street, upon the consent of the mayor and council of the city of Macon; that by the statute and contract in evidence, under which said road was built and constructed along said street, it would have no right to lay side tracks into said property of defendant,"—by adding: "Of course, without defendant's consent."

Error in refusing to charge the following written requests of defendant: "Where private property is taken, the owner thereof is entitled to recover the full value of the property so taken, without any deduction on account of benefits which may have accrued to the balance of the property by reason of the improvements. To constitute a taking of property it is not necessary that there should be an actual disseizure of the owner. It is not necessary that it should be taken in an absolute and literal sense, to entitle the owner to compensation. A serious interruption of the common and necessary use of

the property is a taking. It is a taking to invade the owner's property by placing upon it superinduced additions of water, earth, and sand, or other material, or by having any artificial structure placed upon it, so as to destroy or impair its usefulness. If the market value of the property was enhanced by other causes, independent of the construction of this road, and the improvement of the street made by this road at the time, then this enhanced value cannot be considered by you for the benefit of the road, but the defendant, Wolff, is entitled himself to that enhancement." The court charged the first portion of this request, but refused to charge the last line thereof, to wit, "But the defendant, Wolff, is entitled himself to that enhancement."

Error in refusing to charge the following written request of defendant: "The Georgia Southern & Florida Railroad's right to lay side tracks across the street into the property of defendant is dependent upon the future action of others, and therefore the jury are not authorized, in estimating the benefits that accrued to this property by the construction of this road and improvements made in consequence thereof on the street, to consider such benefits as might arise to said property by the laying of side tracks to it in the future."

Error in the following ruling: "When the case was called, before any evidence was introduced, Wolff announced that by his plea he admitted the right of the Georgia Southern & Florida Railroad to enter upon said street and lay the track there, and make the improvements in said streets that had been made, and thereupon proposed to assume the burden, make out his cause that his property had been damaged, and demanded the right to open and conclude the argument in said cause. The court ruled that, the plaintiff having commenced these proceedings, the burden was upon the railroad to show that the property was not damaged, and they were entitled to open and conclude the argument."

Error in instructing the jury as to the form of their verdict as follows: "You take the case, and determine from the evidence and law given you whether there has been any damage done to the property of Wolff, remembering that the measure of damages the law says should be; and in the event you find he has been damaged, find the extent of it, remembering the measure of it, and write upon the papers, 'We, the jury, find that the property has been damaged so much money,' and find a verdict against the railroad for that amount. In the event you find that it has not been damaged, or find its benefits equal or exceed the damages, you say, 'We, the jury, find that the property has not been damaged.' In one case you say, 'We, the jury, find that the property has been damaged,' and assess the amount of damages at so much. In the oth-

er you simply say, 'We, the jury, find the property has not been damaged.'" Alleged to be error, in that the judge, in his direction to the jury, excluded from them the right to find a verdict for Wolff for the property that had actually been taken by the railroad, and said instructions were calculated to and did mislead the jury as to their rights to find for Wolff the value of such property as was actually taken.

Hardeman, Davis & Turner, for plaintiff in error. Gustin, Guerry & Hall, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 540)

WILLIAMS v. SAVANNAH, F. & W. RY. CO.

(Supreme Court of Georgia. April 30, 1894.)

CONSTRUCTION OF DEED — BOUNDARY BY CERTAIN RAILROAD — EJECT — PRESUMPTIONS — EJECTMENT — DEATH OF PLAINTIFF — SUBSTITUTION OF HEIRS.

1. A deed which bounds on one side the property conveyed "by the Savannah, Albany & Gulf Railroad, or Atlantic & Gulf Railroad, as otherwise known," the deed being made after that road was constructed, is to be construed prima facie as not embracing any premises which belonged, at the date of the deed, to the railroad corporation, whether its title comprehended the whole fee or only the right of way. But no presumption arises, from the bare fact that the corporation was authorized by its charter to acquire along its whole line a right of way extending 75 feet on either side from the center line of its track, that it actually acquired that much or any more than it occupied with its track, and what was necessary for the construction, maintenance, and use thereof, or so much as was actually used by the exercise of exclusive dominion over it.

2. Under the evidence in the record, it was a question for the jury whether the deed on which the plaintiffs relied covered the premises in dispute or not, taking into consideration the acts of ownership exercised by the parties, respectively, and all the circumstances attending the same.

3. While the personal representatives of a plaintiff in ejectment who dies pending the suit, and not his heirs, are the proper persons to succeed him in that suit, yet, after the heirs have been made parties by order of the court, so long as this order is not reversed or vacated, the heirs may recover if the personal representatives could have been made parties.

(Syllabus by the Court.)

Error from superior court, Ware county; C. C. Smith, Judge.

Action of ejectment by B. F. Williams against the Savannah, Florida & Western Railway Company. Said Williams died pending suit, and Sarah F. Williams and others were substituted as plaintiffs. Judgment was rendered for defendant, and plaintiffs bring error. Reversed.

The following is the official report:

On October 2, 1889, B. F. Williams brought his action against the Savannah, Florida & Western Railway Company to recover a strip of land. He relied on a deed to himself from

Lyon, executor of Martin, dated December 10, 1800, recorded June 29, 1861, conveying 315 acres of land lot 166 in the Eighth district of Ware, formerly Appling, county, bounded on the northwest side by the Savannah, Albany & Gulf Railroad, or Atlantic & Gulf Railroad, as otherwise known (now the defendant's railroad), and on all other sides by the original boundary of said original survey, with possession claimed thereunder from the date thereof to the time of suing. The strip sued for is described in the declaration as a part of said 315 acres, "running from the mill branch on the southeast along and parallel with the track of the Savannah, Florida & Western Railroad to the Brunswick & Western Railroad on the northwest, having a length along said Savannah, Florida & Western Railroad of seven hundred and fifty yards, more or less, and having width along said distance of from sixty to seventy feet, containing five acres of land, more or less, situated, lying, and being in the town of Waycross, and county, district, and state aforesaid." It was alleged that the defendant had entered on the land, and inclosed this strip with fences, one a wire fence. B. F. Williams died after the suit was brought, and an order was taken making all his heirs at law parties plaintiff, "suing for the use of Sarah F. Williams"; and, by subsequent amendment, the words quoted were stricken. At the close of plaintiffs' evidence, defendant moved for a nonsuit, on the grounds (1) that the plaintiffs, as heirs at law, were not the proper parties to the suit, but the administrator was the proper party; (2) that the evidence was not sufficient to authorize a recovery by plaintiffs. The nonsuit was granted, and plaintiffs excepted.

The bill of exceptions contains the following evidence:

Henry C. Williams, one of plaintiffs, and a son of B. F. Williams, testified: "B. F. Williams has been in possession of this portion of land, lot 166 in the 8th district of Ware county, on the south side of the S., F. & W. Ry. Co., about 26, 27 or 28 years. He had three buildings on this lot of land, that had been there as far back as I can remember. As far back as I can recollect, one field was over there [indicating], containing about 20 acres; one across the branch, containing about twenty acres; and one where Mr. Reed's place now is, containing about 8 or 10 acres,—all on the south side of the S., F. & W. Ry., previously the Atlantic & Gulf Railroad. We cut the timber off of this lot of land, with the exception of a small part of it, about 23 or 24 years ago, the last of it having been cut about 19 or 20 years ago. It has been in our possession ever since then, and used for getting rail timber, wood, for cultivation, and any purpose we saw fit. These fields have been cultivated from that time to this. They may have missed a year or so, during that time, but they have been

in almost continuous cultivation ever since, and some of them all the time. No buildings were on the place now owned by Reed until he built them. On the other two places have been buildings as far back as I can recollect, up to 10 or 12 years ago. In 1871 or just before that, when Grant and Metcalf ran this mill, they built, with my father's permission, an office on this land, just across the south side of the railroad. In 1871 we built the house that stands there now,—the second house from the crossing. The one standing further down was started in 1871, and finished in 1872. We lived there in the spring of 1872, having moved in April. The land in front of the house along the S., F. & W. Ry. we had to cut down and level. There were trees and banks on it. I have measured these lines [indicating on a diagram made by witness' brother, and verified by witness], and they are within 75 feet of the center of the S., F. & W. Ry. track. They are from 12 to 13 feet this side towards the railroad of the claimed right of way of the defendant. We had a fence running where that line of trees is, about 12 feet this side of the house. It was built in 1871 or 1872. It stood there until about 5 or 6 years ago, until it was set back some 6, 7, or 8 feet, where it now stands. These two houses [indicating] were built in the latter part of the seventies; I do not recollect the exact date. All of these houses are on the south or southeast side of the railroad track, and were two or three feet within 75 feet from center of track. We (my father, mother, and seven children) lived in the second house from some time in 1872 for about 13 or 14 years. The other house we used as a store, and, when we did not occupy it, we had it rented out. The upstairs was used as an hotel. My father claimed that property under a deed from Lyons and his possession of it. The fence and shadetrees were from 12 to 13 feet over that 75-foot line. These trees, in 1859, were about 8 or 10 inches in diameter. They were set out there in 1872 or 1873. They are about 10 inches in diameter now. They are about 62 or 63 feet from the center of the S., F. & W. track. There are a string of them reaching about 800 or 1,000 feet up the side of the side of the railroad track. There is a cut and embankment along the line of the S., F. & W. Ry. Co. at that point, from one to ten feet deep along where those buildings are. The fence is about four feet from the first house, and three feet from the last one towards Savannah. The field along there is a little over 700 yards. The fence runs the whole length of the field from the B. & W. Ry. down to the creek. About ten telegraph poles are along there, which are from 200 to 210 feet apart. I was not living there with my father when these fences were built by the railroad company. Those houses are situated in the town of Waycross on the south side of the S., F. & W. Ry. Co., about 200 yards from this courthouse. I knew

nothing of this strip of land until some time in 1872. Up to that time we were living about two and a half miles out of town. We lived on that property about twelve years, and then we moved here to Waycross. The fence we put there was built in the first of 1872. The fence then ran only from here [indicating] to here. In a year or two afterwards, we took in all of this [indicating from diagram], and put it under cultivation. Before we built those houses and fences the land between the track and where the fence was located was perfectly wild. Trees were standing there. The old Atlantic & Gulf Railroad cut down some of the timber within 75 feet of the track, but how much of it they cut right along there I do not recollect. Their right of way was pretty badly kept. Of course, some of the trees were cut; else they could not have operated the road. This fence [indicating] was originally further out, but was moved back five or six years ago. We had a schoolhouse on what they now claim as right of way, the door of which stood from 15 to 20 feet from the track. This building was used as a schoolhouse for some years, and then it was moved round where it now stands, as a kitchen to that old house. My father had it moved. He and I were then in partnership, running a store. I paid the money for building those two lower houses. This [indicating] was the house we lived in, and here [indicating] is where the S., F. & W. Ry. put their fence. Of my own knowledge, I know nothing of the S., F. & W. Ry. Co. having cut down trees upon what they now claim is their right of way. I do know that we cut most of the trees and weeds down ourselves. The S., F. & W. Ry. Co. may have done some weeding and clearing up along there, but, if so, it has been since I left home, and that was about ten years ago. Up to that time we kept that land cleared up ourselves. I expect I may have seen at other points on the S., F. & W. Ry. their right of way cut out to that width. I don't recollect whether or not we ever cut any of the trees beyond our fence. I cannot recollect as far back as when the Atlantic & Gulf first built along there; it may have been before the war. I have not known all during this time since the S., F. & W. Ry. had charge that they claimed this right of way. I knew they had a charter for 75 feet on each side of the center of the track. I was away from home about ten years, and during that time always returned home on an average of once or twice a month. During all that time my father and his tenants were in possession of that property. Having visited my home during those ten years, as I have stated, I know from my own knowledge that my father and his tenants were in possession of that property. I saw it myself. I did not investigate each house on each visit to see who occupied it."

James Knox testified: "I am acquainted with the property on the south side of the S.,

F. & W. Ry., just opposite here. I have seen the wire fence there just outside of the line of shadetrees within a few feet of the fence that inclosed the field. I think that fence runs probably seven or eight hundred feet parallel with the railroad, although I have never measured it. I have been here fifteen or sixteen years, and during that time this property has been in the possession of Dr. B. F. Williams, and has been called Dr. Williams' land. He lived upon it. He was living there long before I moved to this place. I have known this road along here ever since it was built, in 1858 or 1859. I did not notice at that time whether the right of way was cut down or not. I only saw it passing through on the train. From the time I knew of his living here, Dr. Williams' fence stood about where it stands now. The fence he had then, according to my recollection, was near about where that wire fence now stands. I do not remember exactly how far towards Savannah Dr. Williams' fence runs; I rather think some eight or nine hundred feet down towards the branch. This diagram [illustrating] is made according to my recollection."

W. P. Williams, one of plaintiffs, and a son of B. F. Williams, testified: "As I remember, we moved to Waycross in 1872. Since that time we have occupied it. B. F. Williams and family lived in one house, and this one [indicating] was used as a store and hotel. These two buildings towards Savannah stand about 10 or 12 feet from that fence, which is probably sixty feet from the center of the track. From the center of the track to the buildings themselves, about two feet of them stood on what was the 75 feet now claimed by the defendant. I drew this diagram. The fence that the S., F. & W. built up to within 100 feet of the B. & W. road is probably 12 feet inside from our old original fence, and inside of a more recent fence. The defendant put up this picket fence there, which is 75 feet from center of S., F. & W. Ry. track, about the same time the wire fence was built. My father occupied that land from 1872 up to his death, and his estate now occupies it. He and his tenants occupied it until his death. When we first moved there, there was quite an inclosure, and from then on we have continued to take in land until the whole of it was inclosed and under cultivation. That fence was 680 yards in length. I think that wire fence was put there some time in the summer of 1889. I suppose that whatever the defendant put under fence it claims is its right of way. I do not mean the wire fence, but the paling fence. I never understood until suit was commenced that you claimed this land as your right of way. We claim that land by our actual possession, but I do not know that we ever notified the railroad company that we claimed it. I think we cleared the bushes from that right of way ourselves. There were trees growing there close to the fence,

set out by my father. They are large shade-trees, measuring eight or ten inches, or probably more, in diameter. They all are over on the 75 feet, measured from the center of the track. The wire fence is about 62 feet, and that is very near the trees. Those trees run over 13, perhaps 15, feet further on the 75-foot limit towards the railroad. The defendant is in possession now, and is claiming that land inclosed by the wire fence and picket fence. I meant to say that both the roots and branches of those trees extended over the 75-foot limit claimed by the railroad. I don't remember how many trees there are, but suppose there are fifteen or twenty. One of them is inside of the wire fence. That stands about where my brother's little office is."

B. H. Williams, one of plaintiffs, and a son of B. F. Williams, testified: "We had a barn built by my father about 300 or 400 yards from our dwelling house down the railroad. There was a fence there on this side of the picket fence that stayed there until it rotted down. There was a sidewalk along there. After we built there, I got my father to cut down some of the trees standing on what the railroad company claim as their right of way. Some of the trees were cut, and others left standing, within seventy-five feet of the track in front of the houses. All of those trees along that line are on the outside of that fence, except one. I used to go to school in a little building, one side of which was right on the cut. The building was afterwards moved, and put in the yard. No one has been claiming or exercising any ownership over this property, except my father and his tenants, up to the time this fence was put there. The further fence—the one beyond the wire fence—was built by B. F. Williams. It was moved in from those trees, and we used the way in front of the fence and trees in going to and from those other houses. I had heard it spoken of in the family as the right of way to the railroad. My father sometimes spoke of it as the railroad right of way, but he always claimed it as his own. I never admitted that it was the railroad's right of way. That fence, as well as I can remember, was 50 or 60 feet from the track."

M. C. Austin testified: "I was an employé in the B. & W. Railroad in 1872, but I have no knowledge of what portion of the S., F. & W. right of way was cleared. I know Dr. Williams lived on this property in question in 1872. In 1884 I kept an hotel in his residence, renting from him. I think the old fence stood nearer the road than the wire fence stands now. I went to work for the B. & W. road in 1870. I passed this place frequently. I had charge of the B. & W. road from here to Albany, and frequently stopped there when Dr. Williams lived there. Being a railroad man, it was natural for me to suppose that that property was the right of way of the railroad company, but I did not know anything about it. I heard no

mention of it, and knew nothing about the S., F. & W. rights of way."

J. S. Williams, one of plaintiffs, and a son of B. F. Williams, testified: "The parties plaintiff named in the amendment are all of the heirs at law of B. F. Williams, and the youngest is not under 25 years old. I am 33 years of age. Ever since I can remember, the property described in this suit has been occupied by my father and his tenants. He had a store there and dwelling house, which he occupied until a few years ago. We moved from there, in 1882 or 1883, to another portion of this same tract of land, where my father lived until he died in May, 1892. We had lived there continuously since 1871 or 1872, and during this time he not only occupied the houses, but cultivated the fields. Since he moved away, these houses have been rented by him to different parties. I included this fence [indicating] in my ejectment suit, for it was one of the fences put up by the railroad company. I think my father moved this fence here [on diagram] in order to make a sidewalk. Mr. Reed bought from him a part of lot 166. I don't think this fence runs straight along by his place. It seems to me that Reed's place is closer than 75 feet to the railroad track. I don't know why this fence was not put out further. That piece was never considered as right of way by the railroad. I never heard my father speak of it as railroad right of way; he always claimed it as his own under this deed. The trees were never cut from that right of way by the company out to the 75-foot line, for father occupied this portion of it within the 75-foot limit. They probably did some clearing on it, but I won't say that it was cut out. It was not an old field along there. I think I may recently have seen employés of the railroad company clearing up bushes on that right of way, but I cannot recall any particular time. The timber is now cut out up to the 75-foot limit, but I cannot say whether it was done by the railroad company or not. When you get outside of the right of way, there are trees still standing."

J. S. Williams and G. J. Holton & Son, for plaintiffs in error. Erwin, Du Bignon & Chisholm, S. W. Hitch, and Goodyear & Kay, for defendant in error.

PER CURIAM. Judgment reversed.

(95 Ga. 566)

BELL v. WEYMAN et al.

(Supreme Court of Georgia. Dec. 4, 1894.)

INTERLOCUTORY INJUNCTION—EXECUTION OF DISPOSSESSORY WRIT.

There was no abuse of discretion in refusing to grant the interlocutory injunction prayed for in this case.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Petition by George Bell against Weyman & Connors for an injunction. From an order denying the writ, plaintiff brings error. Affirmed.

The following is the substance of the official report:

The petition alleged: In 1892, Bell borrowed from Weyman & Connors \$100, but they paid him in cash only \$60, for which his note was given for \$100, payable nine months from date, and, to secure its payment, a mortgage was executed by him upon certain realty described. The paper he then signed was, as he understood it, a simple mortgage, and not a mortgage and option to purchase the property, as it appears to be from the exhibit attached. When the day came for the payment of the \$100, he called at their office to pay it, and they could not be found. He called the next day, and a third time, with the same result. About the third day after the note was due, he again called, and tendered them the \$100. They declined to take it, claiming that the time for redeeming the land had passed, and that he also owed them \$250, which debt they had purchased, or had contracted to purchase, of one Ford, and that he must also secure them on that debt. He did owe Ford the \$250, and had also given Ford a security deed to the property, and was willing to secure them as he had done Ford; and at their instance he executed a paper that he thought and understood was a mortgage, to secure them for the \$100 and the \$250. At that time he never received a cent from them, nor did they pay for him any debts due by him. All the money due by him to them was the \$100 borrowed March 22, 1892, and the \$250 they claimed was purchased by them from Ford, and the statement in the deed that he had received \$500 is untrue. Shortly afterwards they obtained from Ford a quitclaim deed to the property. At the time he executed the instrument to secure them in the sums of \$100 and \$250, it was agreed that the rents and profits of two of the small houses on the lot should be paid monthly to them, in order to liquidate his indebtedness to them. In pursuance of this agreement his tenants have been paying their rent regularly to Weyman & Connors ever since December 13, 1892, amounting to about \$250. If the paper signed by him on December 13, 1892, is a deed, it was simply meant for a security deed, and not one of pure bargain and sale. The lot described in the deed contains three houses, and is worth not less than \$2,500. It is subject to be subdivided into three lots, on each of which will be a house, and either of the three houses and lots is worth more than is due Weyman & Connors, which fact alone shows that he never intended to sell and convey the entire property for \$500, mentioned as the consideration of the deed of December 13, 1892. He is an ignorant negro, can neither read nor write, and never knew the character of the instrument of December 13, 1892, until recently. Weyman & Connors

are now claiming to be the absolute owners of the property, basing their claim upon the deed obtained from Ford, and the deed made by petitioner December 13, 1892, and have, under this claim, begun proceedings to dispossess him. Being poor, he cannot give the bond and security required by law to arrest the proceedings to dispossess, and therefore has no legal remedy to prevent the execution of the dispossessory warrant. He prayed that said proceedings be enjoined; that defendants be enjoined from selling, incumbering, or in any manner interfering with the property; that the deed made by him of December 13, 1892, be canceled, because not the kind of deed he was induced to believe he had signed, and because it contains usury; that the deed made by Ford dated December 13, 1893 (?), also contains usury, and should therefore be void; that defendants be required to credit the amounts collected by them as rents upon the amount actually due by him; for general relief, etc.

Defendants answered: On March 22, 1892, Bell borrowed from them \$100, and gave them a mortgage covering the land. They paid him the entire \$100 in cash, without any deduction, he giving them his promissory notes for the \$100, with interest from date at 8 per cent. per annum. He made to them two instruments,—one the mortgage, and the other an option to buy the land upon certain conditions. The latter instrument, only, is exhibited to the petition. He has never tendered to them the \$100, nor has any one for him ever tendered to them the sums legally due them. Bell did owe Ford the \$250, and so told them. Ford held a deed to the property as security therefor, and at Bell's instance they paid off the debt owing by Bell to Ford. It is not true that Bell executed a paper he thought to be a mortgage, to secure them for the \$100 and the \$250, but Bell knew he was signing an absolute conveyance of the property, in accordance with the terms of the option above mentioned. It is not true that he received no money from them, and that they did not pay any debts due by him, nor that the \$100 and the \$250 was all the money due by him to them, nor that the consideration named in the deed he made to them was incorrect or included any usury. They did obtain a quitclaim deed from Ford. It was never agreed by them, nor understood by Bell, that the rents and profits of any of the houses should be received by them in liquidation of any of Bell's indebtedness to them, but the property was turned over to them as absolute owners, and they had been receiving the rents since December, 1892, without objection on the part of any one, until they sought to dispossess Bell of the house occupied by him. They have received about \$250 as rents. It is not true that the instrument of December 13, 1892, was meant simply for a security deed, nor is it true that Bell so understood it. There are three houses on the property, but the property is not worth

more than \$1,750, and is not worth more than the aggregate amounts paid and assumed to be paid by them. Bell is a negro without education, but is not too ignorant to comprehend the difference between a mortgage and a deed, if the same be explained to him, and he knew the character of the instrument of December 13, 1892, when he signed it. They are claiming to be the absolute owners of the property, and base their claim upon the deed made by Bell December 13, 1892; and they have begun proceedings to dispossess him from the house occupied by him. He is insolvent, and is probably unable to give bond and security. At the time of the execution of the mortgage of March 22, 1892, and of the option to buy the land at the price of \$500, there was already on the property a prior mortgage for \$1,100 principal, in favor of the Home & Foreign Investment & Agency Company, Limited, of Norwich, England; and, though the consideration of \$500 is named as the price at which the land could be bought under the option, it was understood that the purchase would be subject to said mortgage, and that defendants, if they availed themselves of the option, would assume payment of said mortgage; and when Bell executed the deed of December 13, 1892, though the consideration therein is \$500, the sale was made by Bell, and accepted by defendants, as subject to the \$1,100 mortgage, and that mortgage was assumed by defendants. They paid, and obligated themselves to pay, at the time of taking the deed, more than \$500 to and for the benefit of Bell, all of said payments being with his full knowledge and consent. Since the deed was made to them, they have paid \$178 of interest on the \$1,100 mortgage, besides taxes on the property, and other sums, which, added to the sums paid before the deed was made, make an aggregate sum that the property has cost defendants of about \$900, without interest, over and above the \$1,100 which they have assumed to pay. The deed of December 13, 1892, was made to them by Bell in pursuance of the option, they paying for the land all they had agreed to pay, and more. After the sale was made by him to them, they gratuitously agreed with him that if he desired, within a reasonable time, to buy the property back, he might do so upon reimbursing them all they have expended in his behalf, with legal interest; and they have more than once proposed to Bell to permit him to do so. He undertook to rent one of the houses, hoping to avail himself of their promise to allow him to repurchase, and agreed to pay them a monthly rental therefor. They did agree that if he would buy back the property they would credit him with what they had received as rents from him and the other tenants. He failed to pay them any rent for the house occupied by him, and in October, 1893, they sought to dispossess him. Thereupon, on October 16, 1893, his wife filed a bill in this court, which is still pend-

ing, setting up that she held title to the land, and seeking to enjoin defendants from dispossessing her and her family, including Bell. Such injunction being denied, defendants again sought to dispossess Bell, whereupon the present bill was filed.

Upon the hearing, the evidence introduced by petitioner was to the following effect: He never agreed to sell the property to defendants for \$500, and never authorized them to pay any debts due by him. He never agreed to pay rent for the house occupied by him, but authorized the tenants in the other houses to pay the rent to them. When he borrowed the \$100 from defendants, he only received \$60 in cash. He never knew, until the commencement of this proceeding, that the bond for titles, given to him by Ford and Jackson, was in the possession of Connors. He (petitioner) is a negro who can neither read nor write. He signed the deed of December 13, 1892, and thought he was signing a mortgage to secure defendants what he was due them. Had he been informed of the true character of the papers he signed December 13 and 16, 1892, he never would have signed the same, as they did not contain his understanding of the transaction. About December 16, 1892, Connors came to the house of petitioner, and told him he (Connors) wanted to get from petitioner a paper signed by Ford, and, after he had searched through the papers in petitioner's possession, took one, saying that was the one he wanted. About three — after the mortgage given by petitioner to defendants became due, Ford, Harrington, and petitioner called at the office of defendants, and tendered for petitioner all the money claimed by defendants to be due by petitioner, and the tender was declined. The reason Ford called and made the tender was because petitioner had offered to sell Jackson and Ford the property for \$1,750, which included incumbrances upon the property, among which was the \$100 due defendants. At the time Ford tendered to defendants the amount said to be due by petitioner, he explained to defendants that petitioner had agreed to so sell the property to Jackson and Ford. So far had Ford and Jackson gone with their trade with petitioner for the lot at \$1,750 that all the notes given by petitioner to them in a loan they made him, and in which transaction a deed from him to them had been executed, and a bond for titles given by them to him, had been, as Ford thought, returned and destroyed, and he was surprised on February 18, 1893, when the attorney for defendants handed to him the bond with a transfer upon it to defendants, signed by petitioner. Ford then became disgusted with the entire business, and made a quitclaim deed to defendants. Petitioner introduced the bond for titles, last above mentioned, with the transfer thereof by him to defendants, dated December 16, 1892. Also, deed from Ford and Jackson to defendants, dated



February 18, 1893, quitclaim deed from Jackson to Ford, conveying Jackson's interest in the land, dated December 13, 1892, and quitclaim deed from Ford to defendants, dated February 18, 1893. Also, a contract by which Bell acknowledged himself indebted to defendant \$100, with interest from date at 8 per cent. per annum, and to secure such indebtedness, and upon a further consideration of \$1, gave defendants the option to buy the property, in case of the failure by Bell to pay the \$100 and interest, at the price of \$500, the \$100 and interest to be deducted from the \$500, and, on the payment of the \$500, defendants to have a warranty deed in fee simple to the property. This paper was dated March 22, 1892, and to it was added, under date of March 29, 1892, that all other sums owing by Bell to defendants or to others, which were liens on the land, should be deducted from the \$500. Also, four promissory notes signed by Bell, payable to the order of defendants, dated December 14, 1892, for \$30 each, and payable, respectively, upon the first day of the four following months.

Defendants introduced *fi. fa.* for city taxes for 1893 against Bell for \$31.95, transferred to them. Also, city tax *fi. fa.* for 1892 against Bell for \$32.75, transferred to Ford, and by him transferred to defendants February 18, 1893. Also, deed to the property from Bell to the Atlanta Guarantee Savings Bank for the consideration of \$51.60, and quitclaim deed from that bank to defendants, dated December 22, 1892, consideration, \$65.80. Also, mortgage by Bell to defendants of the property to secure \$100, evidenced by two promissory notes each, due November 22, 1892, and dated March 22, 1892. This mortgage recited that it was given subject to one for \$1,100 (mentioned above) made the same day. Also, state and county tax *fi. fa.* for 1892 and 1893 against Bell,—the first for \$13.90, amount of the other not stated; the first transferred to Ford and by him to defendants, and the other transferred to defendants May 9, 1894. Also, two notes for \$50 each, dated March 22, 1892, due eight months after date, signed by Bell, and payable to the order of defendants; note due 30 days after date, for \$17, dated March 30, 1892, similarly signed and payable; note dated November 13, 1892, due November 24, 1892, for \$11, payable to Ware & Owens, and marked "paid" by defendants December 21, 1892; also, note due 30 days after date, dated November 21, 1892, for \$22.50, payable to Ware & Owens, paid by defendants December 21, 1892. These notes provided that, to secure the same, the land in dispute was mortgaged. Also, deed from Bell to the Home & Foreign Investment & Agency Company to the land for loan of \$1,100, dated March 21, 1892. Also, interest coupon for \$90, due April 1, 1893, signed by Bell, upon said loan, and receipt for similar interest, April 1, 1894. Also, five notes, signed by Bell

and his wife, for \$10.48 each, payable to the cashier of the Atlanta Guarantee Savings Bank, and due one, two, three, four, and five months after date, date not given. Also, receipt of F. W. Miller, president, to defendants, for \$64.60, as per deed from Miller, president, quitclaiming interest in Bell's property, December 22, 1892, dated December 22, 1892. Also, the deeds from Ford to defendants, Jackson to Ford, Bell to Ford and Jackson, above mentioned, and deed from Bell to defendants, dated December 13, 1892, consideration, \$500. Also, evidence to the following effect: At the time the deed of December 13, 1892, was taken from Bell, defendants had paid to Bell, or for his benefit and under his instructions, or obligated themselves to pay at his instance, the two notes for \$50 each, the note for \$17, the note for \$11, the note for \$22.50, the indebtedness to the Home & Foreign Investment & Agency Company and interest thereon, the five notes of Bell and his wife, the \$64.60 as shown by Miller's receipt, and the amounts for the deeds from Ford, and Ford and Jackson, and Bell to defendants. Defendants paid the following sums: \$30 to Austin, attorney's fees due by Bell, and \$20.10 in cash to Bell, at various dates in December, 1892, and January and February, 1893. All the above payments were made with the full knowledge, consent, and approval, and at the instance, of Bell. They also paid King & Anderson \$50 on account of services rendered in a suit brought by the wife of Bell against defendants as to this same property. The aggregate sums paid up to the taking of the deed December 13, 1892, and paid after, but then assumed, including the tax for 1892, with cash advances, and the \$250 paid to Ford at the time he quitclaimed to them, amounted to \$583. The amount paid out since December 13, 1892, for the benefit of the property, amounted to \$300.30, the above sums not including interest. After the \$100 was loaned to Bell, Connors loaned Bell \$17, and Bell paid nothing on either of these debts. No tender of the amount due was made by any one to defendants. In January, 1893, after the debt was due, and after defendants had obtained the deed from Bell, and had paid off over \$100 worth of liens on the land, and had advanced other sums to Bell, Ford called and offered, in his own behalf, to pay the \$100 which defendants had loaned Bell, without interest, and without offering to pay the other sums they had paid out for Bell. Connors, for defendants, refused to accept this offer in full payment, but stated to Ford that they would willingly transfer to him the titles they had on the property, if he would pay them all the sums paid by them on the property, which Ford declined to do. The offer Ford made was made by him to protect his own lien on the property, and not made for Bell. The property in question is not worth more than \$1,500. Bell offered to defendants, as

an inducement to make the loan of \$100, the option which was afterwards executed, and was fully acquainted with the character of the deed of December 13, 1892, and all of the other papers made by him in the transaction, their contents being fully explained by Austin, who represented Bell, to Bell. Austin drew the deed from Bell to defendants of December 13, 1892, at the request of Bell, and Bell knew the character of the instrument he was executing.

T. C. Battle and W. I. Heyward, for plaintiff in error. King & Anderson, for defendants in error.

**PER CURIAM.** Judgment affirmed.

(95 Ga. 570)

**CROSTHWAIT v. JAMES et al.**

**JAMES et al. v. CROSTHWAIT.**

(Supreme Court of Georgia. Nov. 26, 1894.)

**ERROR—PARTIES DEFENDANT—SERVICE OF BILL.**

Where suit is brought against partners in their firm name, and personal service is had upon each, and a verdict is rendered against the partnership, and the members of the firm make a motion for a new trial, which is granted, upon writ of error to this court, each member of the firm is a necessary party defendant in error, and a failure to serve one of them with a copy of the bill of exceptions is cause for dismissing the writ of error.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action by H. C. Crosthwait against J. H. James and A. L. James, and action by the same defendants against H. C. Crosthwait. There was a verdict and judgment for Crosthwait, and from an order granting a motion for a new trial he brings error. Writ of error dismissed.

R. J. Jordan, for plaintiff in error. Hill-  
yer, Alexander & Lambdin, for defendants in error.

**PER CURIAM.** Writ of error dismissed.

(95 Ga. 498)

**FARMER v. STATE.**

(Supreme Court of Georgia. Nov. 12, 1894.)

**CRIMINAL LAW—CONTINUANCE.**

The showing for a continuance was incomplete, it not appearing that the application was not made for delay; it did not appear by affidavit or otherwise that the accused and his counsel were ignorant of the alleged newly-discovered evidence until after the verdict; the law of involuntary manslaughter in the commission of a lawful act without due caution and circumspection was inapplicable to the facts of the case; the evidence for the state warranted a conviction for murder; and as the accused was found guilty of involuntary manslaughter, in the commission of an unlawful act, he has no cause for complaint against the verdict.

(Syllabus by the Court.)

Error from superior court, Jackson county, N. L. Hutchins, Judge.

J. A. Farmer was convicted of involuntary manslaughter, and brings error. Affirmed.

Geo. C. Thomas and J. J. Strickland, for plaintiff in error. R. B. Russell, Sol. Gen., for the State.

**PER CURIAM.** Judgment affirmed.

(95 Ga. 498)

**BELL v. STATE.**

(Supreme Court of Georgia. Nov. 12, 1894.)

**CRIMINAL LAW—APPEAL—ASSIGNMENT OF ERRORS—SUFFICIENCY.**

1. The charge complained of being a lengthy extract from the general charge of the court, containing several distinct propositions, most, if not all, of which were correct, and no error being specified or pointed out, no proper assignment of error for adjudication by this court is presented.

2. The evidence fully warranted the verdict.

(Syllabus by the Court.)

Error from superior court, Meriwether county; S. W. Harris, Judge.

Gus Bell was convicted of murder, and brings error. Affirmed.

The following is the substance of the official report:

The motion contained the general grounds, and also that the court erred in charging: "It must appear that the danger was so urgent and pressing at the time of the killing that, in order to save his own life, the killing of the other was absolutely necessary, and it must appear also that the person killed was the assailant. Now, the questions that you are to pass upon [in] this branch of the case are these: If it be admitted that this defendant killed this man, Alex. Furgerson, at the time that the shooting was done, does it appear from the evidence in this case that Alex. Furgerson manifestly intended by violence or surprise to commit a felony upon the person of Gus Bell? What does the evidence indicate? You alone can determine that. Further, did he act from a bare fear that it was about to be committed upon him, or were the circumstances that surrounded him at that time,—and you look at each matter as the evidence shows it existed at that time,—were the circumstances sufficient to arouse the fears of a reasonable man that Alex. Furgerson was about to commit a felony upon him? Then go a step further. Does it appear that the danger was so urgent and pressing that, in order for Gus Bell to save his own life, it was absolutely necessary for him to kill Alex. Furgerson? If Furgerson manifestly intended by violence or surprise to commit a felony upon the person of this defendant; that is to say, if the circumstances were such as would have made it appear so to a reasonable man,—a reasonable, courageous man; a reasonable, prudent man; and if also it would have appeared to a reasonable man that it was abso-

lutely necessary for him to have taken the life of Alex. Furgerson in order to protect himself,—if these things appear to be true, then I charge you he would be justifiable under the law in killing this man; he would be guilty of nothing, and you ought to acquit him. But these things must appear, and, if he has failed to make them appear, why then the theory of self-defense would have failed, and you would pass upon the question as to whether he is guilty of the offense of murder or voluntary manslaughter. First, is this man guilty of murder? If not, is he guilty of voluntary manslaughter? If not, he is guilty of nothing, and you ought to acquit him."

McLaughlin & Jones, for plaintiff in error.  
T. A. Atkinson, Sol. Gen., and J. M. Terrell,  
Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

(95 Ga. 431)

### BROWN v. STATE.

(Supreme Court of Georgia. Nov. 12, 1894.)

#### ASSAULT—WHAT CONSTITUTES.

Mere preparation to commit a violent injury upon the person of another, unaccompanied by a physical effort to do so, will not justify a conviction for an assault, and, therefore, where the evidence showed that, during an altercation between the person alleged to have been assaulted and two other persons acting in concert, one of the latter picked up a stone, but made no attempt to cast it at the former, who was about 20 steps distant, neither of the two persons so acting in concert could be lawfully convicted of an assault.

(Syllabus by the Court.)

Error from superior court, Hart county; Seaborn Reese, Judge.

George Brown was convicted of an assault, and brings error. Reversed.

The following is the official report:

Claude Bailey and George Brown were indicted for the offense of assault upon Salina Ginn. Brown was found guilty, and, his motion for a new trial being overruled, excepted. The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Upon the trial of the case, Mrs. Ginn testified: "George Brown and a negro boy, Bailey, were at work in their fields across the public road from my house, which road is the public road leading from Hartwell to Bowman, Ga. Bailey and my son Gordon got into a fuss out about the lot. Gordon came in the house, and, because of what he told me, I went on the veranda and scolded the boys, who were at work over in their field. They both quit work, and started towards where I was. I told them to stop. Brown told Bailey to go ahead. He would see him through. Bailey stooped and picked up something, and advanced a few steps towards me. I called my husband, who was at work near by, and Bailey stopped. He was on the opposite side

of the road from me, in the field, and about twenty steps from me, when he stopped. Brown was a short distance behind him. Brown did not have anything. Did not strike me nor attempt to strike me. Did not throw anything at me, nor attempt to throw anything at me. Bailey did not strike me, nor attempt to strike me, nor throw anything at me, nor attempt to do so. This was in Hart county." Defendant made the following statement: "I and Bailey, a boy in my employment, were in the field planting. Mrs. Ginn came out of her house, and she and the boy got to quarreling. She dared him to come up to the road, and I said to him: 'Go ahead. She won't hurt you.' Bailey stooped and picked up something and started up there, and went a few steps and stopped. I did not have anything. I did not strike her or attempt to strike her. Did not throw anything at her, or attempt to do so, nor did Bailey. He was about twenty-five or thirty yards from her when he stopped. That ended the whole trouble, and Mr. Ginn came up presently where we were at work, and wanted to whip the boy, and I would not agree for him to do so."

A. G. McCurry, for plaintiff in error. Wm. M. Howard, Sol. Gen., for the State.

PER CURIAM. Judgment reversed.

(95 Ga. 570)

### COLLINS PARK & B. R. CO. et al. v. SHORT ELECTRIC RY. CO. et al.

(Supreme Court of Georgia. Nov. 12, 1894.)

#### APPEAL FOR DELAY—AWARD OF DAMAGES—WITHDRAWAL OF WRIT OF ERROR.

Unless a "judgment for a sum certain" has been rendered in the trial court, the supreme court has no authority, under section 4286 of the Code, to award damages in favor of the defendant in error against the plaintiff in error, although, in the opinion of the court, the cause was taken up for delay only. In such case the plaintiff in error will be allowed to withdraw the writ of error over the objection of opposing counsel. *Brantley v. Buck*, 62 Ga. 172; *Ransom v. Coleman*, 45 Ga. 316; *Baillie v. Kinchley*, 52 Ga. 487; *Dozier v. Williams*, 57 Ga. 600.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

From a judgment in an action between the Collins Park & Belt Railroad Company and others and the Short Electric Railway Company and others, the Belt Company brings error. Withdrawn.

Simmons & Corrigan, for plaintiffs in error. Glenn & Slaton, J. A. Anderson, N. J. & T. A. Hammond, Ellis & Gray, Hines & Felder, and Palmer & Read, for defendants in error.

PER CURIAM. Leave to withdraw granted.

ATKINSON, J., not presiding.

(95 Ga. 519)

**WELCH v. SINGLETON.**

(Supreme Court of Georgia. Nov. 12, 1894.)  
**PROCESS—TO WHAT TERM RETURNABLE—VACATION  
 OF JUDGMENT—CASE CALLED OUT OF ORDER.**

1. Although the plaintiff's petition prayed for process returnable to the January term of the city court, and was backed, numbered, and docketed accordingly, yet, as the process itself and the copy process served upon the defendant required him to appear and answer at the next ensuing March term, the case could not, as to him, be treated as returnable to the January term.

2. It appearing that the case was improperly assigned for trial as a case of the January term, and that, consequently, it was afterwards called for trial out of its proper order, and a judgment rendered against the defendant, although he had in due time filed an issuable defense, there was no error, at the next term, in setting the judgment aside, and ordering the case to be reinstated, it appearing that the defendant had not been negligent in failing to ascertain earlier the fact that the judgment had been entered.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action by M. E. Welch against A. M. Singleton. From an order setting aside a default judgment, plaintiff brings error. Affirmed.

The following is the official report:

Mrs. Welch sued Singleton in an action of bail trover. The suit was brought to the city court of Atlanta, and process was prayed requiring Singleton to appear "at the next city court of Atlanta." The declaration was filed, and the affidavit to hold to bail was sworn to, on December 6, 1892. The process was dated February 6, 1893, and summoned defendant to appear at the March term of 1893 of the court. Service was made February 18, 1893. On March 21, 1893, defendant demurred in writing, and on the same day filed a written plea. On December 12, 1893, a verdict and judgment were rendered in the cause in favor of plaintiff. The court adjourned for the term on December 23d, and on December 30th a rule to show cause why the judgment should not be set aside was granted; and upon the hearing of the motion to set aside the judgment, it being admitted that in the regular call of the docket the March term, 1893, had not been reached, the court granted the motion, and ordered the judgment set aside, and the case reinstated and docketed for a term different from that on which it stood for more than 12 months. In a note to the bill of exceptions the judge states that on the hearing of the motion defendant's attorney agreed that the case might be docketed on the March term of the court, the term to which the process made the case returnable, and it was so ordered. The motion to set aside was upon the following grounds: (1) Because the case was made returnable to the March term, 1893, and was set down and a verdict taken therein as of the January term, 1893, where-

by defendant was misled; (2) because no judgment has as yet been entered up on the verdict, and a *fi. fa.* has issued and levy been made on defendant's property; (3) because no judgment can legally be rendered on said verdict; (4) because the verdict was obtained by collusion and fraud, was illegal, out of time, and void. Plaintiff alleges that the court erred (1) in granting the rule, the same being an application in the nature of an equitable proceeding, of which the court had no jurisdiction; (2) in refusing to hold that defendant was estopped from taking any exceptions to informalities of pleadings, he having appeared and pleaded to the merits more than eight months before the rendition of the judgment; (3) in holding that the court had a right to order the case docketed at a term of court different from that on which it had been regularly entered by the clerk, more than six months after said term had ended; (4) in holding that defendant had not been put on notice of the term to which the case had been docketed, the process calling him to the March term, 1893, it being entered on the outside of the cover over the proper signature of the clerk, as filed December 6, 1892, making it in time for the January term, 1893, and marked as of said January term, numbered and docketed therefor, it being an action to hold to bail, necessitating immediate notice to defendant, defendant having appeared and pleaded to the merit without taking any exceptions thereto.

Culberson & Hunt and C. B. Reynolds, for plaintiff in error. Haralson & Gowdy, for defendant in error.

**PER CURIAM.** Judgment affirmed.

(95 Ga. 566)

**ALDINE MANUFACT'G CO. v. WARNER et al.**  
 (Supreme Court of Georgia. Nov. 12, 1894.)

**GRANTING NEW TRIAL—REVIEW.**

The case involving questions both of law and fact, and the trial court having granted a first new trial without basing its judgment on any special ground, this court will not closely scrutinize the record for the purpose of determining whether or not the judgment of the court below in granting a new trial was erroneous, but will adhere to the general rule applicable in such cases.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action between the Aldine Manufacturing Company and W. C. Warner and others. From the judgment, the company brings error. Affirmed.

L. P. Skeen, for plaintiff in error. Culberson & Hunt, C. B. Reynolds, and King & Anderson, for defendants in error.

**PER CURIAM.** Judgment affirmed.

(95 Ga. 319)

**WALTERS v. COLLINS PARK & B. R. CO.**

(Supreme Court of Georgia. Nov. 12, 1894.)

**ACTION AGAINST STREET-RAILWAY COMPANY—INJURIES TO PASSENGER—ALIGHTING FROM MOVING CAR—NEGLIGENCE.**

It appeared from the evidence of the plaintiff, who was a passenger upon an open electric car, that he signaled the conductor to stop, that the speed of the car was greatly reduced, that while it was yet in motion the plaintiff stepped out upon the running board, picked up his sample case with his right hand, turned his body a little outward from the car, let loose the upright support with his left hand, and was just in the act of stepping off, when the conductor signaled the motorman to go forward, who obeyed, and the car gave a sudden and violent jerk, by reason of which the plaintiff was thrown to the ground and injured. Under these facts it was error to grant a nonsuit, as the jury might have found that the plaintiff was not guilty of such negligence as would bar all right of recovery. But for the signal to go forward, and the jerk, the judgment of nonsuit would have been affirmed.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by O. W. Walters against the Collins Park & Belt Railroad Company for personal injuries. There was a judgment of nonsuit, and plaintiff appeals. Reversed.

R. J. Jordan, for plaintiff in error. Hillyer, Alexander & Lambdin, for defendant in error.

PER CURIAM. Judgment reversed.

ATKINSON, J., not presiding.

(95 Ga. 520)

**WESTERN UNION TEL. CO. v. DAVIS.**

(Supreme Court of Georgia. Nov. 12, 1894.)

**APPEAL—REVIEW—CONFLICTING EVIDENCE—DILIGENCE IN DELIVERING TELEGRAM.**

The only question being whether or not the telegraph company exercised proper diligence in attempting to deliver the message, and the evidence being sufficient to authorize the jury to find that it did not, the verdict for the plaintiff below will not be disturbed.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action by Randall Davis against the Western Union Telegraph Company for the statutory penalty for failure to deliver a telegram. Judgment for plaintiff, and defendant's motion for a new trial overruled. Defendant brings error. Affirmed.

The following is the substance of the official report:

The motion was on the general grounds that the verdict was contrary to law, evidence, etc.; also because, it being agreed by counsel that there was no other issue, the court charged the jury that there was no issue of fact in the case but whether the defendant had acted with due diligence in trying to make delivery of the telegram, and that the burden was upon plaintiff to

show by preponderance of evidence that defendant had failed to use such diligence, and the jury found against this charge.

The evidence for plaintiff was, in brief, as follows: About 7:35 p. m., September 13, 1891, within the usual office hours, plaintiff delivered to defendant's agent at Hapeville, Ga., a telegram addressed Miss Lillian Hendricks, No. 38 Terry street, Atlanta, Ga., paying the charges thereon. Miss Hendricks lived at that time in Atlanta, at No. 38 Terry street, within a quarter of a mile of the telegraph office, and near the business portion of the city. Several days afterwards, when Davis returned to Atlanta, he called at the telegraph office there, and was tendered 25 cents, which he declined to accept, and was informed by defendant's agent that the telegram had not been delivered, because, as the messenger reported, he could not find the number of the place addressed, though the messenger said he looked for it carefully. A demand in writing was made in time. One Bentley, a colored man, testified for plaintiff: "I own the house No. 38 Terry street. Commenced building it in May, 1891, and on the 8th of August, afterwards, the family to which Lillian Hendricks belonged moved into it. A day or two after the family moved in, because of a complaint made to me that they did not receive a letter intended for them, I had a number put on the house. The gable end of the house was towards the street. On the other side of the street, just opposite, was a house, number 37. I therefore had number 38 put on this house. The letters were painted with a brush on a piece of pasteboard, and stuck up on the gable end of the house. There was a window in this end, but no door. The number was put about where it would have been, had there been a door." On the direct examination the witness said that he himself put on the number. On the cross-examination, having been asked to make "38" with a pencil on a sheet of paper, he wrote "8," and then said he would add "30." Then, for the first time, he said his son painted the letters with a brush, under his direction. He further testified: "Never saw the plaintiff but once, and that was while Lillian was living at number 38. The city has renumbered the houses since then, and on this house the city placed its number where I had placed mine. My pasteboard on which the number was painted was larger than the plate on which the number was written by the city. I know the family moved in on the 8th of August, 1891, because I gave a receipt for the rent on that date. I recollect the date from having seen the receipt recently. It is now at home. On the left-hand side of Terry street, going south from Woodward avenue, there are several houses in the block. On the right-hand side, opposite the same block, there are only two houses. About ninety feet from Woodward avenue to 38 Terry

street is vacant, and from this same house, going south towards Rawson street, it is more than 200 feet to the next house. Number 38 Terry street is on the right-hand side, going south, towards Rawson." Viola Hendricks, a sister-in-law of Lillian Hendricks, testified: "On September 13, 1891, I lived at 38 Terry street. When I moved into the place, on August 8, 1891, I think the number was on the house. I know I moved on August 8th, because I had to pay my rent on that day, and when I paid it a receipt for it was given me, written by Bentley's daughter. I never gave this receipt to him. I was there all day September 13th, and no telegram was brought for Lillian Hendricks. I never saw Bentley or his son, or any one else, put a number on the house." This witness gave substantially the same account of the house on Terry street as Bentley had given. She also said the number 37 is there now.

The defendant introduced the following evidence: The telegram was given to Boon, a colored messenger of defendant, at its Atlanta office, at night, to be delivered. He looked in the directory for 38 Terry street, and could not find it, found 37 and 39, and thought 38 ought to be near them. He then went to the street, and tried to find 38 by searching for it. As it was dark, he could not see the number. He went to 37, and inquired for Lillian Hendricks, and where number 38 was, and got no satisfaction. He then went to 39, and a man living there said they did not know Lillian Hendricks, and did not know where 38 was. Then he crossed over the street, and knocked at the house next to 38, making the same inquiry, and they said in the house they did not know. He did not go to the next house, which was the one he afterwards found to be 38. He therefore gave up the search, as he could not find the place. The next morning he made a new search for 38, in the daylight, and could not find it. A little while afterwards, —a day or two,—plaintiff complained at the office that the telegram had not been delivered. The manager called Boon up, and asked him, in plaintiff's presence, about it. Boon replied that he did not deliver it because there was no such place, and he could not find number 38. Davis asserted there was such a number, and the manager then proposed to Davis that if he would go with Boon, and show Boon the number, the manager would make Boon settle with him. Davis said he could not go then; that he had some business to attend to. A day or two afterwards, Boon went to the place again, and found that a number had been put on the house. It was freshly put up, and painted in red letters on pasteboard. After Davis had left defendant's Atlanta office, and Boon had also gone, the manager called up Itson, and instructed him to see if he could find 38 Terry street. Itson was one of defendant's most reliable messengers, and Boon also was a reliable messenger. Itson

went out there, and looked for the number the best he could, and could not find it. He looked for 38 Terry street on the left-hand side of the street, going south. When Itson was asked, on cross-examination, if he found Nos. 37 and 39 Terry street, he replied that he was not looking for them, but for 38 Terry street.

Bigby, Reed & Berry and Dorsey, Brewster & Howell, for plaintiff in error. J. B. Stewart, for defendant in error.

**PER CURIAM.** Judgment affirmed.

### LISEUR v. HITSON.

(95 Ga. 527)

(Supreme Court of Georgia. Nov. 12, 1894.)

**LIMITATIONS—PLEADING—PARTIAL PAYMENTS.**

The plaintiff's action being upon an open account for money loaned, and it appearing upon the face of the declaration that the suit was not brought until after the lapse of more than four years from the time the loan became due and payable, a demurrer setting up that the case was barred by the statute of limitations was properly sustained. The mere making of a partial payment on the account, and entering the same as a credit thereon, did not make a case of mutual dealings between the parties, or constitute a new point from which the statute of limitations would begin to run. *Ford v. Clark*, 72 Ga. 760; *Lark v. Cheatham*, 5 S. E. 290, 80 Ga. 1.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by H. A. Liseur against R. J. Hitson on an open account for money loaned. From a judgment sustaining defendant's demurrer to the declaration, plaintiff brings error. Affirmed.

The following is the official report:

Mrs. Liseur filed her declaration in attachment against Hitson. Defendant demurred to the petition, whereupon plaintiff offered an amendment, which was allowed without objection, and the demurrer to the declaration, as amended, was sustained upon the second grounds of demurrer. To this judgment, plaintiff excepted.

The petition alleged: Hitson owes petitioner \$450, besides interest. She had certain money in the hands of one Rankin, and, defendant having married her sister, petitioner, being a widow, went to defendant's place to live in 1880, and remained there until 1887, as one of the family. In 1881, defendant knowing that she had money she could get, and defendant having certain property in Atlanta, he proposed to her to build two houses on such property at a cost of \$300, and he would use the rent of one of the houses, and she could take the other. Accordingly, she let him have \$300 at one time, \$100 at another, and \$30 at another. He built the two houses, and up to June, 1887, she collected the rent of one of them, and he of the other, the rent of each being \$4 per month. In June, 1887, his wife died. Petitioner still resided at de-

defendant's until November, 1887, at which time defendant married again, and then required her to leave. Shortly before the death of her sister, defendant, over petitioner's objection, forced her to collect the rent of a house belonging to defendant, and use that, instead of the rent of one of the two houses above mentioned. This she continued to do until July or August, 1889, when he would not allow her to collect any more rent, and refused to pay her anything for the money she had let him have. In the latter part of 1889, or first of 1890, he told her he would give her \$100, that if she refused to accept that she would get nothing, and forced her to take \$50, but never paid her any more. It was understood that the money she had allowed him to put into the two houses should be paid back to her when she left his house, and the other \$130 was also to be paid then, but he has only paid her, in all, \$50; and she did not accept this amount, but he just threw it down and left it, and she has only treated it as a part payment on her claim against him. The declaration further alleged the suing out of the attachment on July 12, 1893, its levy by service of summons of garnishment, and answer of the garnishee admitting indebtedness. The petition was filed October 2, 1893. The amendment to the declaration, though specified in the bill of exceptions as a portion of the record material to be transmitted to this court, does not appear in the record. The demurrer was on the grounds: (1) The declaration showed that the debt had been paid; (2) the declaration showed that the action was barred by the statute of limitations.

R. J. Jordan, for plaintiff in error. Blalock & Roan, for defendant in error.

PER CURIAM. Judgment affirmed.

(95 Ga. 535)

TANNER v. MUTUAL BEN. BLDG. ASS'N.  
(Supreme Court of Georgia. Nov. 26, 1894.)

WAIVER OF HOMESTEAD—EFFECT ON NOTE.

1. While the head of a family to whom a homestead has been set apart has no power to "waive homestead" so as to subject the homestead estate to the payment of debts for which it would not be otherwise liable, the mere insertion of such waiver in a promissory note made by the head of the family does not invalidate the note, and render the same void as being contrary to the policy of the law.

2. Inasmuch as it appears from an inspection of the record that the judgment in this case was excessive to the extent of \$6.10, direction is given that this excess be written off, and that thereupon the judgment stand affirmed.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by the Mutual Benefit Building Association against Ben Tanner on a promissory note and on an account rendered. From a judgment sustaining plaintiff's demurrer to defendant's pleas, and rendering judgment for

the sums stated, defendant brings error. Affirmed.

The following is the official report:

The Mutual Benefit Building Association sued Tanner upon a promissory note dated February 1, 1893, and due December 1, 1893, for \$1,148.00, with interest from date at 8 per cent. per annum, and 10 per cent. attorneys' fees, the note containing a waiver of homestead; and also upon an account for \$6.10, with interest, for taxes paid, at defendant's request, on December 11, 1893. Pleas were filed by the defendant, to which plaintiff demurred generally. The demurrer was sustained, the plea stricken, and the court rendered judgment for plaintiff for \$1,154.74 principal, \$120.50 interest to date, with future interest at 8 per cent. To the judgment sustaining the demurrer, and striking the plea, and rendering judgment for the sums stated without the intervention of a jury, defendant excepted. In a note in the bill of exceptions the judge below states: "My attention was not called at the hearing to paragraph 6 of the petition, being on account for \$6.10, but the argument was solely on the note, and the defense to it. The judgment rendered by the court is therefore for \$6.10 too much, and the court would now order the excess to be written off, if it was in term time. No point was made that the count on the account carried the case to the jury, and the court made no ruling on that, but only that the plaintiff should have judgment on the note itself, and now for the first time discovers that the note is smaller than the judgment." The pleas were: (1) The note sued on was given as evidence of a debt for money loaned defendant by plaintiff February 1, 1893, to secure which debt defendant executed and delivered to plaintiff a deed of trust or mortgage of the same date with the note, covering certain land described, in which mortgage or trust deed was a power of sale, which power was set forth in the plea. The note is illegal and void, being a contract against the policy of the law, in that it contains a waiver of homestead or exemption right of defendant or his family, as against the debt or any renewal thereof. Defendant's wife has filed a schedule for the exemption of realty and personalty, under the provision of section 2040 et seq. of the Code of Georgia, for the benefit of her family, and in the schedule particularly set forth the tract of land above mentioned. The schedule was filed in the office of the court of ordinary of Fulton county, and was approved and recorded on October 7, 1878, in Book A of Exemptions, pages 271 and 276, in the office of the ordinary. (2) The homestead property, having been so set apart, is in the nature of a trust estate, and proceedings against it should be shaped accordingly; and nothing appears in plaintiff's petition to authorize a judgment of this court against said trust property. (3) Defendant's wife has filed a petition for injunction, and for such other relief as she

may be entitled to, the premises considered, in the superior court of Fulton county, Ga. (this suit was brought in the city court of Atlanta). Said proceeding for injunction, etc., is now pending in the superior court; and that court, having full jurisdiction of the parties and subject-matter of this controversy, should be allowed to retain jurisdiction to do full and complete justice to all parties thereto.

Johnson & Pledger and Thomas & Thomas, for plaintiff in error. J. H. Gilbert, for defendant in error.

PER CURIAM. Judgment affirmed, with direction.

(95 Ga. 529)

**SOUTHERN BELL TEL. & T. CO. v.  
LYNCH.**

(Supreme Court of Georgia. Nov. 26, 1894.)

PERSONAL INJURY — PLEADING AND PROOF — VARIANCE — EVIDENCE — EXAMINATION OF PERSON — NEW TRIAL — NEWLY-DISCOVERED EVIDENCE.

1. The declaration alleging that the plaintiff became entangled in a coil of telephone wire belonging to the defendant, which it had negligently left lying or hanging in the street, and that, the wire becoming entangled in her clothing, she was thrown violently on the pavement and injured, and the evidence showing that one end of the wire was fastened to a pole and the other to a tree, that it was about six or seven inches from the ground, that a parcel of it was tangled up, and that the plaintiff became entangled in it, and tripped and fell over it, there was no substantial variance between the allegations and the probata as to the manner in which the injury was occasioned.

2. Although the declaration did not specifically allege any injuries to the sexual organs of the plaintiff, there was no error in allowing the plaintiff to testify to such injuries; it appearing that her evidence as to the same was admitted solely for the purpose of throwing light on the general nature of her injuries and her pain and suffering, and that the jury was instructed not to consider the same for any other purpose.

3. There was no error in refusing to require the plaintiff, during the trial, to submit to a medical examination at the instance of the defendant; it appearing that she had previously been several times examined by physicians, one of whom was sworn as a witness for the defendant.

4. The newly-discovered evidence being mainly of an impeaching character, and not being such as would, upon another trial, probably produce a finding for the defendant, is not cause for a new trial.

5. The evidence warranted the verdict, and there was no error in refusing to grant a nonsuit, nor in denying a new trial.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action by Maggie Lynch against the Southern Bell Telephone & Telegraph Company for injuries received from falling over a wire. Judgment for plaintiff for \$700, and defendant's motion for new trial denied. Defendant brings error. Affirmed.

The following is the official report:

Maggie Lynch sued the telephone company for damages claimed to have resulted from being tripped up by a wire, and thrown upon

the street pavement. She obtained a verdict for \$700, and the defendant's motion for a new trial was overruled.

The declaration alleged that plaintiff resided on Wheat street, in the city of Atlanta, and on December 31, 1892, about 9 o'clock at night, started to go from her home, across that street, to a store. She had not gone far when she became entangled in the coil of a wire belonging to the company, and by it negligently left lying or hanging in the street, whereby she was thrown violently upon the pavement, where she lay for some time, unable to rise, from the instantaneous pain and suffering caused by the fall. Then she managed to get into her house, a few feet away, where she took her bed, and has since been confined thereto. Soon after getting into the house she was seized with convulsions, and had one after another, from 24 to 30 hours thereafter, although a physician was called immediately upon her reaching the house. She suffered indescribable agony. She was married and pregnant, and the nervous shock and injury caused by the fall caused her to abort or miscarry. As the direct result of the fall she suffered, and still suffers, from inflammation of the tissues of the bowels, concussion of the spine, and injury to her back, hips, side, and head, and from the swelling of her feet and limbs. She is permanently injured, and will continue to suffer great pain as long as she lives. She had no notice that the wire was down in the street, had never seen it there, and, it being dark, did not know it was there until she became entangled in it. She was without fault or negligence. The fact that the wire was down and the danger attending the same were known to the company, or could have been known by the exercise of ordinary and reasonable care and diligence; and it was grossly negligent in not inspecting and looking after the same. Whether or not it was in use by the company at the time, it was placed upon the telephone poles for use by the company, and an inspection could not fail to reveal its dangerous condition. Plaintiff previously worked as a laundress and cook, besides cooking for her own family, and earned from \$20 to \$30 per month, but in future will be unable to earn anything, and will be a burden to her family. She sues for pain and suffering, lost time, deprivation of capacity to labor, mental anguish, disappointment of maternal hopes, permanent injury, and incapacity for happiness and labor, and for exemplary damages. She originally alleged that she was 37 years old at the time of the injury. By amendment at the trial, she alleged that this statement was a direct error, as her age was 28 years at said time.

The motion for a new trial contains the grounds that the verdict is contrary to law and evidence, and a ground of newly-discovered evidence. Also, that the court erred in overruling a motion for nonsuit on the grounds that plaintiff had failed to prove that defend-



ant was negligent, and that the proof varied from the allegations in such manner as to prevent a recovery under the declaration. Also, that the court refused to charge, upon oral request made in argument, that plaintiff could not recover for any injury to her sexual organs. (The court certified that there was no written request to charge, and that he did not remember what oral request was made.) Also, that the court permitted the plaintiff to testify, over defendant's objection that it was not covered by any allegation in the declaration, thus: "I just can't sleep with him, and be with him as a wife should be with her husband. I can't stand nothing like that." The jury were instructed that they were not to consider this testimony for any purpose other than to throw light on the character of the injury, and the pain and suffering. Also, that the court refused to permit defendant to have plaintiff examined by a physician.

The testimony for the plaintiff at the trial tended to show that she and her daughter went from their house about half past 9 o'clock on the night of December 31, 1892, and as they started across Wheat street they stumbled over a wire, one end of which was lying loosely, somewhat coiled, upon the ground, and the other attached to a pole of the defendant. It was dark and raining. Both of them were tripped and thrown to the ground. Plaintiff was assisted by her daughter to rise. They continued across the street, bought goods, and returned to the house, reaching there about 20 minutes after she started out. The loose end of the wire had been down for two or three weeks. Most of that time it was tied to a tree, 12 or 15 inches above the ground. According to the testimony of plaintiff, her husband, and other witnesses, including her physician, Dr. Couch, she was pregnant from two to three months, and the fall upon the rock pavement caused her to have spasms, a miscarriage, inflammation of the peritonitis membrane, enlargement of ovaries, abscesses, displacement of womb, etc., together with much pain and suffering, and that she was in all probability permanently injured; also, that she was well and strong before the fall, worked and earned money—\$12 a month—for cooking, besides doing washing and ironing, but has since been able to do practically no work. She suffered in her back, hips, head, etc.; also, her feet and stomach swell constantly. She was 28 years old at the time of the trial. Was first married at the age of 12. Married her present husband about 6 years ago, and was not pregnant by him for 3 or 4 years.

The testimony for the defendant tended to show that it employed six men, whose duties were constantly to traverse the city and inspect and repair, when necessary, the company's wires, there being about 3,000 miles of them in Atlanta. The company's manager testified that they called up every subscriber in the city every 10 days, to learn

whether or not the wire was out of order or the instrument broken, and, if they got no response, they sent a man to find out what was the matter. The men thus employed are experts, and readily notice any trouble on a line in the street. The wires sometimes are broken by heavy rains, storms, cold weather, etc. None of the company's employes seem to have had any notice that there was a wire down at the place in question, until the morning succeeding the night when plaintiff claims to have been hurt. One of them testified that he went to the store of one of plaintiff's witnesses on the day of the alleged injury, and fixed the telephone there, and that he looked at the wires just below that place, and saw none down. This store was next to plaintiff's residence. Other employes of the company were in the same vicinity two days before, and the wires were in good order, so far as they saw, though the wire might have been down without their seeing it. The testimony for the company further tended to show that the plaintiff was not injured nearly so seriously as she claimed. She was examined by Dr. Jones shortly after the injury, and again about two weeks before the trial. On the morning after the fall she was sitting up, and during the day she drank intoxicating liquor with a man not her husband, and fell down drunk (which testimony she denied in rebuttal). She had complained of womb trouble previous to the time of the injury.

The newly-discovered testimony tends to show that the plaintiff, who had been a resident of Atlanta but a brief time before the injury, previously resided in Greenville, S. C., where she was commonly known as a lewd and disorderly woman; that in April, 1893, she stated that she was not hurt by wire, but she was going to sue the company and get money to go to Chicago, and that she had womb trouble before; also, that she had lived in the house with Thomas Lynch before they were married, and that Thomas Lynch married another woman previously, in Greenville, and was not known to have been divorced from her. Also, that plaintiff had sexual intercourse with a man other than her alleged husband on February 22, 1894; that she did not testify truly as to her earnings as a cook; that she is about 37 years old; that, within two or three weeks after she claimed to have been hurt by the wire, she had men coming to see her just as they always had; that she drank a great deal, and sometimes became so drunk that she would have fits or spasms, etc. No affidavits supporting the character or credibility of the newly-discovered witnesses appear in the record. The affidavit of counsel for the defendant states "that none of the evidence contained in the affidavits were communicated to him by the witnesses until after the trial."

Smith & Pendleton, for plaintiff in error  
C. Z. Blalock, for defendant in error.

P&R OURIAM. Judgment affirmed.

(95 Ga. 433)

**WATSON v. STATE.**

(Supreme Court of Georgia. Nov. 26, 1894.)

**CRIMINAL LAW—REVIEW ON APPEAL.**

The only question properly presented for adjudication by this court being whether the verdict was contrary to the evidence, and there being sufficient evidence to authorize the conviction, the refusal of a new trial will not be overruled.

(Syllabus by the Court.)

Error from city court of Columbus; J. L. Willis, Judge.

Charles Watson was convicted of larceny, and brings error. Affirmed.

The following is the official report:

The ground alleged was that the court erred in allowing the testimony of one Ephraim Nathaniel, over the objection of defendant, that defendant tried to sell him a pair of shoes on the evening the shoes in question were alleged to be stolen, but would not swear that they were the shoes in question. What objection was made to this evidence was not stated. Upon the trial, the evidence for the state was as follows, in brief: Defendant was seen by Oats, who works for Ware, when defendant went into Ware's store. Oats could not then see any bundle under his coat, and saw him plainly; and does not think defendant had it. He saw defendant when defendant went out of the store, and saw a bundle in defendant's hand, which contained calico (defendant said he had bought five cents' worth), and another bundle under defendant's coat, which bundle was not wrapped in paper, and the contents of which Oats could not tell. Defendant had an overcoat thrown over his arm. Ware saw defendant in the store at about half past 5 or 6 o'clock in the evening. Ware did not sell him the shoes. Ware employs about seven clerks, though only five sell shoes, and would not swear from his own personal knowledge that the shoes in court were stolen from his store. He further testified: "Defendant did not purchase any shoes, but bought five cents' worth of calico, while in the store. Witness had just bought these shoes [he was handed the pair of shoes], with a lot of others, the day before, and had not missed this pair until the policeman brought them around to his store to look at, at half past 7 of the same evening. He identified them as being his shoes, from the cost mark on them, and their general appearance. Defendant walked by the counter where these shoes were, and had an opportunity to take them." The policeman testified that he saw defendant going into a barroom, and saw under his arm, in his coat pocket, the toe of a new pair of shoes, which witness supposed defendant had stolen, and witness caught hold of him and found the other in his inside coat pocket. Defendant said he bought them from a negro who worked at the railroad. He said he bought them from Ephraim Nathaniel. He made several statements about them as he

and witness were going to the station house. Witness went to Ware's store, and showed the shoes to Ware, who said they came from his store, and that he identified them by the cost mark on them. The shoes were turned over to the sheriff by the policeman, and have been in the sheriff's possession until the trial. Ephraim Nathaniel testified: "Defendant tried to sell me a pair of shoes like those. I did not have the money to buy them. I would not swear that these are the shoes he tried to sell me. They were elastic shoes, just like these, but I would not swear these were the shoes." Defendant introduced no evidence. He stated: "I did not steal the shoes. I was going up town to get me some calico, when I met a negro at the bell tower, and bought these shoes from him for seventy-five cents. I then went to Ware's store, and bought some calico. Then went to Syke's bar, where I was arrested. I bought these shoes from a negro who works at the railroad. I do not remember his name."

Wm. C. Munday, Jr., and Morgan McMichael, for plaintiff in error. Tol. Y. Crawford, for the State.

PER CURIAM. Judgment affirmed.

(95 Ga. 545)

**DAWSON WATER-WORKS CO. v. CARVER et al.**

(Supreme Court of Georgia. Nov. 26, 1894.)

**INJUNCTION—VALIDITY OF CONTRACT BY CITY—RES JUDICATA.**

There was no error in refusing to enjoin the payment by the city for the water it had already consumed, whether the contract between it and the water-works company for the full period contemplated thereby was valid and binding upon the city or not; but, at the hearing of the application for the interlocutory injunction, the question of the validity of this contract for future supplies of water was not properly for determination, and therefore nothing stated with reference to this question in the order passed by the presiding judge is conclusive upon the parties.

(Syllabus by the Court.)

Error from superior court, Terrell county; J. M. Griggs, Judge.

Action by A. J. Carver and others against the city of Dawson and the Dawson Water-Works Company for an injunction to restrain the defendant city from paying a certain water tax to defendant Dawson Water-Works Company, and to have a contract for the supply of water to the city annulled. From a judgment making certain findings, defendant water-works company brings error. Affirmed.

The following is the official report:

Carver and others, for themselves and other taxpayers of the city of Dawson, brought their petition against the Dawson Water-Works Company and the city and mayor and council of Dawson, praying for an injunction restraining the city and mayor and council from paying, and the water-

works company from collecting, \$1,000, about to become due from the city to the water-works company for water, for the first six months of 1894, furnished by the water-works company to the city for fire purposes, and to restrain the defendants from further carrying out the contract between them, and that the contract might be annulled. Upon this petition, and the answer and demurrer of the water-works company, together with the evidence submitted at the hearing, the judge below refused the injunction prayed for, but made certain rulings, to which the water-works company excepted, and said company brought the case to this court by writ of exceptions.

The petition alleged, in brief: On May 13, 1886, there was published in a newspaper in Dawson a notice that there would be an election held in Dawson on June 11, 1886, "to determine whether the city of Dawson shall incur expenses for water works." This notice was signed by the mayor, and stated that it was given by order of the council. There was no authority for the publication of this notice, it did not conform to the law, and was not a legal notice for the purpose of fixing an indebtedness against a municipal corporation. On June 11, 1886, an election was held in the city, the result of which petitioners do not know, nor is it material. Under the notice and election, no move was made by the city authorities towards water works, unless it be claimed that the building of some cisterns for fire purposes was such a move. Nothing more was done in that direction until 1890, when the then mayor and council entered into a contract with E. L. Bennett and his associates, who were to organize a company to be styled "The Dawson Water-Works Company." This contract was without authority of law, and is not binding on the city. The contract is in the form of ordinances, and is in the city code. Under it the city granted to the water-works company the exclusive privilege for 99 years to construct, maintain, and operate water works to supply the city and its citizens with water, and to lay water pipes and mains along the city streets; and the city agreed to pay the water-works company \$2,000 annually for water for fire and other purposes, \$1,000 to be paid on the first days of January and July of each year thereafter, for 20 years. The company did not complete its system of water works until during the year of 1891, and ever since that time the city authorities have been paying it \$2,000 a year under the contract. On June 9, 1891, the company was incorporated by the superior court, with a capital stock of \$10,000, with the privilege of increase. The time is fast approaching when another installment of the debt will be due, and the city authorities will undertake to pay it. There is no money in the city treas-

ury with which to pay it, and the city will have to borrow the money, or issue its warrant on the treasurer, and it will be held by the company as an indebtedness against the city. Unless the city authorities and the water-works company are restrained, petitioners and other citizens and taxpayers will continue to be assessed and taxed to pay the money under the contract.

The water-works company demurred upon the following grounds: (1) Petitioners have no such interest in the subject-matter of the petition as would authorize them to bring the suit, or entitle them to the decree and relief asked for. (2) Misjoinder of defendants. (3) The petition purports to be an action against the municipal authorities of the city and this defendant, and the suit is not properly and legally against the city council of Dawson. (4) Petitioners fail to set forth any valid or sufficient cause of action against this defendant.

By its answer the water-works company alleged: The notice mentioned in the petition was not the only notice given of the election, but the notice was published in the newspaper mentioned, which had a general circulation in the city, not only on May 13, 1886, but once a week for four weeks preceding the election, and in addition on June 10, 1886, immediately preceding the election on June 11, 1886; and the notice stated plainly the time and place of the election, the purpose for which the election was held, stated it to be by order of the council, was signed officially by the mayor, and was a compliance with the law. It is not true that there was no authority for the notice, and that the notice did not conform to the law, nor is it true that it was not such a notice as is required by law to fix an indebtedness against a municipal corporation. The notice was in pursuance of the charter power of the city council stated, conformed fully to all the requirements of law, and accomplished all the purposes for which the requirement of notice was intended. The time and place and purpose of the election were known to and understood by all. The notice was properly framed for said purpose by order of the city council, of which one of the petitioners, Lowery, was then a member. The election was held on June 11, 1886, and the petitioners do know what was the result, Lowery being one of the aldermen when the election was ordered and the result declared. All of petitioners knew fully the purpose of the election, and, as defendant is advised and believes, voted at the election, and knew the result thereof when it was declared. The building of cisterns had nothing to do with the incurring of the expense of securing to the city the benefit of a system of water works, as contemplated by the election, and was never supposed by anybody to have any connection therewith; nor was the building of such cisterns the result in any wise of the election, or dependent on the vote thereat.

Before the election the city had built several cisterns, and after the election may have added one or two, the expense being inconsiderable. It is not true that, from the election until 1890, nothing was done in the direction of water works. On the contrary, the city council, during the whole time, were carefully considering the question of how best to accomplish the wish expressed at the election, and receiving and inviting such offers as they could get, until in February, 1890, they adopted the proposal of Bennett and his associates, as the fairest and most liberal towards the city, and at the same time the cheapest, that had been offered or suggested. This defendant entered into the contract under the advice of learned counsel that the city council was making a contract which could not be questioned. The contract had the full approval of the city council and the taxpayers and citizens of the city, was published in full for four successive weeks in a newspaper published in the city, and having the largest circulation therein. The validity of the contract or the authority of the city council to make it was not questioned by any one, and no objection was ever offered to making it. This defendant has built an expensive plant and paid out large sums upon the faith of the contract, and has fully complied with the contract on its part. So soon as the contract was entered into, this defendant, with all practicable expedition, went to work to erect and establish the water works in compliance with the contract, and the works were completed as soon as it could be satisfactorily done, the works being amply sufficient for the requirements of the city. This defendant has furnished the city the best of service, it has given no cause of complaint, and the furnishing of water under the contract has been of great benefit to the city and its citizens. The contract is not only legal, and by proper authority, but has received the sanction of legislative enactment, as well as the approval and consent of citizens and taxpayers down to the present time. All of petitioners are enjoying at their homes the use of water furnished under the contract, at the prices fixed therein, and asked no injunction against the city's continuance in the enjoyment of the benefits of the contract, but only ask that this defendant may be cut off from receiving payment therefor. This defendant was chartered and organized with a capital stock of \$40,000, and has invested in its plant, in order to carry out the contract, \$41,000, which money was all of its capital, from beyond the limits of Georgia, in the faith that the money expended in benefiting the city and its citizens would be protected by law, and an honest compliance with the contract on the part of the municipal authorities. It is not true that when the petition was filed the time was fast approaching when the city council would undertake to pay this defendant another installment, but, on the contrary,

the petition was brought upon the procurement and with the consent of the city council, and as part of the plan of the city council to compel this defendant to sell its water-works property to them on their own terms. During May and June, 1894, the city council opened negotiations with this defendant for buying the plant, and this defendant promptly offered to sell at a very reasonable price. The city council desired to buy at a lower sum, which, if accepted, would involve this defendant in serious loss. Thereupon, on June 28, 1894, the city council passed a resolution, prepared by its attorney, to the effect that the city council would no longer comply with its part of the contract, and appointed a committee to carry this purpose into effect. The next day the petition was brought by said attorney, as one of the two attorneys for petitioners. When the contract was made, the property returned in the city for taxation for the then fiscal year was over \$1,000,000, and from that time to the present has been considerably in excess thereof, and in addition the council has other large sources of revenue, such as license and business taxes and fines. The city council owes no debt, and the requirements thereof, except for support of public schools, are small, and if there is no money in the treasury it is because of neglect or willful default of said council to provide for meeting its obligations to this defendant. If the city council has the financial ability to purchase the property, it is at least able to pay this defendant one half-year's installment on the contract. The city is a small town, and the business this defendant could hope to do outside the water to be furnished the city council under the contract was small, and could not possibly justify the expense of constructing or operating a system of water works. Such system would never have been built or attempted but for the contract, and but for such contract this defendant would never have been called into existence. It has realized no profits from the water works, except the payments to be made it by the city council, and it could not hope to do so, and its profit under the contract is small. The construction of the water works extended over considerable time, and required the working of a large force of hands in all the principal parts of the city. The purpose of the works and the contract which caused it was known to all, and there was not a suggestion that the contract was unauthorized or illegal. It appears that the contract between the mayor and city council and Bennett and his associates, successors and assigns, gave to the latter the exclusive privilege for 99 years of constructing, operating, etc., water works for the city, together with the necessary privilege of laying pipes, mains, etc., the latter agreeing to complete and have in operation within 18 months from the date of the contract a thorough system, to furnish 50 fire plugs, free and unrestricted use

of water for fire purposes, and water for private consumers at a maximum rate fixed therein, for which the city was to pay \$2,000 per year for 20 years, in semiannual payments, either in money or warrants on the city treasurer, as the city might elect. The contract was dated February 21, 1890, and is printed in the code of the city of 1893. It further appears that notice of the election was published in a newspaper in Dawson, having a general circulation therein, once a week for four weeks before the election, the terms of the notice being stated in the petition.

At the hearing, plaintiffs submitted the petition, sworn to by them. Also, the testimony of the present mayor, as follows: The \$1,000 due the water-works company for the first six months of 1894 would have to be paid by the city council, and would be paid, unless the injunction be granted. There is no money in the city treasury with which to pay it. Witness, as mayor, and the alderman of the city, in the meeting of June 28, 1894, decided to fight the contract in court. The resolution of that date was prepared by the attorneys of petitioners, one of whom is the city attorney, and the petition was brought in pursuance of the wishes of the city council. Plaintiffs also put in evidence the affidavit of Lowery that when the question of water works was submitted to the voters, in 1886, while he was a member of the city council, the present system of water works was not contemplated or suggested by himself, nor any member of the council, but was simply for enlarging the system of cisterns then in use; and that at that time the city was in debt, needed an election to authorize a further increase of expense, and was not in a condition to authorize issuing of bonds.

The water-works company submitted its sworn answer, there being no waiver of discovery. Also, the affidavit of its treasurer and chief executive officer, who has been and is the officer most thoroughly conversant with its business from the beginning to the present, to the following effect: The main and controlling reason to his company to construct and operate the water works was the agreement of the city to pay annually the \$2,000, and without the guaranty of this sum his company would not have undertaken the construction of the system. Also, the affidavit of Cheatham that during 1890, and several years since, he was mayor of the city; that before entering into the contract the mayor and council examined as to the election held several years before on the subject of water works, and the result of that election was the main factor in shaping and controlling the action of the city authorities in making the contract; that the mayor and council believed and intended, when they entered into the contract, that they were carrying out the wishes of the people, as expressed at the election; that at the time of making the contract, and for some time before, the mayor and council

discussed fully and freely the matter of making it, and endeavored to learn then if there was any objection to the making it; the citizens nearly all acquiesced in the proposed plan of having the water works erected as contemplated by the contract, and in making the contract the city authorities acted in good faith, and believed that they were doing what was right and best in accordance with the wishes of certainly more than two-thirds of the citizens and voters of the city; that in fact no objection was made thereto by any one; and that when the ordinances requiring the water works were passed they were published in the newspaper in which the official advertising of the city was done; no citizen made any protest or objection to the ordinances, and the same were adopted as being satisfactory and unobjectionable. Also, the affidavit of Deubler, one of the five aldermen of the city when the contract was made, tending to corroborate the affidavit of Cheatham, and further stating: When the contract was made, the citizens were clamoring for water works, and continually calling upon members of the city council to know why the city was not given water works after the voters had voted almost unanimously in favor of water works. After the election, and up to making the contract, the council had been examining carefully the question of establishing water works, and the cost thereof, and when Bennett proposed to form a company and furnish the city the benefits of water works, at the price named in the contract, it was believed by the entire council that the terms were very favorable to the city and the citizens, and that the price was reasonable, and deponent still thinks so. The contract was the very best arrangement the council was able to make with anybody. The negotiations with Bennett lasted some time, and the fact and terms of his proposal were well known to the citizens. If the council had had the slightest idea that a vote of the citizens was necessary to be again taken, it would have submitted the making of the contract to the voters of the town before finally adopting it, and there can be no question that it would have been adopted by the voters had such an election been held. But the council believed that the submission at the election in 1886, and the result of that election, was all that could be necessary, and was advised by learned counsel that the contract was legal and binding, and deponent heard no suggestions to the contrary. The time and purposes of the election held on June 11, 1886, were at the time generally known to all the citizens and voters of Dawson, and the election was fully discussed. The vote was a full representative vote, and was larger than the vote cast at the last general election before that, namely in December, 1885, for the election of mayor and council. Also, the affidavit of Kaigler, who was one of the aldermen when the contract was made, which was similar to the affidavit of Deubler. Also, another affi-

affidavit of Deubler that he was a member of the city council when several cisterns were contemplated after the year 1886, and was chairman of the committee which superintended their construction, their average cost being not over \$150 each. Also, the affidavit of the superintendent of the water-works company that, aside from the \$2,000 derived from the city, the income of the company is barely sufficient to meet the actual operating expenses, such as wages, fuel, and lights, in furnishing water to the city and its citizens; and that two of the persons who were aldermen in 1890 are dead. Also, tax records showing that in 1890 the amount of property in the city returned for city taxation, and upon which taxes were paid, amounted to upwards of \$1,000,000. Also, letter from the mayor to the water-works company, showing negotiations by the city to buy the plant, and an entry from the minutes of the city council, showing a resolution to negotiate for purchase of the plant in May, 1894, and minutes of the city council of June 28, 1894, showing resolution refusing to further carry out the contract. Also, minutes of the city council of May 10, 1886, showing that a motion was made and carried that the question of incurring expenses of water works be submitted to the citizens of the city; that notice of an election be run in the Dawson Journal for the time prescribed by law; and that an election be held on said question on June 11, 1886. Plaintiffs admitted that they made no question as to the vote cast being two-thirds of the qualified voters. The mayor and council of Dawson interposed no defense, and no defense was interposed by any other of the defendants, except by the water-works company.

In the order refusing injunction the judge below held: "Under this provision of the constitution (article 7, § 7, par. 1, Const. 1887), the legislature has provided for elections for the purpose of fixing all bonded indebtedness against municipal corporations, but, so far as I have been able to ascertain, the law-making power has never made provision for the purpose of fixing indebtedness against municipal corporations other than bonded indebtedness. In the absence of such general provision by the legislature for fixing other classes of debt, can a municipal corporation, without special authorization from the legislature, hold an election for the purpose of fixing a valid indebtedness against the corporation other than bonded indebtedness? I think not, and so declare." To this ruling the water-works company excepted, alleging that such ruling was error, and, further, that the ruling was an adjudication of the merits of the case, not necessary to be made in the refusal of the injunction, and not authorized by law at the preliminary hearing of the case. The judge held, further: "In any view of the question, it is very clear to me that the election, as held, was not such an election as could fix a valid and binding indebtedness of forty thou-

sand dollars against the city of Dawson. If this view be the correct one, and I am constrained to so hold, the contract for the payment of two thousand dollars per annum for the term of twenty years is illegal and invalid, and it is now so declared." To this ruling the water-works company excepted, alleging that the judge erred in ruling that, under the facts and circumstances, the election as held was not such an election as could fix a valid and binding indebtedness of \$40,000 against the city, and in ruling that said election, if valid, was an election fixing an indebtedness of \$40,000, and in further holding that the contract for the payment of \$2,000 per year for the term of twenty years is illegal and invalid. Further, that the court erred in adjudicating in vacation, upon preliminary hearing and in advance of the final hearing, that the election was invalid, and that the contract was illegal and invalid.

It appears from the decision rendered by the judge below that he held that the city had the right to make annual contracts for a water supply for fire purposes without the preliminary sanction of a popular vote; and though holding that the contract under consideration, being for 20 years, and providing for an indebtedness of more than one-fifth of 1 per centum of the value of the assessed property in the city, was invalid, yet, upon the authority of *Ford v. Mayor, etc.*, 84 Ga. 213, 10 S. E. 732, and *Cartersville Imp., Gas & Water Co. v. City of Cartersville*, 89 Ga. 683, 16 S. E. 25, further held, that the water must continue to flow in the city during 1894, and, flowing, must be paid for; and hence refused the injunction as prayed for.

Hoyl & Parks and Steed & Wimberly, for plaintiff in error. J. H. Guerry and J. A. Laing, for defendants in error.

PER CURIAM. The judgment is affirmed, with direction that the order be construed as herein indicated.

(95 Ga. 535)

### MORRIS v. MORRIS.

(Supreme Court of Georgia. Nov. 26, 1894.)

#### DECEIT—EVIDENCE.

This being an action of deceit, and there having been no misrepresentations upon the part of the defendant to induce the plaintiff to enter into the contract in question, and no misplaced confidence upon the part of the plaintiff, and it appearing that, although the parties were brothers, they dealt each with the other at arm's length, acting each upon his own judgment, and the transaction being otherwise free from fraud, there was no error in granting a nonsuit.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by Samuel M. Morris against John F. Morris. From a judgment of nonsuit, plaintiff brings error. Affirmed.

The following is the official report:

S. E. Morris by his petition alleged that his brother, John F. Morris, had damaged him \$5,000, as follows: Their father, O. C. Morris, left a large estate, part of which consisted of two pieces of realty in the city of Atlanta, a house and lot on Walker street, and a storehouse on the northeast corner of Broad and Hunter streets. Defendant, by reason of his business qualifications, and being a resident of Atlanta, has had the management of said property, and plaintiff, being a resident of Douglas county, knew nothing as to its value. In September, 1890, defendant approached plaintiff, and offered to trade him a farm in Douglas county for his interest in the property above mentioned. His interest in the two pieces was four-fifteenths, and the value, as placed on it by defendant, was \$2,000 for one and \$16,000 for the other. He told plaintiff that the property was only given in at \$12,000, and that the price he put on it was its full market value; also, that the farm consisted of 362½ acres. Plaintiff had all confidence in his brother, and no reason to doubt his statement as to said value or number of acres; and being a farmer, and having no use for the Atlanta property, he accepted defendant's offer, and accordingly made the trade on September 26, 1890. The consideration expressed in the deed from him to defendant is \$6,000, but plaintiff's interest in the Atlanta property was estimated in said trade at \$4,800, of which \$533.33 was represented by his interest in the Walker street lot, and \$4,266.67 by his interest in the Broad street lot; the sum of \$6,000 being inserted as a consideration, not because it was really so, but only upon the suggestion of defendant, and to accommodate him. About a year after the trade, plaintiff learned that defendant, at the time of the trade, had bargained the storehouse to John Ryan, Jr., for \$30,000, and his purpose was to buy up plaintiff's interest as cheaply as possible, and thereby defraud him out of several thousand dollars, and in this way did defraud him out of \$8,733, this sum being the difference between the amount at which plaintiff's interest in the Broad street lot was valued, and the sum at which it was sold. The representations made by defendant as to the value of the storehouse, and as to the number of acres of land, were false and fraudulent, and made for the purpose of deceiving plaintiff, and did deceive him, he believing them to be true, and acting thereon. He has had the farm surveyed, and it turns out to be only 322 acres,—a shortage of 40 acres,—the value of which at the price at which plaintiff took it, being \$664. O. C. Morris died testate in May, 1881, owning the two pieces of city realty previously described, which by his will were devised equally, share and share alike, to plaintiff, defendant, Edward M. Morris, Adaline E. Defoor, and Hubbard N. Morris. Subsequently, plaintiff, defendant,

and James A. Defoor purchased jointly the interest of H. N. Morris in said store property, by which purchase plaintiff became the owner of an interest equal to four-fifteenths of the same. Defendant was nominated in the will as one of the executors thereof, qualified as such, and had full control and management of said property in such character up to the date of the transaction between him and plaintiff, having rented the property, collected the rents, and paid the taxes thereon, and in every particular treated the same as a part of the estate of testator in process of administration. Said property, at the time of exchange, constituted a part of the undistributed estate of testator, and was under defendant's control and management as executor. At the close of the evidence for the plaintiff, the court granted a nonsuit, which ruling is assigned as error.

Plaintiff testified: "Defendant is my brother. Our father was C. C. Morris. In 1890 I lived in Douglasville. Have lived in Douglas county eight or nine years. I once lived in Atlanta. Removed from there in June, 1887, and have not lived here since. I had no control over the property described in my declaration, as to collecting rents, giving it in for taxes, or anything of the sort. I knew nothing of its market value in 1890, except what my brother told me. We finally traded. I cannot state exactly when the negotiations between us began. I came to Atlanta from three to six times a year; and, probably a year before we traded, I would come here, and he would get after me. He wanted to trade me his property on the river. He said his health was so that he could not attend to it, and I had some property close to it, and he said he thought it would suit me better than it would him; and I suppose we were talking about the trade about a year. We had three or four different conversations relative to it. It was consummated on September 26, 1890, at Douglasville, no one being present but him and me. He met me going to supper, and on the way to my house we made the trade. The deed was drawn that night in the office of Roberts. I had no notice of my brother's intention to be there on that occasion. He came on the train about two o'clock in the afternoon. I met him on the street just after the train arrived. He went out to my mother's, a quarter or half mile from the courthouse. I do not remember whether I or my son went after him in my wagon, but he came back to my office, and after supper we walked up town. He stated that his Douglasville property would suit me better than the store property; that he was not able to attend to it; that I had a little property there, and could attend to it, and he would figure his property down there for my interest up here; but he thought his property there was worth more than my interest here, and asked me \$500 boot, and stated to me that the property here was assessed at \$12,000 by competent men. I told

him I thought the property was worth \$16,000. He thought not, and kept on after me to give him boot, and I would not do it. Then he offered to swap if I would give to boot the horse he rode behind that evening, and I would not do that; and after a while he told me it was a trade. We valued the property on the corner of Broad and Hunter streets at \$16,000, and the house and lot on Walker street at \$2,000, and I just gave him my interest in that property, counting it at that value; he claiming at the time that he was giving me \$4,000 more than the property was worth, figuring on the assessment then at \$16,000. He said that was its full value, and more too. I had no knowledge of the market value of this property. I had never asked anyone what it was worth. What induced me to make this trade was, I thought I was getting the full value of my property here, and the property down there was worth fully as much as the property here. I thought I knew what the property was worth down there. I had land there in three or four miles of it, and I thought he was telling me what the property was worth here. The reason he gave for being in Douglasville that evening was that he had not started there. He said he had started to Austell to see Mr. Brockman, and decided, as he had got that far, that he would come on and see myself and mother. On that occasion he had all the deeds to this property in Atlanta; and, after this matter was consummated, he and I returned to my house, and he spent the night, and left next morning. He did not tell me anything about any negotiations pending between him and anybody else relative to this piece of property. It was something like a year before I ascertained that he had disposed of it. I went to his house and asked him about the trade, and told him he could have his land back, or just to let me have half of the money he got, that my interest brought in the property, and he refused to do it. He said it was a fair trade, and that he thought he was entitled to it. I do not know that he told me what he got for it. In the negotiations when the trade was made, he said the country property was worth more than this. He claimed that our father gave \$7,000 for it, and he thought it was still worth that. I told him I did not think so; that there had been freshets; it had been washed off; that there had been depreciation in real estate at that time, from the time he bought it. I think the property was worth \$2,000 less than at the time my father bought it. My age is 45. My brother is about 10 years older. Something was said between my brother and me as to the debts of the estate not having been paid at the time. The understanding was that, if there were any debts behind, he would pay them. It seems to me that contract was in writing, but I do not remember. The transaction I had with my brother, relating to the different pieces of property, was all closed up, and the

deeds passed between us, that night at Douglasville. Defoor (the other executor), my brother John, and I had made several trades about this estate in previous years. We had traded about this estate ever since our father died, off and on. He died in 1880 or 1881, at which time one Attaway held bond for title to half of this plantation I got; and Defoor, brother, and I took that property,—one-half of it,—and paid the estate for it. Father and I owned a mill in Carroll county, which was sold, and Defoor, brother John, and I bought it. Afterwards, I traded my interest in the Attaway place—this place that I now own—to John for his interest in the Carroll property. Afterwards, I traded my interest in the Carroll property for John's interest he drew in the Strong place. John and I drew our land right together, and I traded him my interests in the Carroll and Attaway places for his interest in the Strong place. The Attaway place is the one I got in the trade. I owned one-third interest in the Attaway place. We bought our brother Hubbard's interest. The first trade that was made in this estate, the two executors and I bought Hubbard's interest—the whole of his interest—in the estate. Then my entire interest in the estate was one-fifth and one-third of one-fifth. At the time I swapped this town property for the Attaway place, I did not own any of the Attaway property. Before that I had owned an interest in it for a little while. At the time of the first trade I made with my brother, I owned one-third interest in the Attaway place, but only owned it about a year. That was after it was divided. My father never lived on it. I lived two and a half miles from it. My father bought it in 1879 or 1880. I knew that Defoor and John bought out the interest of Edward in the city property. I have known the Attaway place ever since I could remember. In all these trades I had with Defoor and John, I knew they were executors of the estate. They did not conceal that fact from me. In all these matters I dealt on my own judgment. I did it in that property; generally where I knew it. I did not know the plantation as good as brother did, because I had never been there to see it since I was a boy. I crossed the river, but never went over the land. I suppose my opportunities to know it were fully as good as his. He lived in Atlanta. I sold him a third interest in that identical land, and it was the same land that I got back by the swap. When I made my proposition to exchange my city interest even for his farm, he declined it, and asked me \$500 boot, and said, if I would give him \$500 boot, he would accept my proposition. He and I had been trying to trade, and I did offer to take from him his Douglas county plantation for my interest in this property in Atlanta, and he declined to accept it, and asked me \$1,000 boot. I think probably it was \$1,000 boot he asked me. It is true, I knew all about this property in



Atlanta, and did take a tapeline and go there and measure it, and see exactly how much there was of it. He told me there was only 25 feet frontage on Broad street, or 27, and I went and measured it, and found it to be 27. Then I knew the actual measurement myself before this trade was made, and I knew exactly how much there was of it. I was in Atlanta a month or so before this trade was made. Mr. High had begun to build his house on the corner of Hunter and Whitehall, and on the corner of Hunter and Broad, at the time I was there. I told him I understood High had bought the corner across there, and had paid \$30,000 for it; and my brother told me, 'Yes; there is a great deal more land of it, and Mr. High is very sick of his trade.' I do not know whether that was true or not. I did know about the Seltzer property, that brought \$1,200 a front foot. I told my brother my property was worth as much as his, without any difference. I do not remember leaving it open to him to trade on that basis at any time. I might have done it. I did not know as much about this property as he did. I had heard them say it was renting for \$75 a month. I had not heard about its being increased to \$90 a month. I did not know that when I made this trade. I had never heard of it before. This is the first time I had heard of it renting for that. Previously, I told him I thought it was worth \$16,000. He did not lead me to believe it was worth \$16,000. That was my own estimate. He said he did not think it was worth that much, and I said I thought it was. He said he thought it was assessed at its value. I did not know whether or not that was true. I thought it was not true. He did not tell me he had sold it for anything. I reached the value of our property on my own hook,—from my own judgment. I was told it was worth \$16,000, and John did not lead me to those figures. It was subject, at the time I traded, to an annuity of \$300 in favor of our mother, and the Walker street property belonged to her during her life. Neither of us had any present interest in it. The estate had to pay taxes on all of this property out of these rents. Our mother died in June, 1892, at the age of 76. The annuity was not increased. She accepted it at \$300. I did business in that Ryan house once. I was there about a year. I knew it well. I knew where it was, and all about it. I was acquainted with a great many people who lived in Atlanta. I knew some of the real-estate men. I had every avenue to ascertain the opinion of anybody about the value of that property. I reached the conclusion that it was worth \$16,000, from all that I knew about it. It is true that after the trade I bragged about it, and stated that I would not begin to swap back with him; that I was perfectly satisfied, and would not swap back. I do not recollect saying, 'for \$1,000 boot.' I might have said \$500. That was probably two or three

months after the trade. I did rely on my own judgment as to the value of the property whenever I dealt with him or Defoor. I relied on him,—what he said the property was worth here. I knew nothing about what property was worth here. I did not take what he said the property was worth. I got a little more. He said it was worth \$12,000, and I insisted it was worth \$16,000. His view was that the Douglas plantation was worth \$7,000. He set the city property here at \$18,000. He rated his at \$4,800, that I was giving him. It was expressed in the deed at \$6,000. We traded on the land,—the value of the land here. I traded on the value of the land,—what he told me was the value of the land here. I thought I was getting the land for \$4,800. There was not a word said about that in the contract. John insisted that his was worth \$7,000, and I insisted that the store property was worth \$16,000. There was an understanding, at the time, between us, as to what this property was rated at,—\$16,000 for the store property, and \$2,000 for the Walker street property. I will swear that we agreed that the two together were worth \$18,000. I knew he was trading for himself, and not as executor. I traded with him that way. I do not know of any fact connected with the estate that he concealed from me. He bought my interest in these specific pieces of property. A part of that interest I owned by the purchase from my brother; the other part I owned as legatee; and he owned his interest in the estate partly by inheritance, and partly by purchase. Defoor owned his interest altogether by purchase. His wife owned hers as legatee. I lived here in the city from the fall of 1869 till June, 1877,—about eight years. When I first came here I clerked for my brother John for four months. Then Defoor and I went into business together, and I was in the business those other years. Up to the time of this trade between brother John and myself, we had sold out very much of our property that came from that estate. We had disposed of all the property of the estate except these two pieces, and dealt with one another, each fellow taking care of himself. We traded and swapped a little piece of property here once before. I say I was trying to take care of myself, and make all I could,—make the best trade I could; and he accepted a proposition that I had tendered him. I don't believe it had been over three months. I told him I would give him my interest in the property here for his land in Douglas, I suppose three months before we traded. I had all that time to investigate about the value of this property. I signed the contract that the property was bound by this annuity. It was made the same date when that trade was made. The reason why the consideration is expressed in the deed at \$6,000 instead of \$4,800 is: Roberts asked what was the consideration, and my brother spoke up and

said: 'Put it \$6,000. It is worth that.' I never said anything, and that was the way it was put down."

Stephen A. Ryan testified: "I had negotiations with defendant relative to the store property. I bought it about the first of October, 1890, from him; that is, his interest in it at that time. He was in my store, and I asked him about the price of that property, and we agreed upon the sum of \$20,000 for the shares he said he owned at that time. There were five shares, as I understood, and he owned three and one-sixth. I made him an offer of \$20,000 for it, and he accepted it. I gave him \$20 or \$50, I forget which, to bind the trade. I think I did take a receipt. It is destroyed, lost, or something. I do not know where it is. I cannot recall to mind the exact date of the transaction. It was about the first of October, 1890. I mean it might have been a few days after or a few days before; that is what 'about' means. Probably a year, or a good while, before that, I had told him I would like to buy the property if it was ever for sale. If there was any other conversation up to the time the earnest money was paid, I do not recollect. It is my recollection there were but two conversations about the whole matter. I might have had two or three prior to that. I think I had two or three talks with him; 'that whenever it was for sale I would like to buy it.' I do not recollect how recently it was before the actual sale that I had the conversation with him. A bond for title was made to me by defendant, and that was destroyed. The trade was not abandoned. I originally bought the property for John F. Ryan, and defendant owned the three and one-sixth shares. I wished to get the other one and five-sixth shares which were owned by Defoor and his wife. At the time I made the trade with defendant for \$20,000, it was made with the distinct understanding that he would say nothing about it to anybody, so that I could purchase this property from Defoor and his wife. This understanding was about the first of October, when I gave the earnest money. The bond for title made my brother was about April of the following year. It was not the next day after this transaction in the store that I gave defendant a check for \$2,000. I do not think it was the next day. It was some short while thereafter. I think it was two or three days, something like that, or a little longer; I do not recollect exactly. He came to me a few days after he delivered the deeds, and asked me to let him have some money, and I think I gave him a check for \$2,000. I knew this property was subject to an annuity of \$300. I did request him to reinvest a certain amount of the money in some other property for the annuity. At the time I made the trade with him he represented that he had the titles to this interest he claimed to sell. He did not turn me over the papers immediately, but a day or

two afterwards. The annuity was released from the property. I never did examine the bond that was given to my brother."

Plaintiff introduced the deed to himself from defendant, dated September 26, 1890, recorded October 6, 1890, and covering defendant's Douglas county property; also, the will of O. O. Morris, whereby he bequeathed all of his city property in Atlanta, Ga., "share and share alike, subject to the charges hereinbefore made upon the same," to his four sons—plaintiff, defendant, Edward M. and Hubbard N. Morris—and his daughter, Adaline R. Defoor. The will did not authorize the executors, as such, to sell any part of the city real estate left by the testator.

R. J. Jordan, for plaintiff in error. J. A. Anderson and Dorsey, Brewster & Howell, for defendant in error.

PER CURIAM. Judgment affirmed.

#### TAYLOR PAINT & OIL CO. v. WHISONANT.

(Supreme Court of South Carolina. Dec. 10, 1894.)

Appeal from common pleas circuit court of York county.

Action by the Taylor Paint & Oil Company against J. J. Whisonant. Judgment for plaintiff, and defendant appeals. Dismissed.

L. F. Youmans, for the motion.

McIVER, C. J. On motion of Mr. Le Roy F. Youmans, for Messrs. Edward A. Trescott and J. S. Brice, attorneys for plaintiff (respondent), ordered, that the appeal herein be dismissed for want of prosecution.

#### STATE v. KINARD.

(Supreme Court of South Carolina. Dec. 7, 1894.)

Appeal from general sessions circuit court of Richland county.

George Kinard was convicted of rape, and appeals. Appeal dismissed for want of prosecution.

John Bauskett, for appellant. P. H. Nelson, for the State.

McIVER, C. J. On motion of P. H. Nelson, solicitor, it is ordered that the appeal herein be dismissed, and the remittitur be forthwith sent to the circuit court.

#### Ex parte WILLIAMS et al.

(Supreme Court of South Carolina. Dec. 10, 1894.)

Petition by William M. Williams, H. W. Behlmer, P. H. Hutchinson, and J. H. Freer, owners of real property in, and qualified electors of, Berkeley county, for an injunction. Dismissed.

H. K. Jenkins, for the motion.

McIVER, C. J. This case having been set for rehearing to-day, and the attorneys for the relators having been duly served with notice of

such order, and no one appearing for the relators, now, on motion of Hawkins K. Jenkins, Esq., respondents' attorney, it is ordered that the proceedings be dismissed for want of prosecution.

(115 N. C. 424)

**LOVELACE v. CARPENTER.**

(Supreme Court of North Carolina. Dec. 11, 1894.)

**ESTOPPEL—WHAT CONSTITUTES.**

Defendant in an action to establish a boundary is not estopped from denying the location as claimed by plaintiff because a surveyor, in the presence of defendant, ran the line, in accordance with a deed to defendant, as claimed by plaintiff.

Appeal from superior court, Rutherford county; Armfield, Judge.

Action by W. B. Lovelace against Henry Carpenter to recover land. Judgment for defendant, and plaintiff appeals. Affirmed.

Justice & Justice, for appellant. McBrayer & Durham, for appellee.

**AVERY, J.** After examining the map, together with the deeds offered, we can understand why, in the unique brief of defendant's counsel, they cite no authority to negative a proposition which is itself, as the case is stated for consideration, supported neither by reason nor authority. The plaintiff's title to the land in controversy depends upon whether he can establish the location of a certain pine tree at a certain point, some distance further north than the location contended for by the defendant, and also whether a certain dogwood corner is at a place on Broad river, some distance northwest of that which the defendant claimed to be the true location. The line between the two corners mentioned, if run according to plaintiff's contention, would so locate his deeds as to include the land in dispute, while the defendant insists that the calls of some, if not all, of the deeds constituting the plaintiff's chain of title, pass so far south as not to embrace the locus in quo within the plaintiff's boundary. The plaintiff introduced a grant and five mesne conveyances. The disputed line is described in the grant as running north, 60 east, in four of the mesne conveyances as running north, 80 east, but in the fifth as running north, 70 east, to the birch and dogwood. Several witnesses were examined on behalf of the plaintiff, and testified to facts tending to show where the disputed line and corners were, when plaintiff put in evidence a deed from one O. P. Earl and wife to the defendant, dated March 15, 1878. The defendant thereupon testified on his own behalf that he was present six or seven years after the execution of the deed from Earl to himself, when one Davis, as surveyor, ran the calls of it so as to pass along the upper line, or that claimed by the plaintiff as the true location of his boundary. We are left to infer, without any explicit statement to that effect, that the defendant's

deed appeared to be for land adjacent to that embraced by the plaintiff's deed, the location of the southern boundary of which depended upon the establishing of plaintiff's northern boundary. The plaintiff, upon this assumption, as we infer, asked the court to instruct the jury that the defendant was estopped from denying that plaintiff's corner was located at the point where the surveyor Davis ran the defendant's line in the attempt to determine the dividing line between them. Whether Davis ran the true line or not, his running was no more conclusive upon the defendant of the controversy as to location than was the running by Watkins, the surveyor appointed by the court in this case, of any one of the lines in making his survey. It is not an estoppel by matter of record, because there is no evidence of a judgment in any former suit between the parties affecting the matter in controversy here. The deed of Earl to the defendant is not executed by the plaintiff or any one in privity with him, but to him. Estoppel in pais is the only remaining kind of estoppel known to the law. 1 Herm. Ex'ns, p. 1. Though it may not seem necessary to do so, we will refer to the text books where the nature of this third species of estoppel is explained, to show that there is no aspect of the testimony in which the defendant is precluded from setting up title to the land in controversy, on the ground that his conduct has misled the plaintiff, and placed him in such a position that he must suffer injury if the defendant is allowed to claim the disputed land. 2 Herm. Ex'ns, §§ 967, 970, et seq. Judgment affirmed.

(115 N. C. 730)

**STATE et al. v. PARSONS.**

(Supreme Court of North Carolina. Dec. 4, 1894.)

**BASTARDY—PAYMENT OF ALLOWANCE—ENFORCEMENT—DISCHARGE OF INSOLVENT—WHO MAY OBJECT—PROCEDURE—EXEMPTIONS.**

1. The obligation of the defendant in a bastardy proceeding to pay the allowance to the mother fixed by Code, § 35, is a duty imposed by the state, which it may enforce under its civil jurisdiction, although such allowance must be paid directly to the mother.

2. Under Code, § 2948, providing that every "creditor" opposing the insolvent's discharge may suggest fraud, a mother to whom an allowance has been made in bastardy is a creditor of the father of her child, and may suggest fraud in answer to his petition for discharge.

3. Code, § 2967, in which the putative father of a bastard is declared entitled to be discharged from prison "upon complying with this chapter" (2 Code 1883, c. 27, on "Insolvent Debtors"), authorizes a defendant found to be the father of a bastard to file a petition for such discharge.

4. When defendant in bastardy has been ordered to pay a fine and an allowance to the mother, under Code, § 35, no one but the state can suggest fraud as to the fine and costs, in answer to defendant's petition for discharge filed under Code, § 2942, relating to insolvent debtors.

5. Where the mother of a bastard suggests

fraud in answer to the father's petition for discharge, the judge of the superior court has no power to make, at chambers, in a county other than that where the issue is pending, any order prejudicial to the mother's rights or interest, without her consent.

6. As to the debt created by Code, § 35, providing that the father of a bastard shall pay an allowance to the mother, such father is not entitled to the constitutional exemption of \$500.

Appeal from superior court, Wilkes county; Whitaker, Judge.

Prosecution by the state and Maggie Church, prosecutrix, against M. A. Parsons, for bastardy. Defendant was convicted, and petitioned for his discharge. Judgment for defendant, and the state and Maggie Church appeal. Reversed.

The Attorney General, for the State.

AVERY, J. The judgment in the original bastardy proceeding was that the defendant pay a fine of \$10, an allowance to the mother of the bastard child, and costs, in accordance with the provisions of section 85 of the Code. Prior to the enactment of section 2, c. 92, Laws 1879, which was brought forward in the section of the Code referred to, the law (Battle's Revisal, c. 9, § 4; Rev. Code, c. 12, § 4) had provided that, on the finding of an issue of bastardy against him, the putative father should "stand charged with the maintenance thereof, as the court may order." In *State v. Cannady*, 78 N. C. 539, it was held that the judgment for the fine and costs was not a debt, but both were imposed, in the exercise of the police power, in order to provide for the child. *State v. Manuel*, 4 Dev. & B. 20. In a later case (*State v. Burton*, 113 N. C. 659, 18 S. E. 657, approved in *Myers v. Stafford*, 114 N. C. 234, 19 S. E. 764), it was held that the fine imposed by the act of 1879 made the proceeding in bastardy a criminal action, but with the provision that upon conviction an allowance might be imposed as a police regulation, as well as the fine by way of punishment for the criminal offense. The common practice under the act of 1814 (chapter 12, § 4, Rev. Code; chapter 9, § 4, Battle's Revisal), when the defendant, upon the finding of the issue against him, stood charged, etc., was to impose an allowance of \$60, to be paid, either in bulk or in installments, into court, and by the clerk to the mother, for the maintenance of the bastard. While the law, where the allowance is paid without objection or resistance, operates as did the practice under the former statute, its language is materially different, in that it fixes definitely the sum to be paid, and in that the payment is made by the clerk to the mother in obedience to the terms of the statute itself, and not in accordance with the order of the court, as was formerly the usual course. But the legal obligation on the part of a defendant in a bastardy proceeding is not the less a duty imposed by the state, as distinguished from a debt arising out of contract, because the allowance is now paid, under the terms of the

law, directly to the woman, instead of to the clerk, to be disbursed by him, under the order of the court, to her, as the natural guardian of the child.

On the other hand, a creditor is "one to whom money is due" (Webster Dict.), and the mother to whom an allowance has already been declared due and payable is not taken out of the definition because the money must pass into her hands with a moral trust or obligation to apply it for the maintenance of the bastard. If she was a creditor, and he was her debtor, then, unquestionably, she had the right to file an affidavit suggesting fraud, under section 2948 of the Code, in answer to his petition, and to demand that an issue of fraud should be framed for trial in the superior court, under section 2947. The subsequent section (2967), in which the putative father of a bastard, and "every person committed for fine and cost of any criminal prosecution," are declared entitled to be discharged from prison "upon complying with this chapter," was manifestly intended to be construed as permitting a defendant convicted in a criminal proceeding, or found to be the father of a bastard child,—the proceeding in bastardy being, when that act was passed (Laws 1868-69, c. 162, § 26), one entered on the civil, instead of the criminal, side of the docket,—to file a petition before the clerk, designating the time when he wished to apply for discharge. The petitioner, under that section, prior to the passage of the act of 1879, owed the duty to the state to pay fine, costs, and allowance, but was not a debtor, and therefore was entitled, as a matter of right, to be discharged, upon filing his petition, and showing himself to be an "insolvent," within the legal import of the term, from all obligation to pay the allowance, as well as fine and cost. When, however, the act of 1879 gave rise to the relation of creditor and debtor between the convicted father and the mother of the bastard, the result was that, as to the fine and costs in the newly-created criminal action, the petitioner could claim his discharge without question or interference on the part of any person not representing the state in an official capacity; but as to the allowance, which became a debt *eo instanti* that the order of the court declared it due and payable to the mother, the defendant, like any other debtor, might be compelled to meet a suggestion of fraud preliminary to the granting of an order releasing him. The defendant here was entitled to an order of discharge as to the fine and costs, with which the mother had no concern, but not as to the allowance due her, except in the way provided for all other debtors. Upon the filing of her affidavit, an issue was raised (Code, § 2949), which should have been entered upon the "trial docket of the superior court," and allowed to "stand for trial as other causes." Obviously the judge could not order his discharge as to the allowance to the mother, when the issue was still pending; and the

defendant's right to demand release, as to that debt to her, was dependent upon the finding of the jury thereon. Nor, if the law recognized the mother of the bastard as a party, was he empowered, without her assent to his hearing the motion then and there, to make, at chambers, and in a county other than that where the issue was awaiting trial, any order prejudicial to her rights or interest. *Bynum v. Powe*, 97 N. C. 374, 2 S. E. 170. Had the motion for discharge been made at a regular term of the court, and when the complainant was, or had constructive notice to be, present, action upon it must have been postponed till after the trial of the issue.

It will be conceded that the fine and imprisonment do not constitute a debt, and that it is competent for the legislature to fix the limit of exemption, when prisoners are held in default of payment of the one or the other, either at \$500, or a smaller sum. *State v. Davis*, 82 N. C. 610; *State v. Burton*, supra. The act of 1881 amended the oath prescribed for insolvents by the act of 1869 (Battle's Revisal, c. 60, § 31), and which was construed in *State v. Davis*, supra, by inserting "\$50" as the allowance over and above "such an exemption as may be allotted by law." But by section 2972 of the Code an oath that the defendant was not worth \$50 "in any worldly substance in debts, money, or otherwise" (not above exemptions), was required in all cases. In *Burton's Case*, supra, this oath was administered to the defendant; and it seems to be settled that, as to the discharge from imprisonment for fine and costs, it was within the purview of the legislative power to so limit the exemption to the sum of \$50 where the application is for discharge from imprisonment for nonpayment of fine and costs. But it may have been contended, and doubtless was on the hearing below, that, if the allowance was not a debt due to the mother, only the chairman of the board of county commissioners, or some officer interested in the fee bill (under section 2973), could suggest fraud, and raise an issue, while, if she was a creditor, the defendant was entitled to an exemption of \$500, by virtue of the constitution. We concede the soundness of the former, but not of the latter, of the two propositions stated. The allowance is a debt due to the mother, in the sense that, in accordance with the provisions of the statute, the court has ordered it to be paid to her, to be used for the maintenance of the bastard. The money intended for the support of the child might have been made payable to the overseer of the poor, as the disbursing agent of the county and of the state, for which the county is but an agency, and he would thus have become a creditor in his official capacity, in the sense that the mother is; but the state would not have abdicated its right to enforce the payment of a sum exacted by its order from the defendant, under its civil jurisdic-

tion, in providing for the present support of the child. *State v. Gilles*, 103 N. C. 396, 9 S. E. 433. The chairman of the board of county commissioners has the power, in such cases, to object to releasing a prisoner from the payment of fine and costs, and to raise an issue of fraud, and the mother may make similar suggestions, on oath, in reference to the allowance; but still the court, "in the exercise of a power to compel obedience" to its own orders (*State v. Gilles*, supra), might have imprisoned the defendant in the county jail for a definite and reasonable time, and, under the express authority of section 38 of the Code, the defendant might have been sentenced to the workhouse for a term not exceeding one year. *State v. Burton*, supra. The defendant, as there was no issue made by the chairman of the board of commissioners, or by any officer claiming a fee, could rightfully claim to be released from prison on account of the fine and costs, and, but for the suggestion of the mother, it would have been the duty of the clerk to discharge him. *State v. Burton*, supra.

In making any order at chambers, when the issue stood for trial, without consent, and especially in ordering the clerk to release the defendant on his taking the oath prescribed, there was error. Let this opinion be certified, to the end that the issue raised by the affidavit may be tried in the superior court of Wilkes county. Judgment reversed.

(115 N. C. 780)

#### STATE v. CROOK.

(Supreme Court of North Carolina. Dec. 11, 1894.)

#### CRIMINAL LAW—SUSPENSION OF SENTENCE.

Where sentence is suspended against two convicted persons on the condition that one of them pay all the costs of the case, and such person pays but part of the costs, the presiding judge may impose the suspended sentence, though such defendant had already been committed to jail for default of payment of such costs.

Appeal from superior court, Union county: Bynum, Judge.

Leroy Crook and another were convicted for making an affray with deadly weapons. Judgment was suspended against defendant Crook on condition that he pay all the costs in the case. Defendant having paid but part of the costs, the presiding judge ordered him to be committed to the county jail for six months. From this judgment, defendant appeals. Affirmed.

The defendant Crook pleaded guilty, and the defendant Gurley stated in open court that he would no longer contend against the state, and upon the motion of the solicitor the court made the following order: "Judgment suspended against both defendants upon the payment by the defendant Crook of all the costs of the case, to be taxed by the clerk of this court." The defendant Crook was given time to pay the

costs, and was required to give bond for his personal appearance at the next term of this court; said bond being renewed from time to time in order that the defendant Crook could the more easily pay said costs, which was a very large amount. The defendant so appeared at the said term of said superior court, and so renewed his bond from time to time until August term, 1894,—the present term of said court,—begun and held on the 20th day of August, 1894, to and including the 1st day of September, 1894, when the defendant Crook came into court on the first day of said term, it being the 20th day of the said month of August, 1894, and stated to the court that he had paid part of said bill of cost,—some \$60 or \$70; none of the court costs or state's witnesses, except solicitor's fee of \$8, which was paid by defendant Crook. Thereupon, his honor, R. W. Winston, judge presiding, upon motion of the solicitor, placed the defendant Leroy Crook in the custody of the sheriff of the said county of Union. That the sheriff committed the defendant Crook to the common jail of said county, where the said defendant remained until Saturday, the 1st day of September, 1894, the same being the last day of said two-weeks term of said superior court, and the 12th day that said Crook had been in said county jail, when his honor, R. W. Winston, just before court adjourned for the term, had the defendant Crook brought into court, and adjudged that he be confined in the common jail of said county for six months, with leave to the commissioners to hire him out, he not having paid or arranged the said costs. To which judgment the defendant Crook excepts, and appeals to the supreme court, and assigns as error the ruling of his honor and the judgment of said court: (1) That the former order or judgment of the court, made in February, 1892, that the defendant Crook pay all the costs in this case, including the costs of his codefendant, Gurley, was a judgment of the court against the defendant Crook; and the judgment having been performed in part, to wit, a payment of a part of the costs, it was no longer in the power of the court to change said judgment, and imprison the defendant. (2) That the defendant having stated to the court that he was unable to pay the balance of said bill of costs, and the court having ordered the defendant into the custody of the sheriff, said order was, by implication, a judgment of the court, and an order to the sheriff to imprison the defendant until the costs were paid, or he be discharged according to law; and the defendant Crook, having been in jail 12 days of the 20 or 30 days necessary to remain in jail to be discharged under the insolvent debtor's law, had thereby executed a part of this judgment, and it was no longer in the power of the court to change the judgment in a manner to make

it more harsh. That the court committed error as pointed out in Nos. 1 and 2, as above. Defendant Leroy Crook prayed an appeal to the supreme court.

F. H. Whitaker, Jr., for appellant. The Attorney General, for the State.

AVERY, J. The practice of making an order, where defendants are convicted or submit on a criminal charge, that the judgment be suspended upon the payment of the costs, is one that seems to be somewhat peculiar to our own courts; but it must be admitted that its adoption has proved very salutary, both in bringing about the reformation of petty offenders, and in the suppression, especially of certain classes, of offenses. The exercise of this discretionary power has not heretofore been questioned, and the beneficial effects of its judicious use have been made so manifest as to commend it both to the judges and the people. We search in vain for direct authority, emanating from the courts of other states, to aid us in determining the precise meaning of such orders, because it has not been the practice to make them elsewhere in the same way. The order is, in effect, a final judgment for the whole or a certain proportion of the costs incurred in the prosecution of the charge, but a suspension of the sentence of fine or imprisonment, either generally and indefinitely, or till some specified term of the court. We cannot understand how the rights of a defendant are infringed, or his interests prejudiced, by allowing him to escape for the present upon a partial judgment for the costs, and suspending the motion or prayer for further punishment, instead of subjecting him immediately to such fine or imprisonment as his own criminal conduct has made him liable to suffer. In civil causes this court has approved the practice of granting a writ of restitution, on appeal, to one wrongfully dispossessed of land under a justice's judgment, and by the same order retaining the case till witnesses could be summoned, and the damages growing out of the wrongful ejection assessed. *Lane v. Morton*, 81 N. C. 38. We might adduce other instances in which one branch of a controversy has been finally disposed of while other matters in dispute have been retained to await further investigation preliminary to judgment, but it is needless to do so.

It is familiar learning that a court may suspend the judgment over a criminal in toto until another term, but has no power to impose two sentences for a single offense, as by pronouncing judgment under one count in an indictment, and reserving the right to punish under another count at a subsequent term, or by imposing a fine, and at a later term superadding imprisonment. *State v. Ray*, 50 Iowa, 520; *State v. Miller*, 6 Baxt. 513; *State v. Watson*, 95 Mo. 411, 8 S. W.

333; *People v. Felix*, 45 Cal. 163; *Thurman v. State*, 54 Ark. 120, 15 S. W. 84; *Whart. Cr. Pl. & Pr.* § 913; *Whitney v. State*, 6 Lea, 247. The judgments, orders, and decrees of a court, as a general rule, are under its control and subject to modification during the term at which they are entered; but where a defendant has undergone a part of the punishment the sentence cannot be revoked, and another, except in diminution or mitigation, substituted for it, because he would be twice placed in jeopardy, and twice subjected to punishment, for the same offense. *State v. Warren*, 92 N. C. 825; *Ex parte Lange*, 18 Wall. 163. The punishment which the courts are prohibited from inflicting twice is usually fine or imprisonment, now that corporal punishment is inflicted only in a few offenses, of a character more serious than that of which the defendant was convicted. *State v. Burton*, 113 N. C. 662, 18 S. E. 657; 1 Bish. Cr. Law, § 940. But costs neither constitute a part of the relief in civil actions (4 Am. & Eng. Enc. Law, p. 313, and note), nor of the punishment in criminal prosecutions, though the payment of them, or a proposition to pay, may be considered in mitigation of sentence by the court. The payment of costs is regulated by our statute (Code, § 1211), which provides that every person convicted, or confessing himself guilty or submitting to the court, shall pay the costs of the prosecution, and the legal effect of a conviction and judgment is to vest the right to the costs in those entitled to them; but, where a fine is imposed, it is due to the state, and is remitted by a pardon granted by the governor. *State v. Mooney*, 74 N. C. 99. The right of the officers to recover costs in the name of the state is a mere incidental one, arising out of the conviction under the provisions of our statute; and the judgment for them, as we have seen, vests the claim in the officers to whom they are due. The order for the payment of them is no more a part of the punishment proper than that to pay an allowance and costs on conviction in bastardy; but in both cases the legislature, in the exercise of the police powers of the state, has provided for the protection of the public by making a defendant liable to imprisonment, as an inducement to the payment of such costs or allowance. *State v. Burton*, at page 659, 113 N. C., and page 657, 18 S. E.; *Myers v. Stafford*, 114 N. C. 234, 19 S. E. 764; *State v. Parsons* (decided at this term) 20 S. E. 511. In *Com. v. Dowdlean's Bail*, 115 Mass. 136, we find a recognition of the principle we have stated in the long-continued practice of the courts of that state, which eventually (in 1865 and 1869) received the sanction of the legislature. The court said: "It has long been a common practice in this commonwealth, after verdict of guilty in a criminal case, when the court is satisfied that by reason of extenuating circumstances, or the pendency of a question of law in a like case before a higher court, or other

sufficient cause, public justice does not require an immediate sentence, to order, with the consent of the defendant and of the attorney for the commonwealth, and upon such terms as the court, in its discretion, may impose, that the indictment be laid on file. \* \* \* Such an order is not equivalent to a final judgment, or to a nolle prosequi or discontinuance, by which the case is put out of court, but is a mere suspending of active proceedings in the case, which dispenses with the necessity of entering formal continuances upon the docket, and leaves it within the power of the court at any time, upon the motion of either party, to bring the case forward, and pass any lawful order or judgment thereon. Neither the order laying the judgment on file, nor the payment of costs, therefore, entitled the defendant to be finally discharged." It thus appears that, under the name of "laying the indictment on file," the courts of that state accomplished the same result attained here by suspending judgment. Such orders are not prejudicial, but favorable, to defendants, in that punishment is postponed, with the possibility of escaping it altogether; and it is presumed that the party adjudged guilty is present and assenting to, if not asking for, such orders. *Gibson v. State*, 68 Miss. 241, 8 South. 329. If the payment of the costs constitutes no part of the punishment, as was held by the supreme court of Massachusetts, and by the court of Mississippi in *Gibson's Case*, supra, as well as by the supreme court of Florida in *Ex parte Williams*, 26 Fla. 310, 8 South. 425, then the payment of a portion of it by the defendant is not undergoing or performing a part of the sentence, and does not bring this case within the principle announced in *State v. Warren* and *Ex parte Lange*, supra. *Easterling v. State*, 35 Miss. 210.

It is conceded that when the court couples with the payment of the costs any judgment that might have constituted a part of a sentence, as that a public nuisance be abated, in case of conviction for creating it, the power of the court is exhausted in its rendition, and the suspension of judgment is deemed to have been ordered on condition of the performance of such requirement. *State v. Addy*, 43 N. J. Law, 113; *Gibson v. State*, supra. But the suspension of the judgment upon the payment of the whole of the costs by one of the two defendants in this case, including the solicitor's fee due from his codefendant, and the actual payment of both fees taxed for the prosecuting officer, fails to bring it within the principle announced in *Addy's Case*, supra, since the adjudication that such codefendant pay his own fee, as a part of the costs, would have constituted no part of his punishment, and when added, as a part of the costs, to defendant's bill, inflicts no punishment on him. The court merely suspended judgment on the condition of paying the costs of the other defendant, as well as his own, as a

part of the terms upon which the favor of the postponement was granted, as it is the practice to do on conviction in such cases. *Gibson's Case*, supra.

It has always been the practice in our courts, so far as we can ascertain, where the judgment for costs is rendered in the same order of the court which imposes the sentence, to leave the exact amount of the costs to be taxed by the clerk, and, under the act of 1879, to be revised by the judge. The practice under that act was to revise the bills of costs at chambers, and it seems neither to have been contemplated by the courts nor by the legislature that costs in a criminal action constituted a part of the punishment for the offense, and that the party convicted might consequently claim the right to such notice as would enable him to be present when the court should adjudge what amount was due. "Where the defendant is found guilty, and the court pronounces judgment that he pay a fine, and stand committed until it be paid, the imprisonment is no part of the punishment, but only a mode of enforcing payment of the fine." 1 Archb. Cr. Pr. & Pl. (Pom. Ed.) p. 530; *Son v. People*, 12 Wend. 344. The same principle applies where he is committed during a term for nonpayment of a judgment for costs, like that in this case, and is brought before the judge during the same term on the prayer of the solicitor for judgment. The court, in such cases, orders the defendant to be committed by way of inducement to pay the costs. If the order prove ineffectual, it becomes optional with the court whether he shall be allowed to remain in prison, and rid himself of responsibility for costs by taking, at the proper time, the insolvent debtor's oath, or whether he shall be brought to the bar of the court, and subjected to the sentence which still remains suspended over him. An order of commitment, whether for nonpayment of fine and costs, or costs only, can be modified during the term at which it is entered (*Burton's Case*, supra), because, where there is a sentence to pay a fine, "its execution" does not begin, in contemplation of law, till the power of modification by the court ends, and the committal for failure to discharge costs is treated as an effort to enforce the payment, till the same period. The rule is different where the court sentences a prisoner, as a part or the whole of its judgment, to a term of imprisonment in the common jail, and he is immediately committed to prison. In such cases he is not incarcerated for failure to pay, or to enforce payment of, fine and costs, but is deemed, from the day of his commitment to the expiration of the term, to be undergoing his sentence. Upon the expiration of his term, he may still pay fine and costs imposed in addition to imprisonment, but on his failure to do so the law holds him to be still committed for the statutory period, and until he shall comply with the requirements of the statute. *State v. Parsons* (decided at this

term) 20 S. E. 511. We think, therefore, that there was no error in the ruling of the court below, and its judgment is affirmed.

(115 N. C. 415)

NEAGLE v. HALL et al.

(Supreme Court of North Carolina. Dec. 11, 1894.)

ADMINISTRATOR — DEATH BEFORE ACCOUNTING — ACTION TO RECOVER ASSETS—BY WHOM MAINTAINED.

Where an administrator sells land of the intestate to pay debts, and dies before making his final account, an heir of the intestate cannot sue the legal representatives of such administrator for proceeds of such sale alleged to have been converted by the administrator before his death, such action being maintainable only by an administrator de bonis non of the estate of such intestate. *Alexander v. Wolfe*, 88 N. C. 398, distinguished.

Appeal from superior court, Gaston county; Boykin, Judge.

Action by W. E. Neagle against John Hall and others, executors of the estate of James D. Hall, deceased. From a judgment for defendants, plaintiff appeals. Affirmed.

Frank I. Osborne, for appellant.

BURWELL, J. The defendants are the executors of the will of James D. Hall. He was the administrator of the estate of J. B. Neagle, who died in 1865, and as such administrator, under an order of court duly obtained, he sold the lands of his intestate to make assets to pay debts. This was done in 1866. He used, it is alleged, only a part of the proceeds of the sale of this realty in the payment of debts, and died in 1892 without having filed any final account of his administration of said estate, and having in his hands about \$2,720 of said proceeds of sale of land. The plaintiff avers that his father was one of the two heirs at law of J. B. Neagle, and, upon the death of said Neagle, inherited one moiety of his land. He further says that his father died in 1872, leaving the plaintiff and another son his only heirs, and that the latter died intestate in 1883, leaving plaintiff as his only heir. He seeks in this action to recover of the defendant executors, and of the sureties on the administration bond of their testator, one-half of the fund arising from the sale of the land of J. B. Neagle, as stated above, which was in the hands of James D. Hall at his death. To the complaint containing the foregoing averments, the defendants demurred, insisting that this action could not be maintained by the plaintiff, the administrator de bonis non of J. B. Neagle alone having authority to receive from them the money so alleged to have been in their testator's hands. The demurrer was sustained, and the plaintiff appealed.

No one, save an administrator de bonis non, has the right to call upon the defendant executors for an account of their testator's management of the assets of the estate of J. B.



Neagle. As to personality, this is well settled. *Lansdell v. Winstead*, 76 N. C. 366; *Ham v. Kornegay*, 85 N. C. 119; *Merrill v. Merrill*, 92 N. C. 657. If the allegations of the complaint are true, the administration of the estate of J. B. Neagle is unfinished. The final accounting which the law requires has not been had. That can only be done with an administrator, and not till it is done can it be ascertained what part, if any, of the assets that came to the first administrator has been used for the purposes of the estate, and what part is in the defendants' hands. Though that balance may be the proceeds of the sale of land, it must be paid over to the successor of the first administrator, as administrator *de bonis non*, to be by him accounted for to such persons, whether next of kin or heirs at law, as may be entitled to it. This case is, we think, clearly distinguishable from that of *Alexander v. Wolfe*, 88 N. C. 398. The fund which that plaintiff held at law recovered was, in legal effect, land. It was the proceeds of the sale of an infant's realty, made by that infant's guardian. The death of the infant had put the right to this fund in the heir, just as it would have put the title to the land in him, if it had not been sold. The guardian held it all as land, and his representative also so held it. To ascertain how much it was, no accounting for personal assets was necessary. No error.

(115 N. C. 386)

**SIMPSON et al. v. LIFE INS. CO. OF VIRGINIA.**

(Supreme Court of North Carolina. Dec. 11, 1894.)

**LIFE POLICY—MODIFICATION—PROVISION AS TO CONTEST.**

Where an insurance company modifies a life policy by an agreement "that all restrictions of travel, occupation, or residence expressed in the original policy" shall be waived, and further agrees that from that time the policy shall be "incontestable," and that when the policy becomes a claim "the amount of insurance" shall be paid on approval of the proof of loss, the provision in the original policy that in case of death by suicide the company shall be liable only for the "net value of the policy" no longer remains in force. *MacRae, J.*, dissenting.

Appeal from superior court, Rutherford county; Winston, Judge.

Action by Mary A. Simpson and others against the Life Insurance Company of Virginia on a life insurance policy. Judgment for plaintiffs. Defendant appeals. Affirmed.

Osborne, Maxwell & Keerans, for appellant. McBrayer & Durham, for appellees.

**BURWELL, J.** The defendant agreed "that all restrictions of travel, occupation, or residence expressed in the original policy" should be waived. By this stipulation, the fourth section of the original policy was in effect stricken out, and forms no part of the contract between these parties. It further

agreed that the policy should be, from the date of that agreement, "incontestable," and, as if to emphasize this promise, it added that when the policy became a claim "the amount of insurance" should be paid to the beneficiary immediately upon approval of proof of death. If the policy had lapsed or been discontinued, as by nonpayment of the stated premium, it would not, upon the death of Robert Simpson, have become a claim against the defendant insurer. It was in full force at the time of that death, and has become "a claim," and the plaintiff demands the "amount of insurance." What is meant by "the amount of insurance"? Certainly the sum for which the life was insured,—the sum which, under the contract, was to be paid to the plaintiff, in case of her husband's death, as indemnity for her loss. Those words cannot, we think, be construed to mean "the net value of the policy,"—a sum which, by the terms of the original contract, was to be paid under certain circumstances in lieu of the amount of insurance, to wit, \$2,000. This construction is consonant with the preceding provision that the policy should be "incontestable." The quality of incontestability could with no propriety be predicated of this contract of insurance if it was still allowed to the insurer to dispute its liability to the insured for the "amount of the insurance" upon the ground that the death was caused "by the use of intoxicating liquor, or by opium, or from the violation of law, or any condition or agreement contained in this policy, or the application upon which this policy is issued." And yet, if it may now, under its contract, contest with this beneficiary as to its liability for the amount of the insurance upon the allegation that the deceased committed suicide, it may contest with beneficiaries under other similar contracts upon the grounds enumerated above. If this can be done, the policy is certainly not incontestable, for the whole field of dispute would then be open to the defendant.

In *Bliss on Life Insurance* (2d Ed., p. 428) the word "indisputable" is used to designate the quality here expressed by the word "incontestable." In a note on page 431 that author remarks: "Lord Campbell says (*Wheelton v. Hardisty*, 8 El. & Bl. 232, 283) that a promise that all assurances shall be 'unquestionable' means 'indisputable,' and amounts to an absolute guaranty that no objection shall be taken to defeat the policy on the death of the person whose life is insured, subject to the implied exception of personal fraud, which will vitiate any contract." This policy became, by virtue of the defendant's agreement, what Mr. Bliss, on page 432, denominates "a really indisputable policy," which should be "subject to no condition whatever." Affirmed.

**MACRAE, J.** (dissenting). I cannot concur with the reasoning or the conclusion arrived at by a majority of the court in this case.

It seems to me that by all rules of construction the agreement of defendant that the policy should be incontestable had reference to the matters named in the same sentence: "all restrictions of travel, occupation, or residence." Further, the express agreement in the original policy was that if the insured should die by suicide the company should not be liable beyond the net value of the policy. In other words, in case of natural death, the amount of insurance was \$2,000; in case of suicide, it was only the net value of the policy. And this the defendant is not contesting.

(115 N. C. 744)

**STATE v. VARNER.**

(Supreme Court of North Carolina. Dec. 11, 1894.)

**CRIMINAL LAW—INSTRUCTIONS—OBJECTIONS.**

1. Defendant may except specially to the charge after verdict.

2. An exception, that on the whole charge the court presented the case in a manner to prejudice defendant, should indicate some particular in which harm was done.

3. The omission to give an instruction is not ground for reversal, in the absence of a request to so instruct.

Appeal from superior court, Lincoln county; Boykin, Judge.

Letha Varner was convicted of adultery, and appeals. Affirmed.

The Attorney General, for the State.

CLARK, J. There was no exception taken at the trial, but the defendant excepted specifically to the charge after verdict. This she had a right to do. *Lowe v. Elliott*, 107 N. C. 718, 12 S. E. 383, and other cases cited in Clark's Code (2d Ed.) p. 383. The first exception—that on the whole charge the court presented the case in a manner to prejudice the jury against the defendant—should have indicated some particular in which harm was done; besides, it is not sustained by an examination of the charge sent up. The second, third, fourth, and fifth exceptions are for alleged omissions to charge. This is not ground for exception. If the defendant had wished more specific instructions, she should have asked for them in writing, and in apt time. *Id.* p. 382, and cases cited. The last exception is that the court should have instructed the jury, on all the evidence, to acquit the defendant. If this exception is for an omission to charge, it is no ground for an exception, for there was no prayer to so instruct. If it is either a demurrer to evidence or an exception that there was no evidence to go to the jury, it is too late after verdict. *State v. Kiger* (at this term) 20 S. E. 466. Besides, the evidence was in fact amply sufficient to submit to the jury. *State v. Poteet*, 30 N. C. 23; *State v. Ellason*, 91 N. C. 564; *State v. Chancy*, 110 N. C. 507, 14 S. E. 780. Its credibility and weight were for the jury to determine. While the in-

dictment is not in the very words of the statute, the offense is sufficiently charged. *State v. Stubbs*, 108 N. C. 774, 18 S. E. 90. No error.

(115 N. C. 344)

**GRADY v. WILSON.**

(Supreme Court of North Carolina. Dec. 11, 1894.)

**LIMITATIONS—SUSPENSION—NEW PROMISE.**

1. The insanity of a debtor does not suspend the statute of limitations.

2. A remark by the executor of a debtor that a creditor need not hire a lawyer to prosecute his claim, as he (the executor) would do whatever the judge said, will not revive the claim when it was at the time of the remark barred by the statute.

Appeal from superior court, Burke county; Allen, Judge.

Action by Louisa Grady, as administratrix of William B. Grady, against James W. Wilson, as administrator of John Tuett, for services rendered. Judgment was rendered for plaintiff, and defendant appeals. Reversed.

Battle & Mordecai, for appellant. Isaac T. Avery and S. J. Ervin, for appellee.

CLARK, J. The allegation of the complaint is that the plaintiff's intestate rendered services during the years 1881, 1882, 1883, and 1884 as a servant for defendant's intestate, who promised time and again to pay for them. The complaint further alleges the reasonable value of said services, so as to recover upon a quantum meruit. The answer alleges full payment of said services, and says that, if defendant's intestate promised any additional compensation or any compensation, it "was in parol, and more than three years had elapsed since the making of such promise, and the defendant specially pleads the statute of limitations upon such promise." The statute was sufficiently pleaded, whether the action is on the express promise or the implied promise. *Stokes v. Taylor*, 104 N. C. 394, 10 S. E. 566; *Fulps v. Mock*, 108 N. C. 601, 13 S. E. 92; *Stubbs v. Motz*, 113 N. C. 458, 18 S. E. 387. This is not a case where the alleged promise is to pay out of the estate after death. Here the statute began to run for each year's services at the end of the year. The statute began to run for the last year's services on January 1, 1885, and three years had elapsed before the death of either plaintiff's intestate or of defendant's intestate. The Code (section 164) has therefore no application. The claim as to 1881 and 1882 was already barred upon the defendant's intestate becoming insane, in 1886. As to the claim for 1883 and 1884, the statute, having begun to run, was not suspended by the supervening insanity. *Chancy v. Powell*, 103 N. C. 159, 9 S. E. 298. Action should have been brought within the three years against the employer, or, after the insanity, against his guardian. The debt

could have been established by judgment, even if the allegation was correct that it could not have been collected till after the ward's death, on account of the income being required for his support. The claim being barred before the death of defendant's intestate, and there being neither proof nor allegation of a new promise in writing (Code, § 172) by the defendant, it is not necessary to consider the question which that would have raised (*Flemming v. Flemming*, 85 N. C. 127.) The reply of the administrator to the plaintiff that it was not necessary to get a lawyer, and that he "would see the judge, and do whatever he said," was not conduct which waived the statute, and justified the plaintiff in not bringing action. *Hill v. Hilliard*, 103 N. C. 34, 9 S. E. 639; *Joyner v. Massey*, 97 N. C. 148, 1 S. E. 702. Besides, the claim was already barred, and the plaintiff was not prejudiced by the delay. Error.

(115 N. C. 398)

**HEATH et ux. v. McLAUGHLIN.**

(Supreme Court of North Carolina. Dec. 11, 1894.)

**WILLS—ABATEMENT OF LEGACIES.**

Where an estate is insufficient to pay all the legacies, the general should abate before the specific legacies.

Appeal from superior court, Mecklenburg county; Winston, Judge.

Action by E. J. Heath and Annie Heath, his wife, against Charles R. McLaughlin, surviving executor of Joseph McLaughlin, deceased, to compel defendant to deliver to plaintiff Annie Heath 12 shares of stock bequeathed to her by Joseph McLaughlin, deceased. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

A testator bequeathed several general legacies, and also several specific legacies, but when testator's estate was reduced to money it was found that there was not a sufficient amount to pay in full the pecuniary legacies bequeathed in the will. The executor thereupon called on plaintiffs to pay a sufficient amount so as to make the legacy of stock and the money legacies abate ratably.

The following are the provisions of the will referred to by the court: "(5) I give and confirm to my daughter, Annie Heath, all that I have heretofore given her, and put into her possession; and, in addition to what has heretofore been given her, I give and bequeath unto her two shares of the capital stock of the Columbia Manufacturing Co., ten shares of the capital stock of the People's Bank, and the sum of two hundred dollars (\$200)." "(15) It is further my will and desire, and I hereby direct, that in case it becomes necessary that there be an abatement of any of the legacies herein bequeathed in order to pay debts, or for other purposes, that all the other legacies shall abate before there is any abatement of the legacy be-

queathed in trust for my said wife in the first clause of this will."

Jones & Tillett, for appellant. Walker & Cansler, for appellees.

CLARK, J. The testator owned at his death the shares of stock bequeathed to the plaintiff. The legacy was a specific one. *McGuire v. Evans*, 40 N. C. 269. It is a general rule that specific legacies do not abate with, or contribute to, general legacies. There are exceptions, as where the whole estate is given in specific legacies, and then a pecuniary legacy is given, or where an intention that the specific legacies shall abate appears in the will. *White v. Beattie*, 16 N. C. 320; *White v. Green*, 36 N. C. 45; *Biddle v. Carraway*, 59 N. C. 95. But nothing of that kind appears in the present case. The provision in clause 15 of the will simply provides that all the legacies shall abate before there is any abatement of the legacy given in clause 1 to his wife. But this, while protecting that legacy from abatement, does not affect, as to the other legacies, the usual order of abatement, to wit, the general legacies first, and then the specific legacies. Affirmed.

(115 N. C. 348)

**McEWEN v. LOUCHEIM et al.**

(Supreme Court of North Carolina. Dec. 11, 1894.)

**FINDINGS BY REFEREE—REVIEW ON APPEAL—RIGHT TO COMMISSIONS.**

1. Where the trial court makes no findings of fact, those of the referee will be presumed to have been adopted.

2. One who, at the request of his employer, sells goods outside of the territory embraced in his contract, may recover his usual commissions on such sales.

3. A referee's findings of fact are not reviewable on appeal.

Appeal from superior court, Ashe county; Allen, Judge.

Action by W. J. McEwen against Joseph Loucheim & Co. to recover commissions on sales of goods by plaintiff, employed as defendants' traveling salesman. From a judgment affirming the report of a referee in favor of plaintiff, defendant firm appeals. Affirmed.

Haywood & Haywood, for appellant. B. A. Daughton, for appellee.

CLARK, J. The judge having made no specific findings of fact, he is presumed to have adopted those of the referee. *Battle v. Mayo*, 102 N. C. 413, 9 S. E. 384. The plaintiff sued for commissions on the bill of goods sold to Carrol & Co. While this was disallowed because the sale was made in territory not embraced in the contract, it being found as a fact that the trip to make the sale was made at the request of the defendant, the referee properly allowed the plaintiff his expenses and reasonable compensation

for his time. *Stokes v. Taylor*, 104 N. C. 394, 10 S. E. 566. There was no error in allowing the commissions on sale to Yarborough, which was according to the contract. There were allegations of fact in the answer which, if found true, negatived liability as to this item and for the \$27.32, but the finding of the referee was adverse, and we cannot review his findings of fact. The judge below possessed that power, but he approved the referee's findings. We do not find in pleadings or referee's report any admission by plaintiff of credit of \$23.54, as stated in the fourth exception. The receipt was only prima facie evidence, and it was directly impeached by the replication. *Harper v. Dail*, 92 N. C. 394. The sixth exception is too general to be considered, except as it covers matters embraced in the specific exceptions just referred to. *Clark's Code* (2d Ed.) pp. 413, 414. No error.

(115 N. C. 366)

#### ERWIN v. ERWIN.

(Supreme Court of North Carolina. Dec. 11, 1894.)

#### CONSTRUCTION OF WILL—ANNUITY—FUND FOR PAYMENT.

Testator gave C. certain land for life, and directed his executor to also pay her an annuity of \$300, and the remainder in the land was given to G., "provided he pays to the estate \$2,000." No disposition was made of the \$2,000 directed to be paid. The annuity was not paid, and C. assigned it, before her death, to plaintiff. *Held*, that plaintiff was entitled to have the \$2,000 applied on his claim, or, on failure of G. to pay such sum, to have the land sold to satisfy the same.

Appeal from superior court, Burke county; Graves, Judge.

Action by Hamilton Erwin against George P. Erwin, executor. There was a judgment for plaintiff, and defendant appeals. Affirmed.

The case agreed was as follows:

"(1) That A. H. Erwin, a citizen and resident of Burke county, died in said county on the 4th day of October, 1877, having first made and published a last will and testament appointing the defendant, George P. Erwin, his true and lawful executor, a copy of which said will, duly admitted to probate and recorded in the clerk's office in Burke county, is hereto attached as a part of this case. (2) That the said George P. Erwin qualified as such executor on the 15th day of October, 1877, and immediately entered upon the duties of his said office. (3) That according to the provisions of item 7 of said will, which reads as follows: 'I give and bequeath to my sister Cecelia M. Erwin all my household and kitchen furniture and my buggy and harness, to dispose of as she pleases, and direct my executor to pay her three hundred dollars annually during her life, which will enable her to board herself where she pleases if she is not disposed to live at Belvidere, and this amount will be sufficient to support her with

the rents from Belvidere wherever she may desire to live,'—Cecelia M. Erwin was entitled to be paid by said executor, out of the estate of the said A. H. Erwin, the sum of \$300 annually during her life. (4) That the said executor failed to pay the said sum of money to the said Cecelia M. Erwin, as provided in said item 7 of said will, for a number of years, and, the account therefor having been duly assigned to the plaintiff, Hamilton Erwin, he brought two several suits in the superior court of Burke county, and recovered two several judgments thereon, to wit, one for the sum of \$1,680, with interest on \$1,500 from March 21, 1892, at six per cent. per annum, as follows: '[Title of court and cause.] This cause coming on to be heard upon the verified complaint, and no answer being filed by the defendant, it is now, on motion of Avery & Erwin, attorneys for plaintiff, considered and adjudged that the plaintiff, Hamilton Erwin, do recover of the defendant, Geo. P. Erwin, executor of A. H. Erwin, the sum of sixteen hundred and eighty dollars (\$1,680), with interest on fifteen hundred dollars (\$1,500) from 21st of March, 1892, at the rate of six per cent. per annum till paid, together with the costs of this action, to be taxed by the clerk; this judgment to be paid by the said Geo. P. Erwin whenever assets come into his hands belonging to the estate of his said testator, or whenever any sum or sums of money shall be due from him to said estate, or for any reason payable by him to said estate. J. F. Graves, Judge Presiding.' And the other for the sum of \$210, with interest thereon at six per cent. per annum from 20th of March, 1893, as follows: '[Title of court and cause.] This cause coming on to be heard, upon the sworn complaint, and it appearing to the court that personal service of summons has been had on the defendant, and that no answer has been filed, it is now, on motion of Avery & Erwin, attorneys for plaintiff, considered and adjudged that the plaintiff, Hamilton Erwin, do recover of the defendant, George P. Erwin, executor of A. H. Erwin, the sum of two hundred and ten dollars, with interest thereon from the 20th day of March, A. D. 1893, at six per cent. per annum till paid, together with the costs of this action, to be taxed by the clerk; the sum to be paid out of any funds now in the hands of said executor, or which may hereafter come into his hands as such executor, or for which the said G. P. Erwin may hereafter be in any manner liable to said action. Jas. D. McIver, Judge Presiding.' (5) That the personal property belonging to the estate of said testator has been exhausted, and there are no assets with which to pay said judgments unless the funds hereinafter mentioned are liable therefor. (6) That item 1 of said will is as follows: 'I will and devise to my sister Cecelia M. Erwin my tract of land, including this old mansion of my father, known as "Belvidere," and the improvements on such parts thereof as I may not include in the specific devises in this will, to have and

to hold for and during her natural life, and at her death the remainder to Geo. P. Erwin and his children, provided he pays to my estate the sum of two thousand dollars, my object being to keep this old family mansion in the family as long as possible.' (7) That Cecelia M. Erwin, the devisee for life named in said item 1 of said will, died on the — day of —, 1894.

"The respective parties claim as follows:

(1) The said Hamilton Erwin claims that he is entitled to have the said sum of \$2,000, which is to be paid by the said George P. Erwin, applied to the payment of the sums due him on the judgments hereinbefore set forth. (2) The said George P. Erwin, executor as aforesaid, claims that the said fund is not applicable to the payment of said judgments, or any part thereof, but should be paid to the heirs of A. H. Erwin."

The following is the judgment: "This cause coming on to be heard upon the case agreed, and the court being of opinion that the sum of two thousand dollars, which is or should be in the hands of said executor, should be applied to the payment of the judgments mentioned in case agreed, it is now, on motion of Avery & Erwin, J. T. Perkins, and S. J. Erwin, counsel for the plaintiff, considered and adjudged that the defendant, G. P. Erwin, executor of A. H. Erwin, pay to the plaintiff, Hamilton Erwin, the said judgments out of the said sum of \$2,000 which he is due said estate, as stated in the case agreed; the said judgments to be paid pro rata, and the cost of this proceeding to be taxed by the clerk. This judgment is without prejudice to the rights of claims of J. W. Wilson as assignee or otherwise. W. R. Allen, Judge." The defendant excepted to this judgment, and appealed.

M. Silver, for appellant. John T. Perkins and S. J. Erwin, for appellee.

MacRAE, J. The Belvidere place was devised to Cecelia M. Erwin for her life, with remainder, after her death, to George P. Erwin and his children, "provided he pays to my estate the sum of two thousand dollars." It will be seen that a condition was attached to the devise of the remainder. This devise could never take effect until the payment of the sum named. This sum was not a charge upon the land, for, if such were the case, the estate in remainder in the land would have vested in George P. Erwin and his children, subject to a lien or charge thereon for the same; but, by virtue of the condition precedent, the estate in remainder could not vest until the payment of the sum named. It will appear, by item 8 of the will, that the testator intended to have made further disposition, by codicil, of the personal estate and the proceeds of real estate directed to be sold, and which should remain in the hands of the executor after payment of debts and charges incident to the execution of the will and of

the specific legacies. Having failed to make such disposition, it necessarily follows that he died intestate as to such portion of his estate as was not specifically devised or bequeathed, there being no residuary clause in the will. There is nothing in the will to indicate that the testator intended that the \$2,000 to be paid by George P. Erwin should be distributed in any other manner than the balance of the personal estate. It therefore, when paid in, becomes part of the said personal estate, liable for the debts, charges, and legacies. The annuity of \$300 bequeathed to said Cecelia, never having been paid, and her claim therefor having been duly assigned to the plaintiff and reduced to judgment, has now become a debt against the estate, and, all the other personal property having been exhausted, it will be the duty of the executor to satisfy these judgments out of the said \$2,000, if the same has been paid in. If the same shall not be paid, the condition not being fulfilled, the devise of the remainder in fee of the Belvidere place will never take effect, and said lands will become part of the undivided real estate of the testator, subject to the satisfaction of the judgments. This was clearly the will of the testator. His expressed desire was to keep this old family mansion in the family as long as possible, so he devised it to Cecelia for her life; and, if George P. Erwin should pay the \$2,000, then it was to go to him and his children in fee as tenants in common. It rests with him whether the first desire of the testator shall be carried out. Affirmed.

(115 N. C. 538)

MYERS et al. v. REEDY et al.

(Supreme Court of North Carolina. Dec. 11, 1894.)

**GUARANTY—RELEASE OF GUARANTOR.**

A guarantor of the payment of goods furnished a merchant is released by a delay of three years in notifying him of default.

Appeal from superior court, Lincoln county; Winston, Judge.

Action by S. F. Myers & Co. against A. W. Reedy and W. L. Crouse on a contract of guaranty. Judgment for defendants. Plaintiffs appeal. Affirmed.

The guaranty was embodied in a letter from defendants to plaintiffs in which defendants stated that A. A. Miller desired to obtain goods from plaintiffs for the purpose of sale, and that, for a certain commission, they would guaranty his payment of goods sold to him by plaintiffs, on 30 days' and four months' time, not exceeding \$75. The guaranty was made in 1890. The court found in accordance with the testimony that Miller went out of business in 1891; that at that time he had more than \$100 worth of goods on hand, and that he did not give the guarantors notice that he owed plaintiffs; that defendants did not know till 1894 that Miller owed plaintiffs, and that, had they

known it within a year after default, they could have saved themselves from any loss; that plaintiffs did not notify defendants of the default, and did not pay them anything for the guaranty. Miller's testimony that, after the guaranty was made, plaintiffs, without defendants' knowledge, gave Miller an extension of time, was uncontradicted.

R. T. Gray, for appellants.

S. G. Finley and D. W. Robinson, for appellees, filed the following brief:

This was an action by plaintiffs to recover judgment against defendants upon their written guaranty of payment for goods to be sold to A. A. Miller. By agreement of counsel, the facts were found by the court in accordance with the evidence set out in the record. We submit that, upon all the evidence and facts found by the court, plaintiffs were not entitled to judgment.

1. It was a continuous guaranty until the limit of \$75, therein specified, was reached. 9 Am. & Eng. Enc. Law, p. 77, note 3; Crittenden v. Fiske, 46 Mich. 70, 8 N. W. 714. Being such, the guarantors were entitled to notice of the acceptance of the guaranty, and of the amount for which they would be held responsible, within a reasonable time, and plaintiffs must aver and prove such notice. 9 Am. & Eng. Enc. Law, p. 78; Oaks v. Weller, 37 Am. Dec. 583; Milroy v. Quinn, 69 Ind. 406; Beebe v. Dudley, 59 Am. Dec. 341; Paper Mills v. Travis (Minn.) 58 N. W. 36. There is no averment and no proof of any such notice in this action, but there is evidence that no such notice was given either defendant.

2. Again, the plaintiffs must aver and prove that they gave notice to defendants' guarantors of the default of their principal within a reasonable time thereafter, and that they were looked to for payment. 9 Am. & Eng. Enc. Law, pp. 68, 79; Cox v. Brown, 6 Jones (N. C.) 100; Sutton v. Owen, 65 N. C. 123; Reynolds v. Edney, 8 Jones (N. C.) 406. Certainly, want of notice from guarantor to guarantors of default of principal, given within a reasonable time, will discharge the liability of guarantors where they have suffered loss thereby. 9 Am. & Eng. Enc. Law, p. 82; Walker v. Forbes, 60 Am. Dec. 498; Reynolds v. Douglass, 2 Am. Lead Cas. p. 53, etc.; Whiton v. Mears, 45 Am. Dec. 233; Milroy v. Quinn, 69 Ind. 406; Bishop v. Eaton (Mass.) 37 N. E. 665. In Beeker v. Saunders, 6 Ired. 380, a delay of nearly three years in giving this notice and bringing suit was held to discharge guarantor from liability. In the case at bar the delay in giving the notice was even longer than in Beeker v. Saunders, and seems to have been given to but one of the defendants, to wit, A. W. Reedy. If the notice had been given within a reasonable time after default, the guarantors could have indemnified themselves, because the principal had on hands sufficient goods to satisfy the guaranty.

3. Again, the plaintiffs failed to aver or prove that they had made demand of the principal debtor before commencing action, or that he was insolvent. Farrow v. Respass, 11 Ired. 170; 9 Am. & Eng. Enc. Law, p. 68, note 1.

4. The limit of defendants' liability and plaintiffs' cause of action arose when amounts due on Miller's account, with plaintiffs, reach the sum of \$75. See authorities under 1, above. This was more than three years prior to the commencement of this action.

5. According to the uncontradicted testimony of Miller, a new contract was made between him and plaintiffs, after the guaranty was given, by which the manner of payment was changed and the time for payment was extended, and this was done without the knowledge or consent of guarantors. Thereby the guarantors were released and discharged. 9 Am. & Eng. Enc. Law, p. 83; Smith, Merc. Law, p. 582; Grice v. Ricks, 3 Dev. 62; Fellows v. Prentiss, 45 Am. Dec. 484; Bishop v. Eaton, supra.

PER CURIAM. We have examined the authorities cited by counsel, and are of the opinion that they sustain the judgment of the court below. Affirmed.

(115 N. C. 402)

VIRGIN COTTON MILLS v. ABERNATHY.  
(Supreme Court of North Carolina. Dec. 11, 1894.)

TRIAL—REFUSAL TO SUBMIT ISSUE—EXCEPTION—  
DEFECT IN COMPLAINT—FAILURE TO ALLEGE  
TENDER—WAIVER—JUDGMENT NON OBSTANTE  
VEREDICTO.

1. An exception to a refusal to submit an issue must be taken before the verdict is rendered.

2. A general denial in an action on a note given for a stock subscription cures a failure to allege in the complaint that the stock had been tendered to defendant.

3. A judgment for defendant non obstante veredicto will not be granted where the defense is a general denial.

Appeal from superior court, Mecklenburgh county; Boykin, Judge.

Action by the Virgin Cotton Mills against W. M. Abernathy on a promissory note. Judgment was granted for plaintiff, and defendant appeals. Affirmed.

Maxwell & Keerans, for appellant. Walker & Cansler, for appellee.

CLARK, J. The first and second exceptions for failure to submit the issue requested, and for issues actually submitted, come too late after verdict. Code, § 412 (2); Phifer v. Alexander, 97 N. C. 335, 2 S. E. 530; Taylor v. Plummer, 105 N. C. 56, 11 S. E. 206; Lowe v. Elliott, 107 N. C. 718, 12 S. E. 383. The issues are, however, in fact sufficient, under the rule approved in Humphrey v. Board, 109 N. C. 132, 13 S. E. 793. The "general denial" cured any failure to allege tender of the certificate, as the only

reason for requiring a tender before action brought is to throw the costs of an unnecessary action upon the plaintiff. *Waddell v. Swann*, 91 N. C. 108; *Moore v. Garner*, 101 N. C. 374, 7 S. E. 732. Besides, this is not a purchase from another, but from the company itself, and in effect a subscription to its capital stock. The prayers for instruction, so far as correct and relevant to the case, were given. There was no ground for the motion for judgment non obstante veredicto, which is only granted when the answer confesses a cause of action, and the matter relied on in avoidance is insufficient. *Walker v. Scott*, 106 N. C. 53, 11 S. E. 364. No error.

(115 N. C. 794)

## STATE v. CALDWELL.

(Supreme Court of North Carolina. Dec. 11, 1894.)

## CONSTITUTIONAL LAW — PROSECUTION FOR HOMICIDE—BLOW INFLICTED OUTSIDE OF STATE—DYING DECLARATIONS—ADMISSIBILITY.

1. Act 1891, c. 68, which provides that if a mortal wound is given on the high seas, or land without the limits of this state, by means whereof death ensues in any county thereof, said offense may be prosecuted and punished in the county where the death happens, is constitutional.

2. Such act applies to foreigners as well as citizens of the state.

3. Const. U. S. art. 3, § 2, providing that in criminal prosecutions "the trial shall be held in the state where the crime shall have been committed," applies only to prosecutions in the federal courts for crimes against the United States.

4. Where deceased, before making his declaration to his physician, told him that he knew that he was going to die, the fact that the physician told him that he thought he was going to die, but hoped that he would get well, and that another person had just told him that the physician had hopes for him, does not render the declaration inadmissible.

Appeal from criminal court, Mecklenburg county; Meares, Judge.

Samuel Caldwell was convicted of manslaughter, and appeals. Affirmed.

The defendant was charged with the murder of one Bob Nelson, upon the following bill of indictment, viz.: "State of North Carolina, Mecklenburg County. Criminal Court, August Term, 1894. The jurors for the state, upon their oath, present that Sam Caldwell, late of Mecklenburg county, at and in said county, on the 10th day of May, 1894, with force and arms, did feloniously, willfully, and of his malice aforethought, kill and murder Bob Nelson, against the form of the statute in such cases made and provided, and against the peace and dignity of the state." Before the plea of not guilty was entered, the defendant offered the following affidavit, viz.: "Sam Caldwell, being duly sworn, says that he is informed and believes that the alleged homicide for which he stands indicted in the criminal court was committed, if anywhere, in the county of York and state of South Carolina, and not in the county of

Mecklenburg and state of North Carolina, as alleged in the bill of indictment in the case above named."

Having introduced the foregoing affidavit the defendant entered a plea in abatement, on the ground that the court did not have jurisdiction. The plea in abatement was overruled by the court and the case was ordered to proceed to trial. The defendant excepted to the ruling of the court in overruling the plea in abatement. The defendant then pleaded not guilty, and the state introduced as a witness Dr. J. J. Rone, who testified as follows, viz.: "About the 15th of May, 1894, I saw Bob Nelson, since deceased, two and a half miles below Pineville, lying in some bushes near the railroad track. His head was badly injured by some dull instrument. There were three blows upon his head,—one scalp wound upon the back of his head, and one blow upon each side of the head, near the temple bone. He was carried to Pineville about an hour afterwards. He lived ten days. The bone was crushed on the right and left temple, and an abscess formed on the brain under the left temple, which was the immediate cause of his death. Either of the wounds on the sides of his head would have produced death. He was unconscious when I found him, near a little path leading from the railroad about twenty steps from the railroad track. There were signs in the path of a struggle, and the body had been dragged to the place where I found it." Here the state proposed to ask the witness what the deceased told him as to how the difficulty between the prisoner and deceased took place. Defendant objected, and the witness testified as to the condition of deceased when he (deceased) made the statements, as follows, viz.: "On the 3d day (after the deceased was stricken) deceased was conscious, and his mind seemed brighter. I told him that I thought he would die, but that his recovery was possible, but not probable; that I had heard of men's brains being partly knocked out, and then recovering, and that I hoped he would get well. He said he thought he would die. I had two other conversations with him, of the same purport. On the 5th day he walked to the door with me, and said he wanted to talk to me again about the matter, and he went through the particulars as to how the affair had happened. In this conversation he again said that he would have to die; that he could not live with his head crushed in that way. I told him I thought he would die, but hoped he would get well." The defendant objected to the admission of the declaration of the deceased, and, at defendant's request, E. W. Russell was put upon the stand, and said that he saw the deceased just before the doctor did, and told him (deceased) that the doctor had hope for him. Russell being a state's witness, the defendant objected to the admission of declarations of deceased. The court overruled the objection, and the de-

defendant excepted. The witness Bone proceeded to testify as follows, viz.: "The deceased said he was looking for prisoner; that he came across prisoner on the railroad; that he and prisoner walked down the railroad till they came to a path, and went a little ways up the path, and prisoner asked him what he was doing. He told him he was squirrel hunting. Prisoner said, 'Yes, I know what squirrels you are hunting'; and then, to allay the suspicions of the prisoner, he (deceased) fired off his gun,—one barrel. 'Then we' (prisoner and deceased) 'sat down, and were talking, when prisoner said, 'Look yonder. What a fire!'" and as deceased turned his head to look the prisoner struck him (deceased) on the head with a rock, and he (deceased) could not remember anything more. The place where the assault occurred is between a mile and a mile and a half beyond the South Carolina line, in South Carolina. Deceased said, when he met prisoner, he asked who he was, and prisoner replied 'Sam Caldwell.' He (deceased) said he did not attempt to arrest prisoner; that he had no papers, and he wanted to fool him back over the line, so that some one could arrest him who had authority. That both the prisoner and deceased were citizens of Mecklenburg county, in this state." The state rested here, tendering the other witnesses to the defendant for examination. Whereupon, William Keener was called, and testified as follows, viz.: "I waited on deceased. He would ask me to do something for his head, saying he would die if I did not. He often would say that he would die, but I told him that he would get well, to encourage him. He (deceased) said he was hunting prisoner. That he first came on prisoner suddenly, and that he (prisoner) was up a tree. To show prisoner that he had no intention of molesting him, he fired off his gun. Prisoner told him, if he was a friend of his (prisoner's), to shoot off his gun, and then he shot it off. Prisoner called his attention to a fire, and, as he looked, prisoner struck him."

The prisoner, Sam Caldwell, was then introduced in his own behalf, and testified as follows, viz.: "I was walking down the railroad, and the deceased overtook me, walking fast, and holding his gun half raised. Just before deceased overtook me, not knowing the man, and judging from his manner that he had some intention towards me, I asked him if he was hunting, in order to get a word out of him. He did not answer, but asked me my name. I answered, 'Sam Caldwell.' He then pulled his gun on me, and said, 'Get before me,' and as I turned to get before him the gun fired. Then I seized the gun, having squatted under him. Then the struggle commenced. After we had struggled some little time, I snatched the gun from his hands. He seized me. I threw the gun down, and the struggle continued, his efforts seeming to recover the gun. We were partly down, on our knees. Deceased got my finger

in his mouth, and I could not free myself. I picked up a rock, and struck deceased on the back of the head. This blow had no effect on him, and I struck him again, on the left side of the head. This blow released my finger, but he continued to struggle, and I struck him on the right side of the head. This blow weakened him, and I did not strike him any more. I did not know the man, and had no harm against him. After the difficulty, I went my way."

State resumed. The state introduced E. L. Yandle, and proposed to show by him (Yandle) a statement made by the prisoner before a magistrate the day after the difficulty. Defendant objected. On examination by the solicitor, the witness, in order to qualify himself, testified as follows, viz.: "After the prisoner was arrested, he asked to see a magistrate. We went before a magistrate, and he told magistrate that he wanted to make a statement, and the magistrate told him he could do as he pleased, and warned him that it might be used against him. I do not know whether prisoner was sworn or not, nor do I know whether his testimony was taken down in writing or not." The defendant's objection was overruled, and he excepted. The witness said: "We went to the magistrate to get a mittimus, and prisoner insisted on making a statement. It was substantially as here, except that he said there that deceased fired one shot before there was any struggle, and fired a second shot when the scuffle began."

The evidence here closed. The defendant asked the court to charge the jury that there was a fatal variance between the allegation and the proof, in that the bill of indictment alleged a murder committed in the county of Mecklenburg, and state of North Carolina, whereas the proof showed that the murder, if any, was committed in the county of York, and state of South Carolina. The court refused to give this instruction, and the defendant excepted. Verdict of manslaughter. There was a motion for a new trial, and the following errors assigned, viz.: (1) That the court erred in overruling the plea in abatement, to the jurisdiction; (2) that the court erred in admitting the dying declarations of the deceased; (3) that the court erred in admitting the statement of the prisoner made before the magistrate; (4) that the court erred in charging that there was no evidence to go to the jury; (5) that the court erred in refusing to charge that there was a fatal variance between the allegation and the proof. Motion for new trial overruled. Defendant excepted. Judgment. Defendant appeals.

Jas. A. Bell and H. N. Pharr, for appellant.  
The Attorney General, for the State.

SHEPHERD, C. J. There are several exceptions in the record, but the only one argued by counsel in this court involves the validity of Act 1891, c. 68, which provides



that "if a mortal wound is given or other violence or injury inflicted, or poison is administered on the high seas or land, either within or without the limits of this state, by means whereof death ensues in any county thereof, said offence may be prosecuted and punished in the county where the death happens." This statute is the same, in totidem verbis, as the acts of Massachusetts and Michigan, and is substantially similar to the act of 2 Geo. II., and of many of the states of this Union. In sustaining the validity of this legislation, the supreme court of Massachusetts, in *Com. v. Macloon*, 101 Mass. 1 (Gray, J.), remarked that: "This statute is founded upon the general power of the legislature, except so far as restrained by the constitution of the commonwealth and of the United States, to declare any willful or negligent act which causes an injury to persons or property within its territory to be a crime, and to provide for the punishment of the offender, upon being apprehended within its jurisdiction. Whenever any act which, if committed wholly within one jurisdiction, would be criminal, is committed partly in and partly out of that jurisdiction, the question is whether so much of the act as operates in the county or state in which the offender is indicted and tried has been declared to be punishable by the law of that jurisdiction." *Kerr*, *Hom.* 225; *State v. Hall*, 114 N. C. 913, 19 S. E. 602. The statutes referred to, and those providing that the offender may be indicted in the state where the assault is committed, although the death occurs in another state (*Code*, § 1197), were evidently intended, among other reasons, to solve the much-debated question whether, at common law, the offender could be tried at all,—that is, in either jurisdiction,—the doubt suggested being that the offense was complete in neither. This uncertainty led to the enactment of 2 & 3 Edw. VI., which provided that the offender might be tried in the county of the death, although the blow was inflicted in another county. This statute, either as a part of the common law or by re-enactment, is in force in many of the states of the Union. The validity of such legislation does not seem to have been questioned, but, where the principle has been extended to cases in which the blow is in another state or county, it has been very vigorously assailed. It is insisted that the crime was complete where the blow was inflicted, and that such legislation is therefore contrary to article 3, § 2, of the constitution of the United States, which provides that the trial "shall be held in the state where the said crime shall have been committed." In *Tyler v. People*, 8 Mich. 319, the court, in sustaining the statute, used the following language: "The shooting itself, and the wound which was its immediate consequence, did not constitute the offense of which the prisoner is convicted. Had death not ensued, he would have been guilty of an assault and battery,

not murder, and would have been criminally accountable to the laws of Canada only. But the consequences of the shooting were not confined to Canada. They followed Jones into Michigan, where they continued to operate until the crime was consummated in his death." This reasoning is quoted with entire approval in *Com. v. Macloon*, *supra*, and the court, in speaking of the dissenting opinion in the foregoing case, said that it "proceeds upon the ground that no part of the criminal act of the defendant was done at the place of the death,—a position which seems to us to be untenable, for the reasons already stated, and the ingenious arguments and illustrations adduced in support of which will not stand a critical examination." Mr. Bishop (1 Cr. Law, 112, 161) takes the opposite view,—that death is but a consequence of the unlawful blow, and that the offender has committed no breach of the law in the jurisdiction where the death occurred. We deem it unnecessary to enter into an elaborate discussion of this question, as it is exhaustively treated by Justice Gray in *Macloon's Case*, *supra*, and by Justice Brannon in the recent decision of the supreme court of West Virginia in *Ex parte McNeeley*, 36 W. Va. 84, 14 S. E. 436. In both of these cases, as in *Tyler's Case*, *supra*, the validity of this legislation is sustained. In *Hunter v. State*, 40 N. J. Law, 495, Chief Justice Beasley says that the contrary view, indicated by the justice in delivering the opinion in *State v. Carter*, 27 N. J. Law, 499 (cited by counsel), was "entirely extrajudicial," and he commends the courts sustaining statutes of this character as entitled to the highest respect. See, also, the authorities cited in *State v. Hall*, *supra*. In *United States v. Guiteau*, 47 Am. Rep. 261, Mr. Justice Bradley said: "There is no doubt that the legislature might have enacted, in so many words, that, if either the mortal stroke should be given or the consequent death should happen within the territory, it should be deemed a murder committed here." The cases from Michigan and Massachusetts are directly in point against the position that the offense was wholly committed in the state where the blow was stricken. There are other cases which lead to a similar conclusion, though the precise question was not distinctly presented. This view would, of course, take the case out of the supposed constitutional limitation, but it must be borne in mind that the provision of the constitution referred to is not a limitation upon the power of the state. Even Mr. Bishop concedes that it is not a question of constitutional law. In *McNeeley's Case*, while the learned justice seemed to be of the opinion that the place of the blow was the place of the crime, he nevertheless came to the conclusion that there was no constitutional restriction upon the state to enact the law in question. He remarks: "Mr. Bishop, the great author, while resisting such statutes with reasoning which seems to me to be very strong and satisfac-

tory, yet says that the question is not one of constitutional law, but one of international law, and properly admits that, if a legislature command a court to violate international law, it is bound to do so. See *Endl. Interp. St.* 175. If, then, he be right in the question not being one of constitutional law, this court could not, on his theory, refuse to execute this law. \* \* \* In none but a case of very plain infraction of the constitution, where there is no escape, will or ought a court to declare a statute unconstitutional. To doubt is only to affirm the validity of the law." After stating that there are no cases directly declaring such statutes unconstitutional, and instancing the Cases of *Macloon* and *Tyler* in which they were distinctly upheld, and other cases which concede their validity, the court continues: "As to the contention that the statute before us violates article 3, § 2, of the United States constitution, we need only say that it applies to United States court proceedings only, relating only to proceedings for offenses against the United States. So does amendment 6. *Fox v. Ohio*, 5 How. 410; *Cook v. U. S.*, 133 U. S. 157, 11 Sup. Ct. 268; *Barron v. Baltimore*, 7 Pet. 243; *Spies v. Illinois*, 123 U. S. 131, 8 Sup. Ct. 21." We are not inadvertent to the possible inconveniences attending the administration of this law in cases where the blow is inflicted in distant places, but, as was said in *Tyler's Case*, "the expediency or policy of the statute has nothing to do with its constitutionality."

It is argued that the statute should be construed in reference to international law, and that it should be confined to citizens of this state who have inflicted mortal wounds elsewhere. It is sufficient to say that we have no authority to so restrict the plain and broad language of the law, and such was the ruling in the Cases of *Macloon* and *Tyler*, *supra*.

After a careful consideration of the able brief of counsel, we must conclude that these authorities are sufficient to warrant us in sustaining the statute under consideration. It may be observed that the case of *State v. Cutshall*, 110 N. C. 547, 15 S. E. 261, cited on the argument, expressly refrains from passing upon this question, and impliedly recognizes the validity of such legislation in cases of homicide. In that case it was clear that the crime of bigamy was fully completed in South Carolina.

The other exceptions growing out of the provisions of the statute, such as variance and the like, must, under the view we have taken, be overruled. What the indictment should charge as to the place, etc., is satisfactorily discussed in *Macloon's Case*, and sustains the ruling of his honor. The other exceptions were not pressed on the argument, but should be noticed.

We can see no error in admitting the dying declarations of the deceased, as testified to by Dr. Bone. Under the circumstances stat-

ed by this witness, and especially the conversation at the time of the declaration (in which deceased said he would have to die; that he could not live with his head crushed in that way,—the witness telling him that he thought he would die, but hoped he would get well), we think the court was warranted in admitting the testimony. The fact that another witness had told the deceased, just before the doctor saw him, that the doctor had hopes of him, cannot alter the result. This was subsequently corrected by the doctor himself.

Neither is there any merit in the objection to the statement of the prisoner before the justice of the peace. It does not appear that there was any judicial investigation before him.

The plea in abatement was also properly overruled. *State v. Merritt*, 83 N. C. 677.

After a careful examination of all of the exceptions in the record, we see no reason for disturbing the judgment of the court below. Affirmed.

(115 N. C. 410)

CHARLOTTE BLDG. & LOAN ASS'N v.  
BOARD OF COM'RS OF MECK-  
LENBURG COUNTY.

(Supreme Court of North Carolina. Dec. 11, 1894.)

TAXATION OF CORPORATE STOCK—HOW LISTED  
FOR TAXATION—EXEMPTIONS.

1. The capital stock of a building and loan association is subject to taxation for state and county purposes.

2. Const. art. 5, § 3, provides that "all" property shall be uniformly taxed. Section 5 provides that the general assembly may exempt property held for certain purposes. *Held*, that the assembly can only exempt from taxation the property therein specified.

3. Under Acts 1893, c. 296, § 14, requiring the officers of a corporation to list for taxation all the "shares of stock" held therein, and the value thereof, the capital stock must be listed by the corporate officers, and not by the individual stockholders.

4. Under Act 1893, c. 296, § 14, corporations must pay taxes assessed on their shares of stock.

Appeal from superior court, Mecklenburg county; Winston, Judge.

Action in a justice court by the Charlotte Building & Loan Association against the commissioners of Mecklenburg county to recover taxes paid under protest. From a judgment of the superior court affirming a judgment for defendant, plaintiff appeals. Affirmed.

This action was begun in a justice's court, and, on appeal by the plaintiff to the superior court, it was there submitted on the following agreed facts: "(1) That the plaintiff, the Charlotte Building & Loan Association, of Charlotte, N. C., is a corporation created and organized under chapter 7, vol. 2, of the Code of North Carolina, and has its residence or place of business in the city of Charlotte, county of Mecklenburg aforesaid, its articles of association having been

obtained from the clerk of the superior court of said county under and by virtue of the provisions of said chapter of the Code. (2) That the capital stock of the said association was listed for taxation in Charlotte township, in said county, under protest, for the year 1893, on the — day of —, A. D. 1893; the commissioners of the said county claiming that the said association was liable to taxation on said stock, and the plaintiff claiming that under the law, and especially under section 30, c. 294, of the Acts of 1893, the said association was not liable to taxation on the said stock. (3) That the said stock, with the valuation thereof, was duly entered on the tax list of said county, as required by law, and the following tax, which was also entered on said books or list, was assessed upon the same: State tax for year 1893, \$31.17; county tax for year 1893, \$31.67; convict tax for year 1893, \$13.57; road tax for year 1893, \$5.28. That said tax list, duly certified by the register of deeds and ex officio clerk of the said board of commissioners, was placed in the hands of R. A. Torrance, tax collector of said township, with an order indorsed thereon by the clerk of said board, commanding the said collector to collect the taxes therein mentioned according to the provisions and requirements of the law. (4) That the said tax collector demanded payment of said tax from the plaintiff, and said plaintiff, by compulsion and under protest, paid said taxes to said collector on the 8th day of December, 1893, and that within thirty days thereafter the plaintiff duly demanded in writing from the treasurer of the state, and from the treasurer of the said county of Mecklenburg, that the said tax be repaid and refunded to it, to which demand the said treasurer of the state and the treasurer of said county refuse to comply. And that the said tax has not been refunded to this plaintiff, although more than ninety days have elapsed since the said demand was made, and also since the thirty days from the day of payment expired. (5) That the stock of the plaintiff association is owned in different amounts by divers persons, who are citizens and taxpayers of the said township, county, and state. (6) That before this action was brought the plaintiff duly demanded, in writing, of the defendant, the repayment of the said tax, which has been paid by it to the tax collector, and with this demand the defendant refused to comply."

The questions submitted to the court on this case agreed are as follows: "(1) Is the capital stock of the plaintiff taxable, under the laws of this state, for state and county purposes, or for either? (2) Should the said stock have been listed for taxation by the said association, or by the individual stockholders? (3) If the stock of said association is taxable under the laws of this state, who is liable for the tax thereof,—the said association, or its individual stockholders?

"If the court shall be of the opinion that the said stock is taxable, and that it is the duty of the said association to list and pay the tax on same, then judgment of nonsuit and judgment against the plaintiff for defendant's costs shall be entered; but if the court shall be of the opinion that the said stock is not taxable under the laws of this state, or that, if taxable, the stock should be listed and the tax paid by the individual stockholders, then judgment shall be entered that plaintiff recover of the defendant the amount of said tax so paid by it, to wit, the sum of (\$81.69) eighty-one and 69-100 dollars, with interest on the same from the date of the payment thereof, and the costs of this action. It is also agreed that if the court should be of the opinion and shall determine that the said tax, or any part thereof, was levied or assessed illegally or without authority, or was for any reason invalid, judgment shall be rendered in favor of the plaintiff for the amount of said tax, with interest and cost. It is further agreed that the court may render judgment, and thereby grant any relief to the plaintiff that it may, under the law, be entitled to in the premises."

Judgment: "In this case the court is of the opinion that the capital stock of the plaintiff association cannot be doubly taxed, that the plaintiff is the proper person to give in said stock for taxation, and that there is no error in the justice's judgment. The plaintiff will take nothing by its writ, and the defendants' go hence, etc., and recover costs. In deference to the ruling, the plaintiff submits to a nonsuit, and appeals."

Clarkson & Duls, for appellant. E. T. Cansler, for appellee.

BURWELL, J. 1. Is the capital stock of the plaintiff corporation taxable, under the laws of this state, for state and county purposes, or either? The capital stock of this corporation is property. The constitution requires that all property shall be taxed uniformly for state purposes. Const. art. 5, § 3. Taxes levied for county purposes shall be levied in like manner with the state taxes. Id. § 6. And "all taxes levied by any county, city, town or township shall be uniform and ad valorem upon all property in the same." Id. § 9. Only one class of property is exempted from taxation by the constitution itself, to wit, "property belonging to the state or to municipal corporations." The general assembly may exempt cemeteries, and property held for educational, scientific, literary, charitable, or religious purposes, and also the personal property of a taxpayer, "to a value not exceeding three hundred dollars." Id. § 5. It has no power to make any other exemptions. It is impliedly forbidden to do so. Hence, if there is any statute which declares that this property—the capital stock of this corporation—shall be exempt from taxation according to the uniform ad valorem sys-

tem established by the constitution, or that attempts to make the burden of taxation it bears greater or less than that which is laid on other property of the same situs and value, such legislation is unconstitutional and void. But the general assembly may require the plaintiff corporation to pay a license tax for the privilege of carrying on its business. Const. art. 5, § 3. It has done this. Laws 1893, c. 294, § 30. And it has forbidden counties or other municipal corporations to exact from it any other license tax or fee. It has not exempted the capital stock of this corporation from bearing its share of taxation, state and county.

2. "Should the said stock have been listed for taxation by said association, or by the individual stockholders?" This association is a corporation, and it is "taxable by law." Sec. 14 of chapter 296 of the Acts of 1893 enacts that "persons owning shares in incorporated companies taxable by law are not required to deliver to the list takers a list thereof, but the president or other chief officer of such corporation shall deliver to the list taker a list of all shares of stock held therein and the value thereof, except banks." It seems clear that the statute requires the listing of this capital stock, not by the individual stockholders, but by the association, through its president or other chief officer.

3. "Who is liable for the tax thereof,—the said association, or its individual stockholders?" The statute referred to declares that "the tax assessed on shares of stock embraced in said list shall be paid by the corporations respectively." The language is plain. The association is liable for the tax. Inasmuch as our conclusion is that to which his honor came, it is not material to inquire whether the plaintiff had a right to appeal from the judgment of nonsuit, to which he chose to submit, under the circumstances set out in the record. No error.

(115 N. C. 602)

**HANSLEY v. JAMESVILLE & W. R. CO.**  
(Supreme Court of North Carolina. Dec. 11, 1894.)

**CARRIERS—SALE OF EXCURSION TICKET—FAILURE TO SUPPLY TRAIN.**

Punitive damages will not be awarded against a railway company because, by reason of defective equipments, it failed to carry a person to whom it had sold an excursion ticket back to his starting point, where the only injuries complained of were such as resulted from inconvenience, delay, and disappointment, and there was no evidence of bad motives on the part of defendant. *Clark, J., dissenting.* *Purcell v. Railroad Co.*, 12 S. E. 954, 956, 108 N. C. 414, disapproved.

Appeal from superior court, Beaufort county; Graves, Judge.

Action by Frank H. Hansley against the Jamesville & Washington Railroad Company for damages for failure to furnish transportation. Judgment was rendered for plaintiff, and defendant appeals. Reversed.

J. H. Small and W. B. Rodman, for appellant. Chas. F. Warren, for appellee.

**PER CURIAM.** We are of the opinion that the plaintiffs in the above cases are not entitled to punitive damages. An opinion will be filed hereafter. New trial.

(Sept. Term, 1894.)

**AVERY, J.** As this controversy grows out of an admitted failure on the part of the railway company to perform its agreement with a passenger to carry him to and from a particular place within a given time, and involves especially the question whether the testimony warranted the court in instructing the jury that they were at liberty to add exemplary damages to the estimated loss actually sustained by reason of the delay, it is not improper to state in the outset several leading principles of the law governing the relative rights and duties of carriers and passengers, and the rules generally applicable in the assessment of damages in such cases. The contract of carriage begins when the passenger comes upon the carrier's premises, or upon its means of conveyance, with a purpose of purchasing a ticket within a reasonable time, or after having purchased a ticket. The relation, once constituted, continues until the journey expressly or impliedly contracted for has been concluded, and the passenger has left the carrier's premises, or has been allowed a reasonable time to leave such premises. 2 Am. & Eng. Enc. Law, pp. 742-745. There is always, on the creation of a relation, an agreement, express or implied, and a legal obligation to perform the stipulation of the contract by transporting the passenger in accordance with the published schedule, or within a reasonable time. *Hutch. Carr.* § 603 et seq. If an action be brought for a breach of this contract, the amount recovered is limited (with the single exception of a breach of marriage contract, say many law writers) to damages supposed to have been in contemplation of the parties, and actually caused by such breach. The measure of damage is ordinarily not materially different whether the defendant fails to comply with his contract through inability, or willfully disregards it. We shall have occasion presently to advert to the distinction between actions of tort founded upon a willful omission of a common-law duty, but involving at the same time a breach of contract, and such as are brought to obtain redress for the intentional failure or absolute refusal to comply with the terms of an agreement. Actionable negligence must be the proximate cause of a legal injury and damage. It may be (1) a pure tort; (2) an inadvertent breach of contract, which cannot be regarded as independent of the contract and tortious; (3) a breach of contract in the nature of tort, and which may be treated as such independent of the contract. 5 Am. & Eng. Enc. Law, supra. Treating of torts of this third class,

Bish. Noncont. Law, § 74, says: "Because a common carrier, whether of goods or passengers, is a sort of public servant, the law imposes its duties upon him, a breach whereof is a tort, although there is a contract which is violated by the same act." Whenever there is a public employment from which arises a common-law duty, an action for a breach of such duty may be brought in tort. *Express Co. v. McVeigh*, 20 Gratt. 284; *Clark v. Railroad Co.*, 64 Mo. 440; *Shear. & R. Neg.* § 22. In actions ex delicto, the motive of the defendant becomes material. 1 *Suth. Dam.* § 373. If a tort is committed through mistake, ignorance, or mere negligence, the damages are limited to the actual injury received. 5 *Am. & Eng. Enc. Law*, p. 21, note 3. But where there is an element of fraud, malice, gross negligence, insult, or other cause of aggravation in the act causing the injury, punitive damages are allowed, said the court in *Holmes v. Railroad Co.*, 94 N. C. 318; but the statement of the rule was modified by omission of the term "gross negligence" in the subsequent cases of *Rose v. Railroad Co.*, 106 N. C. 170, 11 S. E. 528, and *Tomlinson v. Railroad Co.*, 107 N. C. 327, 12 S. E. 138. The modification mentioned was due to the fact that this court meantime had said, in *McAdoo v. Railroad Co.*, 105 N. C. 149, 11 S. E. 316, that "the most learned and discriminating text-writers concur in the opinion that, in actions arising ex delicto, there can be no degree of negligence that can be described by the word 'gross' alone. But, where an injury is due and can be traced directly to the willful act of another, he is not absolved from liability to the injured party. \* \* \* Hence we often find, in opinions which have emanated from this and other courts, the expression 'gross and wanton negligence'; but the former word is never used to describe a degree of carelessness that will excuse the fault of the plaintiff in exposing himself to danger, except when it is improperly held synonymous with 'willful,' 'malicious,' or 'fraudulent.'" Thompson, in his work on *Carriers and Passengers* (page 573, § 27), says: "Such damages are termed 'exemplary,' 'punitive,' or 'vindictive,' sometimes called 'smart money,' and are only awarded in cases where there is an element of either fraud, malice, such a degree of negligence as indicates a reckless indifference to consequences, oppression, insult, rudeness, caprice, willfulness, or other causes of aggravation in the act or omission causing the injury. \* \* \* Some of the authorities include 'gross negligence' as one of the elements which entitles the plaintiff to exemplary damages." But the better view is given in an opinion delivered in a recent case in the supreme court of the United States. In reviewing that case Mr. Justice Davis, who delivered the opinion, said: "Some of the highest English courts have come to the conclusion that there is no intelligible distinction between ordinary and gross negligence." *Railway Co.*

*v. Armstrong*, 91 U. S. 489. The general rule, therefore, is that, where the violation of duty makes the defendant a wrongdoer, only compensatory damages are allowed, while proof of a wrongful purpose may take a case out of it as an exceptional one. Fraud, malice, or insult imply from their very definitions the existence of an intent on the part of the wrongdoer to cheat, to injure through hatred, or to oppress. Where even the rightful ejection of a passenger is accompanied with undue force, "rudeness, recklessness, or other willful wrong" (*Rose v. Railroad Co.*, supra), the law assumes the existence of bad motive on the principle applicable in ordinary cases of assault,—that every person is presumed to intend the natural consequences of his own act. *Tomlinson's Case*, supra. It must be noted that Mr. Thompson carefully excludes "gross negligence" as an element warranting the allowance of such damages, and substitutes the expression "such a degree of negligence as indicates a reckless indifference to consequences," which is equivalent to wanton carelessness; yet the learned justice who wrote the opinion in *Holmes' Case*, supra, inadvertently cited that author (94 N. C. 323) in support of his statement of the doctrine. In the consideration of the case at bar, therefore, it is proper to dismiss from our minds the idea that the weight of authority, in our own court or elsewhere, leaves us at liberty to hold that punitive damages may be awarded in every instance where a court can, by giving a very comprehensive meaning to that undefined and improper term, "gross negligence," as descriptive of the degree of carelessness, classify a case as an exceptional one, taken out of the general rule by the evidence of intent.

Counsel for the defendant asked the court, on the trial of the case at bar, to charge as follows: "(1) That upon the complaint, and the facts as stated in the complaint, in the absence of any allegations of willful or gross negligence, the plaintiff is not entitled to recover punitive damages; (2) that, taking the entire evidence in view, the plaintiff is not entitled to recover punitive damages; \* \* \* (4) that if the plaintiff knew, when he contracted for transportation to Jamesville and return, of the general character, quality, and condition of the defendant's equipment, and the general condition of its road, plaintiff would be entitled to recover no damages except the cost of transportation back to Washington; (5) that, the cause of action being laid in tort, the plaintiff cannot recover damages for a breach of contract of carriage in this action; (6) that, upon the entire evidence, the jury should respond to the several issues in favor of the defendant; (7) that, if the defendant was expending the entire income from its road in the maintenance of its roadway and the equipment of said road, it is not guilty of such willful negligence as will subject it to punitive damages,

but the plaintiff can only recover such actual damages as may have been proved." The court refused to give these instructions asked, but charged the jury, among other matters, as follows: "(2) The plaintiff claims that he bought a ticket from Washington to Jamesville, and back to Washington; that the defendant negligently failed to have a train to bring him back; and also punitive damages for the wrongful act of the defendant in failing to bring him back. He alleges that the defendant has willfully failed and neglected its duty to the public in not properly keeping its roadbed, tracks, engines, and cars in such condition as to do the business which it naturally gets; and if you are satisfied that the defendant has willfully neglected to do this, and in consequence of this willful negligence they failed to run the engines and cars to return the plaintiff to Washington, then he would be entitled to punitive damages; otherwise, he will only be entitled to compensatory damages." The court also charged the jury that it was the duty of defendant to have known the condition of its road and cars; and if they found that the roadbed, track, and engines of defendant were, at the time alleged, in such condition as not to render it reasonably certain, in the ordinary running of its trains, that the engine would be able to carry the trains through, etc., it would be willful negligence, for which they might allow punitive damages.

It appeared from the testimony that the road was originally constructed for the purpose of hauling lumber, but ultimately engaged in the business of transporting passengers across the intervening swamp from its northern terminus, at Jamesville, to its southern terminus, at Washington. The roadbed had been made by driving down piles of various kinds to make a foundation for the cross-ties. In the earlier years of its operations, as a carrier of passengers, the company had owned two engines, one regular narrow-gauge passenger car, and one passenger car constructed out of a street car; but the latter car had become unserviceable some time before the injury complained of, and on extraordinary occasions a flat or box car had to be used to accommodate passengers. The engines had become worn, and had been jolted and injured on account of the bad condition of the roadbed and the consequent jarring in passing over it. The earnings of the road had been applied exclusively to its improvement during the whole period of its use as a road for transporting passengers, but latterly the income had been greatly diminished, and was insufficient to keep the roadbed in repair, much less to provide additional cars or engines. These are some of the facts testified to by the witnesses. The gravamen of the complaint is that the defendant company carried the plaintiff from Washington to Jamesville November 7, 1892, but failed to

furnish means of transportation at the stipulated time, November 9th, to bring him back to Washington on his return ticket. In applying the abstract principles which we have stated more specifically to the case before us, we find it to be a well-settled rule that where a passenger is delayed or carried contrary to the agreement, so as to lead to a failure to accomplish the object of the trip, such person is entitled to recover in all cases at least the sum paid for the ticket, with interest thereon, together with compensation for the whole of the time lost in the trip, and in some instances the reasonable cost of reaching the objective point by means of some other conveyance. *Yonge v. Railroad Co.*, 1 Cal. 353; *Hamlin v. Railroad*, 1 Hurl. & N. 408; *Railroad v. Banaud*, 58 Ga. 180; *Hawcroft v. Railroad*, 8 Eng. Law & Eq. 362; *Sears v. Railroad*, 14 Allen, 433; *Eddy v. Harris*, 78 Tex. 661, 15 S. W. 107; *Walsh v. Railway Co.*, 42 Wis. 23. The rule of damage just stated is to be adopted, not only when the suit against the railway company is brought for, or the proof confined to, the breach of contract of carriage, but as well where the plaintiff elects to sue in tort, and rely upon the disregard of duty on the part of the carrier as a cause of action, unless it appear that the plaintiff has suffered, in addition to the expense, loss of time, and inconvenience incident to every failure to comply with such a contract, some personal injury of which the willful failure to transport him according to the schedule time is a proximate cause, 5 Am. & Eng. Enc. Law, 40; *Railway Co. v. Armstrong*, supra; *Railroad Co. v. Sellers*, 93 Ala. 9, 9 South. 375; 3 Suth. Dam. §§ 934-938; *Martin v. Railroad Co.*, 32 S. C. 592, 10 S. E. 960; *Wilkinson v. Searcy*, 76 Ala. 176; *Shear. & R. Neg.* § 23. In *Railroad Co. v. Sellers*, supra, where the conductor carried a female passenger beyond the station to which the company had contracted to carry her, and ordered her off the train in a driving rain with an infant in her arms, and so incumbered with baggage that she could not protect herself by using an umbrella, thereby subjecting her to exposure, from which she contracted sickness that lasted for three weeks, the court carefully and in express terms rested the decision that the jury might allow exemplary damages upon the ground, not of the "omission of the duty" on the part of the conductor of stopping at the station, but of his willful disregard of her comfort and health in forcing her to expose herself and her infant, instead of letting her off at a house or backing the train to the station. In discussing this doctrine, *Sutherland* (volume 8, § 938) says: "Where a person has bought a ticket, and is carried beyond the station for which he is ticketed, without any fault on his part, he has a right of action for at least nominal damages, though he suffers no actual injury, and for such actual injury as he may in fact suffer." After laying down the foregoing as the ordi-

nary rule, when the conductor, with a full knowledge of the destination of a passenger, merely takes him beyond that point, and lets him off without circumstances of aggravation, proceeds to refer with approval to the ruling of the court of Alabama, already cited, that where there was evidence, in addition, that a female passenger was ordered off the train with her infant, the circumstances attending her expulsion were evidence to be considered by the jury of willful wrong on the part of the conductor, and consequent liability on the part of the company to punitive damages. It is an error that will lead to endless confusion to hold that "smart money," which is allowed as a punishment to the wrongdoer, may be recovered in every case where, under the common-law practice, an action *ex delicto* would lie. *Wanamaker v. Bowes*, 36 Md. 42; *Wilkinson v. Searcy*, *supra*; *Phelps v. Owens*, 11 Cal. 22. All of the actions brought against railway companies for breach of duty arise out of tort; but it is only in those where the elements already mentioned as indicative of bad motive exist, and where, in addition, some personal injury or indignity is sustained, that the plaintiff is allowed to recover more than compensatory damages. *Morse v. Duncan*, 14 Fed. 396. In *Tomlinson v. Railroad Co.*, *supra*, the court said: "The fact that the plaintiff was wrongfully expelled places him in no more favorable attitude, as a claimant of punitive damages, than if he had been rightfully ejected, but in an unlawful or unwarranted manner. It is an essential prerequisite, to the acquisition of the right to recover exemplary damages for wrongful expulsion of a passenger from a train, that there should be evidence of undue force, unnecessary rudeness in the application of the force or insult, malice, or some willful wrong accompanying the act of ejecting him or causing him to leave the train." *Rose v. Railroad Co.*, *supra*, and authorities there cited. Justice Clark, for the court, in *Wallace v. Railroad Co.*, 104 N. C. 452, 10 S. E. 552, approving the rule laid down in 3 *Suth. Dam. (1st Ed.)* 261, said: "Plaintiff is to have a reasonable satisfaction for loss of both bodily and mental powers, or for actual suffering both of body and mind, which are the immediate and necessary consequences of the injury." "In the absence of any sufficient testimony to make the company liable for willful disregard of the interstate's danger," said the court in *Roseman v. Railroad Co.*, 112 N. C. 719, 16 S. E. 766, "we think the court below erred in submitting the case to the jury."

It is true that smart money may be awarded by the jury when no actual, but only nominal, damage is shown, as when a conductor rightfully expels a person from a car, or the owner puts a trespasser off his premises, and either of them uses excessive force or subjects such person to useless indignity. *Tomlinson v. Railroad Co.*, *supra*; *White v.*

*Barnes*, 112 N. C. 323, 16 S. E. 922. The allowance is made, in these instances, on account of the assault or rudeness. But, where a trespass is committed by mistake, the case is not governed by the same principle, as when a willful assault is committed. *Beveridge v. Welch*, 7 Wis. 465. It is not sufficient ground for allowing punitive damages that the defendants, when they committed a trespass, had reason to believe, but did not know, that their acts were wrongful, and might result in injury to plaintiff. *Inman v. Ball*, 65 Iowa, 543, 22 N. W. 666. On the other hand, a trespasser is always responsible for such actual damages as legitimately follow from his act, whether he contemplated the result or not (*Allison v. Chandler*, 11 Mich. 542), while one who assaults another is presumed to have intended the personal injury,—that is, the consequence of committing the assault; it being a wrongful act, done purposely and without cause. *Goetz v. Amba*, 27 Mo. 33; *U. S. v. Taylor*, 2 Sumn. 586; *Fed. Cas. No. 16,412*; *Causee v. Anders*, 4 Dev. & B. 240. We think that the case at bar is one of those where the plaintiff, under the old common-law practice, might have elected to bring his suit either for the breach of contract in failing to bring the plaintiff back on schedule time, or for the disregard of his duty to the public as a carrier,—either an action of *assumpsit* or of *trespass*. But because he chose then to sue for the tort, and now to allege such facts as show an omission of duty, it does not follow that, upon proof of such allegations, exemplary damages will be allowed. There has been a failure to show the sort of willfulness that manifests its presence in malice, rudeness, violence, indignity, and reckless disregard of consequences, and there is no evidence that the plaintiff suffered from sickness contracted by exposure incident to the delay, or was subjected, in consequence of the defendant's failure to furnish transportation, to any other personal injury or to indignity. If neither the intentional and wrongful expulsion of a passenger not accompanied with undue force (*Tomlinson's Case*, *supra*), nor the negligent carrying him beyond his destination (3 *Suth. Dam.* § 938), after having inspected his ticket or received it, is sufficient evidence of the willful infliction of personal injury to warrant the allowance of punitive damages, we fail to see upon what principle we can hold a railroad company liable to be so punished because, with a full knowledge on the part of its manager that the company had but two engines, one of which was in the shop at Norfolk for repairs, it undertook to haul to Jamesville and back, with the other, not then in good condition, the train on which the plaintiff and others who had return tickets were to be carried as passengers, because only of the delay and inconvenience incident to such detention. If the same engine, in consequence of the bad condition of the track or the engine itself, had, with the cars, been derailed.

only those passengers who received bodily injury could have maintained actions against the company, and have recovered, as a part of the compensation for the consequences of the accident, exemplary damages. It is not necessary to cite authority in support of the soundness of so plain a proposition; and yet, if we sustain the court below, the logical result would be that a passenger who is delayed without suffering bodily injury by a defective engine is entitled to smart money, though he could not have subjected the company to such punishment had he escaped unharmed when it was derailed and upset. "Neither negligence without damage nor damage without negligence will constitute any cause of action." *Shear. & R. Neg.* §§ 23-25. The case of *Purcell v. Railroad Co.*, 108 N. C. 414, 12 S. E. 954, 956, seems to have been confidently relied on to sustain the contention of the plaintiff. The facts in that case were that the plaintiff had purchased a ticket, and was waiting at the time at which it was advertised that the train would stop at the station where he was to embark; but, the cars being overloaded because a circus was to give an exhibition at the station to which the passenger was destined, the conductor did not stop at the station, but left him standing. It was held that the failure to provide sufficient means of transportation, when by reasonable diligence it could have been ascertained that they would be needed, was such evidence of willfulness and gross negligence as to warrant the court in instructing the jury that they might allow punitive damages. In the opinion, *Heirn v. McCaughan*, 32 Miss. 17, was cited as "exactly in point" to sustain the ruling, though even that extreme case was distinguishable from *Purcell's Case*, as well as that at bar, in that the jury must have found, preliminary to the assessment of exemplary damages, (1) that, after advertising that the boat would stop for passengers at the landing where the feme plaintiff was waiting, the owners or their agent willfully and capriciously passed by, when they could have effected a landing there, and had room to accommodate the plaintiff; (2) that the instruction excepted to and sustained was that the plaintiffs were entitled, "from the exposure and discomfort they suffered" in waiting for the boat, to exemplary damages (page 24); it appearing on the trial that the feme plaintiff was pregnant, and that, the weather being unusually cold, she suffered great pain and anguish, whereby her health and life were in peril.

In addition to the authorities already cited upon this point, we find a summary of the doctrine compiled from leading cases in *Ray, Neg. Imp. Dut.* p. 228, § 68, which is as follows: "Where, according to the schedule of trains, a passenger arrives at a station, intending to take passage, and he finds no train ready, and is compelled to remain over the night, and in consequence of the delay

he fails to keep an appointment and complete business arrangements, while he will be entitled to recover the actual expense incurred in his hotel, he cannot recover beyond more than nominal damages,"—citing *Railroad Co. v. Green*, 52 Miss. 779, to sustain the proposition; and the court say in that case, on page 229, that "punitive damages will not be allowed in the absence of any circumstances of malice, oppression, insult, personal injury, mental and physical suffering, although sometimes more than actual damages may be awarded against common carriers by way of punishment for their neglect of duty, and as a protection to the public." In the application of the proposition which is taken from that case, the court held that where a passenger train ran 60 yards beyond the platform, and failed to stop there long enough for a passenger who had bought a ticket, and was waiting to embark, to reach it, the allowance of \$1,500 damages was excessive because "no damages were proved except disappointment, delay, and inconvenience." The reasonable rule adopted in *Mississippi* will not, therefore, apply either to *Purcell's Case* or to that at bar, since no personal injury was sustained by the complainant in either case, nor was there any ground for compensatory or punitive damages shown, except the disappointment, delay, and inconvenience resulting from the failure to furnish means of transportation. We conclude, therefore, that the plaintiff was not entitled, upon any phase of the evidence, to recover punitive damages, for the reasons (1) that he has not proved that he sustained any personal injury, or shown any grounds for asking damages except inconvenience, delay, and disappointment; (2) that in no aspect of the testimony is there evidence of bad motive sufficient to entitle the plaintiff to more than compensatory damages.

In passing upon this question we must invoke the aid of common sense and common observation, since the question whether a given act amounts to negligence at all, and, if it does, what degree of culpability attaches to it, depends not only upon surrounding circumstances, such as the condition of the parties, but the condition of the country and the progress of improvement in science and the arts. We cannot shut our eyes to the history of railways in North Carolina, and the daily developments of the country by new branch lines, built first for the transportation of lumber, and gradually extending their business, as carriers, to other freight, until at last, though the corporation has been able to purchase not more than two or three engines and a single passenger car with few appointments, its patrons induce it to transport passengers in order that they may have the advantage of saving time and expense by substituting such a conveyance as an improvement on a road wagon or other vehicle. We are not disposed to check the



process of evolution which we see around us, from a lumber road into a comfortable line for passengers, as the development of business justifies the change. Even where a road appears to be retrograding, we see no reason why we should interpose with a harsh rule, such as would have stopped the operation of the Raleigh & Gaston Road nearly 50 years ago with the best efforts of our distinguished Governor Graham, representing the state, as a principal stockholder, and running it with poor equipments and constant danger of injury to passengers by derailments and snakeheads, and frequent delays of many days to purchasers of tickets. History has repeated itself in the gradual improvement of the roadbed and equipments of the Western North Carolina Railroad. If the axe is to be brought to the root of the tree by stopping these roads from transporting persons at all unless the conditions be improved, the legislature has wisely attempted to vest the necessary power in a railroad commission, to accomplish this end either by ordering a cessation of operations, or the improvement of the roadbed and the purchase of new equipments. Meantime, neither the law, fairly interpreted, nor considerations of public policy, warrant the adoption of so harsh a rule as that proposed. It necessarily follows that *Purcell's Case* is overruled as inconsistent with the principles we have laid down. We are less averse to taking this course, because the doctrine there enunciated can never become a rule upon which the title to property depends, and, as we have intimated already, because it may operate in its enforcement to check the improvement and development of sections now too remote from market to justify the most costly roadbeds and the best equipments. For the reasons given, we deem it unnecessary to discuss the other exceptions, which we may state, in a general way, are untenable, and we feel constrained to grant a new trial.

CLARK, J. (dissenting). It is the duty of railroad companies to run their trains according to schedule. "Passengers, if delayed, are entitled to compensation for loss of their time (*Railroad Co. v. Books*, 57 Pa. St. 339), with their expenses during delay, or, when necessary, expenses of procuring another conveyance. As to compensation for loss of time, \* \* \* it is admissible to prove the rate of wages at the place of destination." 2 Harris, Dam. Corp. § 545. "A passenger, in order to avoid delay, can only incur a reasonable expense. He cannot take a special train in order to avoid a slight delay. \* \* \* The value of time lost may also be recovered. Evidence of the rate of wages earned by persons of plaintiff's trade at the place of destination is admissible to guide the jury in fixing the damages." 2 Sedg. Dam. §§ 862, 863. Such are the general principles applicable in cases where, by reason of the train being behind the schedule

time, the passenger misses connection with the first train on a connecting road, or is delayed even in reaching his destination on the carrier's own line according to the advertised schedule, when the action is for breach of contract. As, in every such case of delay, each passenger is entitled at least to nominal damages, it is of importance to the public and the common carrier to revert to the settled principle, in actions for breach of contract,—that the parties are only liable for those damages which were reasonably in their contemplation at the time of making the contract. This is the usual limit of damages, but there may be cases where the neglect of the carrier is so willful as to make it liable in an action of tort for punitive damages. The plaintiff, however, contends that, as the present is an action of tort upon the evidence, he is entitled to recover exemplary damages. The question was decided by this court, no one dissenting, in *Purcell v. Railroad Co.*, 108 N. C. 414, 12 S. E. 954, 956, where it is said (pages 417, 418, 108 N. C., and pages 954, 956, 12 S. E.): "The Code (section 1963) provides: 'Every railroad corporation shall \* \* \* at regular times to be fixed by public notice \* \* \* take, transport and discharge such passengers and property \* \* \* on due payment of the freight or fare legally authorized therefor and shall be liable to the party aggrieved in an action for damages for any neglect or refusal in the premises.' For a violation of such statutory duty the plaintiff might have sued in contract (*Hodges v. Railroad Co.*, 105 N. C. 170, 10 S. E. 917), but he could elect to sue in tort for the injury and the breach of public duty, existing independent of the statute, by the willfulness or negligence of defendant (*Bish. Noncont. Law*, §§ 73, 74; *Redf. Carr.* § 422; *Tattan v. Railroad*, 2 El. & El. 844). If the tort was committed by mere negligence of the defendant, as simple carelessness or inadvertence, the plaintiff would be restricted to compensatory damages, and as no special damages were alleged and shown, other than obtaining another conveyance, the measure of damages as laid down by the court, to wit, the price of procuring such other conveyance, would have been correct; but if the conduct of the defendant was willful, or showed such gross negligence as to indicate a wanton disregard of the rights of the plaintiff, he was entitled to recover punitive damages in addition." In the present case there was evidence of great dilapidation of cars, rolling stock, engines, roadbed, and trestles, and of continued neglect to repair same. So gross was it that for defendant to continue to offer to transport and to receive for transportation passengers, with such defective machinery and roadway, was such a disregard of its duties and the rights of the public that, in case of death resulting to a passenger while en route, there are authorities which would have sustained an indictment for man-

slaughter against the president, directors, and other chief officers. It is very certain that, with such machinery and roadbed, to contract to take the plaintiff and others on a round trip, and, having gotten them to the other end of the line, to leave them there to get back as they could, was such "gross and willful disregard of plaintiff's rights as would entitle him to recover punitive damages." As was said in *Purcell v. Railroad Co.*, supra: "Should an excessive verdict have been found by the jury, the discretion rested with the trial judge to correct it; but it would be a denial of justice to permit a common carrier to exhibit such arbitrary and willful neglect of the duties it has assumed, and such disregard of the rights of others. Yet such is the effect, if, without adequate excuse, it should be allowed thus to act with no other penalty than refunding the price of the ticket, and the price paid for another conveyance, since the latter would be demanded in very few cases, and only when the destination is at a short distance. \* \* \* The refunding of the price of the ticket would in most cases amount to nothing, as the passenger would usually buy a ticket by the next train; yet the inconvenience, annoyance, and injustice to the traveling public by such detention would be great, and difficult to estimate." In that case the plaintiff sued for damages because the train ran by its regular station without stopping to take him on. Here the condition of the machinery and roadbed was such that it was dangerous to travel over the road. The defendant company showed a criminal indifference to the rights of the public in offering to transport passengers when it knew the uncertainty alike of safe transportation and on schedule time, both of which are implied in its offer. The company owed it to the public to keep its appliances and roadway in proper condition to transport safely and according to schedule. If it had not money in the treasury, it should have borrowed it, and, if unable to do that, it should have suspended operations, as we learn it has since done.

It is not every case where a railroad is in a bad condition, and there is delay or failure to convey, that the jury can give punitive damages. The court here told the jury that "if the defendant had reason to believe, and did believe, from the business of the road for several years past and the condition of its engines, that it would be able to keep its contract to transport plaintiff, and an accident occurred which they could not have, in the ordinary course of their business, foreseen and provided for, it would not be willful negligence." To this the defendant did not except. The court further charged, if the jury "found that the roadbed, track, and engines of defendant were, at the time alleged, in such condition as not to render it reasonably certain, in the ordinary running of its trains, that the engines would be able to carry the trains through, or the roadbed

and track in such condition as to render it unsafe to carry its trains over it, and they permitted this condition of things to continue up to the alleged time, it would be willful negligence, for which you may allow punitive damages. If you find that they had allowed their road, track, and engines to get in such condition as not to be able to do the ordinary business of the road by their negligence, and the character of that negligence was such as to satisfy you that defendant did not care, or was indifferent, as to whether they had the train there or not, it would be willful negligence." To this the defendant excepted. The action was brought for a tort. The second paragraph of the complaint was as follows: "(2) That the defendant so carelessly and negligently conducted and managed the said railroad, and so carelessly and negligently allowed its track, cars, locomotives, and other appurtenances belonging to the said railroad as a common carrier to become so out of repair, and the equipment of the said railroad to become so run down and incomplete, and so negligently failed to provide adequate facilities for the transportation of passengers, that the plaintiff, by reason of the premises, having on the 7th day of September, 1892, purchased at the town of Washington a ticket to the town of Jamesville and return,—to return on the 9th day of September, 1892,—and for which the defendant charged and received from the plaintiff the sum of one dollar, was carried over the railroad of the defendant company to the town of Jamesville; that upon the said 9th day of September, 1892, at the advertised time plaintiff presented himself at the defendant's depot in Jamesville, N. C., for transportation over said railroad to Washington, N. C., and because of the negligence, carelessness, and lack of proper equipment of a railroad receiving the profit of a common carrier and owing duties to the public, and without fault on the part of the plaintiff, defendant failed to provide locomotive, cars, or other means for the transportation of, and failed to transport, this plaintiff to the town of Washington, according to its public duty and advertisement, to plaintiff's damage five hundred dollars." And one of the issues submitted was: "Did the defendant negligently suffer and permit its road, rolling stock, and equipment to become in the condition described in section 2 of the complaint, so that it was unable to discharge its duties to the public as a common carrier of freight and passengers?" The above charge was therefore appropriate to the controversy in the pleadings, and it was most amply supported by the testimony. It will be seen by reference thereto that the roadbed, the engines, and the rolling stock were all unfit and dangerous to be used; that the manager of the company reported the condition of the same to the owners in Philadelphia, but that in willful disregard of their public duties they neither put the

road, engines, and rolling stock into fit condition, nor discontinued holding themselves out to the public for the safe and regular carriage of passengers. If such conduct as the evidence described was not such willful disregard of the defendant's duties to the public as will entitle the plaintiff to recover punitive damages, it will be absolutely impossible for a railroad company in this state to show that "willful disregard of its duties and indifference to the rights of the public" as will, under all the authorities, make it liable for punitive damages. The damages recovered was \$50. Upon the evidence, the defendant has cause to congratulate itself that it is not defendant in an action for damages for death or personal injuries caused by its gross and willful negligence, or that its officers are not under indictment for manslaughter. This is not a breach of contract of carriage by a private party; but it is the direct result of a long-continued disregard of duties assumed in regard to the public by a corporation which sought and obtained the exercise of the right of eminent domain to furnish it a right of way and other special privileges. These were granted solely in consideration of the services which the defendant undertook to render to the public, but which it has willfully and grossly neglected to properly render. The defendant's own evidence was that its manager had repeatedly, time and again, notified the president and directors of the dilapidated and dangerous condition of the machinery and roadbed, but that adequate relief had always been denied. In *Railroad v. Hurst*, 36 Miss. 660, it is said: "It is the right of the jury in such cases to protect the public by punitive damages against the negligence, folly, or wickedness which might otherwise convert these great public blessings into the most dangerous nuisances." This disposes of the exception to the charge. The exception to the evidence that an engineer in defendant's employ a year previous was allowed to testify to the bad condition of roadway and machinery at that time cannot be sustained. This was competent, taken with the other evidence, to show the gross neglect of defendant in permitting the dilapidation to continue, all the while holding itself out to the public for the safe and regular carriage of passengers. The exception to issues is also without merit. Every phase of the controversy raised by the pleadings could be fairly presented upon the issues submitted. *Humphrey v. Board*, 109 N. C. 132, 13 S. E. 793.

(115 N. C. 624)

**BROOKS v. JAMESVILLE & W. R. CO.**  
(Supreme Court of North Carolina. Dec. 11, 1894.)

Appeal from superior court, Beaufort county; Graves, Judge.

Action by L. F. Brooks against Jamesville & Washington Railroad Company for dam-

ages for failure to furnish transportation. Judgment was rendered for plaintiff, and defendant appeals. Reversed.

John H. Small, for appellant. Chas. F. Warren, for appellee.

**EVERY, J.** Though a critical examination of the assignments of error shows that some of the instructions given to the jury, and excepted to by defendant, were erroneous upon different grounds, yet we deem it best to hold that this case depends upon the principle announced in the opinion in *Hansley v. Railroad Co.* (filed at this term) 20 S. E. 528, in reference to the allowance of vindictive damages, and therefore we grant a new trial.

**CLARK, J.** (dissenting). When damages are special, and do not necessarily accrue from the act complained of, the facts out of which they arise must be specially averred in the pleadings; but exemplary damages are not the subject of a claim in the sense that it is necessary to make an averment thereof in the complaint, and such damages may be allowed by the jury without being specially pleaded, if they find that the injury complained of was committed in such a manner as justifies the addition of punitive or exemplary damages to the compensatory damages allowed. 1 Boone, Code Pl. § 140; *Gustafson v. Wind*, 62 Iowa, 281, 17 N. W. 523; *Railroad Co. v. Arnold*, 84 Ala. 159, 4 South. 359; *Wilkinson v. Searcy*, 76 Ala. 176; 2 Thomp. Neg. 1245; *Panton v. Holland*, 17 Johns. 92; *Taylor v. Holman*, 45 Mo. 371. Such was the rule at common law, and the Code was not in the direction of more technical pleading. This rule has been uniformly observed in this state. *Knowles v. Railroad Co.*, 102 N. C. 59, 9 S. E. 7. In *Purcell v. Railroad Co.*, 108 N. C., on page 418, 12 S. E. 954, 956, it is said: "If the tort was committed by carelessness or inadvertence, the plaintiff would be restricted to compensatory damages, as no special damages were alleged and shown; but if the defendant's conduct was willful, or showed such gross negligence as to indicate a wanton disregard of the rights of the plaintiffs, he was entitled to recover punitive damages in addition." This is an action for tort. *Bish. Noncont. Law*, §§ 73, 74; *Thomp. Carr.* 544; *Redf. Carr.* § 414; *Purcell v. Railroad Co.*, 108 N. C., on page 422, 12 S. E. 954, 956. Whether, in such actions, the jury shall add exemplary damages to the compensatory damages given, arises upon the proof, and is not a matter of pleading. In some of the states exemplary damages are not allowed at all. It is settled in this state, in conformity with the rule generally obtaining elsewhere, that in a proper case the jury may add such damages to the compensatory damages given. *Johnson v. Allen*, 100 N. C. 131, 5 S. E. 666; *Bowden v. Bailes*, 101 N. C. 612, 8 S. E. 342; *Knowles v. Railroad Co.*, supra; *Gilreath v. Allen*, 32 N. C. 67. A most interesting and instructive discussion as to the origin and nature of exemplary damages, and a summary of the jurisdiction and instances in which allowed, will be found in 1 Sedg. Dam. (8th Ed., 1891) c. 11, pp. 500-548. It only remains to consider if this is one of the cases in which the jury would be authorized to allow such damages.

The judge correctly charged the jury as follows: "(3) If you answer the third issue (i. e. did the defendant negligently fail to transport the plaintiff as alleged in the complaint) in the negative, the plaintiff would be entitled only to compensatory damages." "(12) If the defendant failed to provide proper means for the transportation of passengers—as, for instance, for the plaintiffs in this case, as they had undertaken to do—wanton and willfully, the jury may give punitive or punishing damages; and the amount of such is largely a matter for the jury to determine, but the court will supervise, to see that no harm is done." The

charge of his honor is full and carefully considered, to which several exceptions were taken, but its correctness depends, after all, upon the legal proposition involved in this section 12. It is settled in this state that punitive damages can be given against a common carrier for willful and wanton disregard of its duties to the public, and that these can be recovered in addition to compensation by any passenger injured by such conduct of the company. *Purcell v. Railroad Co.*, supra, citing *Heirn v. McCaughan*, 32 Miss. 17. In *Railroad Co. v. Hurst*, 36 Miss. 660, the court say it is "the right of the jury in such cases to protect the public by punitive damages against the negligence, folly, or wickedness which might otherwise convert these great public blessings into the most dangerous nuisance."

It is contended, however, that, though punitive damages are allowed in this state, they cannot be recovered against a corporation, (1) because there is a remedy by proceedings to vacate the charter upon failure to discharge its duties properly; (2) that, if the track and rolling stock were in the frightful condition shown by the evidence, application could have been made to the railroad commission to have them put in order; (3) because the defendant expended on its track and rolling stock the earnings of the road, and it was compelled to do no more; (4) that the plaintiff was guilty of contributory negligence in traveling over a railroad which was in such terrible condition.

As to the exception 1, if the plaintiff had been wealthy, public spirited, possessed of leisure and a knowledge of the condition of defendant's road and rolling stock (none of which things are in proof), he might, if so inclined, have taken proceedings to have the defendant's charter vacated; but even then it would not be incumbent upon him to do so. Besides, it is not clear that a failure to properly convey the plaintiff according to contract time would entitle him to vacate the charter, and the condition of the road only violated his individual rights to that extent.

Exception 2. For the same reasons, and because the plaintiff could not foresee that he would wish to use the defendant's road, the plaintiff's failure to apply to the railroad commission neither cures the defendant's willful and wanton negligence nor deprives the plaintiff of his remedy in this action. Indeed, it is for these very reasons that, where a quasi public corporation has willfully and wantonly failed to discharge its duties, punitive damages are allowed to a private party who undertakes to punish the corporation by an action prosecuted at his own cost.

Exception 3. Neither is it a defense that the defendant expended its earnings on the road. It was notified by its superintendent of the dangerous condition of the road and rolling stock, and that the earnings were not sufficient to put them in proper order. To continue to hold itself out thereafter as a common carrier, and invite travel, without putting the property into a safe condition, was wanton and willful negligence, amounting to criminality. If the earnings were not sufficient, the company should either have borrowed money, on mortgage or otherwise, to put the road and rolling stock in a safe condition, or it should have ceased to offer itself to the public as a carrier of passengers. *Hutch. Carr.* § 812.

Exception 4. If the fourth objection is seriously raised, it is sufficient to say that the record fails to disclose any previous knowledge by the plaintiff of the condition of defendant's road.

There was ample evidence to justify the court in submitting to the jury the question whether the defendant showed such a reckless disregard of its duties to the public and to the plaintiff as amounted to wantonness or willful negligence. Without reciting the evidence, it may be said that it would be difficult to make out a

stronger case. The defendant had only one of its two engines in order, and no shops on its road, so that, if an accident happened to that engine, a delay of several days must ensue. Its roadbed was partly on stringers so infirm that in places the track would sink below the water when the train passed. It had an insufficient number of ties, many of them rotten, so that the track would spread. The rails were laminated, and the general condition of the track and roadbed was such that even a new engine would soon be broken by the jarring and shocks, and its only engine was old and dilapidated. Under these circumstances, to offer itself to the plaintiff and his comrades to take them on an excursion over its line, returning the next day, showed a reckless and wanton disregard by the defendant of its duties to the public and the plaintiff, for which, in addition to compensating the plaintiff for his expenses, the defendant is liable also to punitive damages.

It is urged, however, that the plaintiff suffered no physical injury. But exemplary damages are not given only in cases of physical injury to the plaintiff. They are often added to punish the defendant for his wantonness, willfulness, or breach of public duty, as in cases of willfully running by a station without stopping to put a passenger off (*Railroad Co. v. Sellers*, 93 Ala. 9, 9 South. 375); or to take one on (*Purcell v. Railroad Co.*, *Heirn v. McCaughan*, and *Railroad Co. v. Hurst*, supra, and *Wilson v. Railroad Co.*, 63 Miss. 352); or wrongfully ejecting a passenger; or doing so rudely (*Knowles v. Railroad Co.*, supra; *Tomlinson v. Railroad Co.*, 107 N. C. 327, 13 S. E. 138); or offering an indignity to a passenger (*Craker v. Railroad Co.*, 36 Wis. 657); and there are many other instances (1 *Suth. Dam.* 748). In these cases the exemplary damages are added to punish the defendant, and they go to the plaintiff, probably in the nature of a reward for vindicating a public wrong by a private action, undertaken and prosecuted at his own risk and expense. They are hence allowed where there is no physical injury (*Railroad Co. v. Sellers*, supra), and where the compensatory damages are nominal only (*Hefley v. Baker*, 19 Kan. 9; *Wilson v. Vaughn*, 23 Fed. 229; 5 *Am. & Eng. Enc. Law*, 22). Suppose this case: A railroad company, in splendid condition as to roadbed and rolling stock, agrees to take an excursion party, say from Charlotte to Ashboro, and bring them back next day, but owing to increased demand for accommodations on other parts of its lines, or for no reason at all, it runs no trains by which the parties could return until the Tuesday following; would it be sufficient, in such case, to give the parties wronged their board from Thursday till Tuesday, and tell them, as they suffered no physical injury, further remedy can be had by beginning proceedings to vacate the defendant's charter (if it could be vacated for one act of this kind), or by application to the railroad commission to require the defendant hereafter to have more engines and cars? The conduct of the defendant is even worse, for it held itself out to the public and to the plaintiff as sufficiently supplied with facilities to take the plaintiff and his party to Jamestown and return to Washington next day; but in fact, from the condition of its track and rolling stock, of which its managers are fixed with notice, there was grave doubt if the passengers could be taken over the line at all, alive and uninjured. The accident seems to have been, not that the passengers were detained five days, but that they got back at all. There were other exceptions, but what has been said disposes of the whole matter. The pleadings and the evidence justified the judge in submitting to the jury the question whether the defendant was guilty of a reckless disregard of its duties to the public and the plaintiff. They so found. That other par-

ties may also sue, and the aggregate sum may be excessive, is an argument against allowing punitive damages in any case; but, as that has been settled in this state, the remedy is in the judge setting aside the verdict unless the damages are reduced, and that course the judge pursued in this case. If common carriers and such other quasi public corporations as exercise franchises by authority of law can willfully and wantonly fail or refuse to discharge the duties in consideration of the promise to perform which valuable franchises are given, then their conduct might become arbitrary in the highest degree. In cases where there is no physical injury, as willfully running by a station without taking up a passenger or putting one off, or not running a train to return on the day promised, if the company is only held to pay compensatory damages, there would be no protection to the public in any case where the company might find it profitable or might arbitrarily choose to disregard the duty it owes to the public and the plaintiff. For this reason, the courts of this and so many other states, in the cases above cited, permit the jury to impose exemplary damages "as an example," subject to the supervision of the court to prevent excessive damages.

(115 N. C. 757)

## STATE v. SHADE.

(Supreme Court of North Carolina. Dec. 11, 1894.)

## ASSAULT IN SECRET MANNER—WHAT CONSTITUTES—INDICTMENT.

1. Under Laws 1887, c. 32, making "an assault committed in a secret manner, by waylaying or otherwise," an offense, an indictment omitting the words "by waylaying or otherwise," in charging that offense, is sufficient.

2. Where an indictment otherwise unobjectionable is not sufficiently specific as to the nature of the charge, and the defendant fails to demand a bill of particulars before trial, after conviction the court will not arrest the judgment for such objection.

3. Laws 1887, c. 32, making "an assault committed in a secret manner, by waylaying or otherwise," an offense, includes, in addition to those accompanied by waylaying, every other assault committed in a secret manner.

Appeal from superior court, Burke county; Allen, Judge.

Rachel Shade was convicted of committing a secret assault with intent to kill, and appeals. Affirmed.

Criminal action tried at September term, 1894, of Burke superior court, before Allen, J. The indictment is, in substance, as follows: "The jurors," etc., "present that Rachel Shade," etc., "unlawfully, willfully, maliciously, feloniously, and in a secret manner, and with a certain deadly weapon, to wit, a pistol, in and upon the body of one Rose Wright did make and assault, with the intent then and there to kill the said Rose Wright, her the said Rose Wright did beat, bruise, and seriously injure, against the form of the statute," etc. The case states that the defendant was charged with committing a secret assault, under chapter 32, Laws 1887, with a pistol, upon Rose Wright; and evidence was offered by the state, tending to prove the charge as alleged, and evidence in rebuttal was offered by defendant.

S. J. Ervin, for appellant. The Attorney General and J. T. Perkins, for the State.

EVERY, J. The defendant's counsel moves in arrest of judgment on the ground that the indictment does not charge that the assault was committed by waylaying, and does not specify the secret manner in which it was committed. The gravamen of the offense created by the statute (Laws 1887, c. 32) is that the assault must be committed "in a secret manner with intent to kill" the person assailed. The language, which the defendant claims was not so followed in the indictment as to put her on notice of the precise nature of the offense with which she was charged, was "by waylaying or otherwise." We think that the charge is sufficiently "plain, intelligible and explicit" (Code, § 1183) to enable the defendant to prepare her defense, and to warrant the court in proceeding to judgment in case of conviction. *State v. Haddock*, 109 N. C. 873, 13 S. E. 714. The trend of judicial decision, and the tendency of legislation, is towards the practical view, that objections founded upon mere matter of form should not be considered by the courts unless there is reason to believe that a defendant has been misled by the form of the charge, or was not apprised by its terms of the nature of the offense which he was held to answer. Where the defendant thinks that an indictment otherwise unobjectionable in form fails to impart information sufficiently specific as to the nature of the charge, he may, before trial, move the court to order that a bill of particulars be filed; and the court will not arrest the judgment after verdict, where he attempts to reserve his fire until he takes first the chance of acquittal. *State v. Brady*, 107 N. C. 826, 12 S. E. 325. The statute denounces as criminal secret assaults with intent to kill, and after giving one explicit illustration, lest the maxim "*Expressio unius exclusio alterius*" might be invoked in its interpretation, the legislature added the words "or otherwise," meaning thereby to include every other manner of making such secret attempts, no matter what might be the attendant circumstances. A court is not bound, in seeking to arrive at the intent of the legislature, to adopt the printer's punctuation, and we think that the purpose in passing the act of 1887 was to include, in addition to those accompanied by waylaying, every other assault committed in a secret manner.

It seems to us no more necessary to set forth the attendant circumstances, in the charge of a secret attempt to kill, than in an indictment under the statute for an attempt to destroy the reputation of an innocent woman, in which class of criminal actions this court held in *State v. McIntosh*, 92 N. C. 794, that it was unnecessary. If it may be said to be the general rule that the word "otherwise," following an enumeration, should be interpreted by supplying after it the

words "ejusdem generis," this statute, like the famous section 9 of 27 Hen. VIII., constitutes a very clear exception, because it is not indefinite, but must be construed as meaning "otherwise in a secret manner." 17 Am. & Eng. Enc. Law, 285. Indeed, in the only case involving a construction of the statute that has been before us (*State v. Jennings*, 104 N. C. 778, 10 S. E. 249), it was said, arguendo, that the statute included, not only cases where the assailant was shown to have laid in wait, but also those where a person, "otherwise than by lying in ambush, hides his purpose from the party assailed till it is too late to guard against its accomplishment." In the declaration of rights it is announced, as a fundamental principle, that "in all criminal prosecutions every man has the right to be informed of the accusation against him." Const. art. 1, § 11. But the duty of protecting the public by providing for the speedy trial and punishment of the guilty, and against the unnecessary detention in durance of the innocent, devolves upon the legislature, along with that of guarantying to every person charged with crime ample opportunity to prepare for his defense. These two apparently conflicting duties seem to have been discharged, and made consistent, in providing that a statement of a charge which upon its face appears to be plain, intelligible, and explicit, shall be sufficient as notice of its nature, subject to the right of the accused in apt time to ask for a more specific bill of particulars, where any reasonable ground for making the request is shown. With such safeguards thrown around prosecutions, it must be the fault of the person charged if he goes to trial without being "informed of the accusation against him." There was no error in overruling the motion in arrest of judgment, and the judgment of the court below is affirmed.

(115 N. C. 753)

#### STATE v. PATTON.

(Supreme Court of North Carolina. Dec. 11, 1894.)

##### SECRET ASSAULT—WHAT CONSTITUTES.

One who stands facing another, or walks up in front of him, and, drawing a pistol from his hip pocket, shoots him without warning, does not commit the offense defined by Acts 1887, c. 32, § 1, which provides that any person who shall maliciously commit an assault and battery with any deadly weapon upon another, by waylaying or otherwise, in a secret manner, with intent to kill such other person, shall be guilty of a felony. *State v. Jennings*, 10 S. E. 249, 104 N. C. 774, distinguished.

Appeal from superior court, McDowell county; W. R. Allen, Judge.

Joseph Patton was convicted of a secret assault on James Cowan, and appeals. Reversed.

Upon the plea of not guilty, the only witness introduced was one Erwin, who testified as follows: That some time in the spring of

1894 he was present at a dance near Marion; that it was in the nighttime, and there were a good many persons present; that the dance was at a house in which there were two rooms; that the dancing was in one room, and the other room was lighted by a lantern; that James Cowan slapped a girl in the room where they were dancing, and thereafter went in the other room with the witness; that while in the other room, standing by the said Cowan, both of them with their faces in the direction of the door leading from the dancing room, he heard the defendant Patton ask where the said Cowan was; that he then saw the defendant, in the room where the dancing had been, advance towards the door leading to the room in which were the witness and the said Cowan; that the defendant had nothing in his hands, and said nothing to the said Cowan nor to witness, and while in said dancing room, and near said door, drew a pistol from his right hip pocket, and immediately shot the said Cowan in the left breast, near the heart. The defendant was represented by counsel, and did not make any request for instructions. The court, after explaining the elements of the offense with which the defendant was charged, told the jury that if they believed the defendant had formed the purpose of shooting the said Cowan, and came upon him suddenly, and concealed from the said Cowan his purpose to assault him, and gave him no notice of such purpose, and made the assault so suddenly that there was no opportunity to guard against it, the assault was committed in a secret manner.

##### The Attorney General, for the State.

AVERY, J. The principal question raised by the appeal is whether one who stands facing another, or walks up in front of him, and, drawing a pistol from his hip pocket, shoots him, without a word of warning, brings himself within the offense defined by Act 1887, c. 32, § 1. That statute provides that "any person who shall maliciously commit an assault and battery with any deadly weapon upon another by waylaying or otherwise in a secret manner with intent to kill such other person, shall be guilty of a felony," etc. It was contended for the prosecution, and so the learned judge who tried the case below seems to have thought, that every assault made upon another with a deadly weapon, and in pursuance of a preconceived purpose to shoot, falls within the language of the statute, unless the assailant, by word or act, gives opportunity of preparing for defense or warning of his intention to the person assailed. The material facts in the case of *State v. Jennings*, 104 N. C. 774, 10 S. E. 249, which seems to have been relied on to support this view, were that the accused walked up behind the prosecutor, and inflicted several severe wounds with a knife on the back of the neck and head, and on his shoulder, be-

fore the latter ascertained who was attacking him, though the assault was committed in the public square of the town of Kinston, and several hundred people there assembled might have seen him. Though some expressions that were used arguendo in that case, one of which is quoted in *State v. Shade* (at this term) 20 S. E. 537, may have been misleading, the only point really settled was that where one steps up stealthily behind another, and stabs him without warning, it is as much an assault committed "in a secret manner" as where one lies in ambush and shoots another. Under the charge of the court below, the jury were left at liberty to infer from the circumstances that the purpose to kill was formed before the moment when the attempt was made to carry it into execution, and told them that, if they should so determine, then, unless the defendant either actually warned the injured party, or otherwise gave him opportunity to defend himself, he was guilty. While a person may be guilty of this offense without any attempt to conceal his identity from others, where he surprises the person assailed, yet where the two—the assailant and the person assaulted—are standing face to face, when the former pulls a pistol suddenly from his pocket, and fires at the latter, we think it is simply an assault with a deadly weapon, and the question of motive or purpose is immaterial, unless death ensue from the wound. To give the statute the interpretation contended for would leave juries at liberty to infer such a purpose in all cases where one should strike another with a weapon capable of producing death, when so used, unless the assailant, by warning or threatening language or conduct, should give some intention of his purpose. It was not, in our opinion, the purpose of the legislature to enact a law so sweeping in its operation. While the fact that the accused makes no apparent attempt to conceal his identity from others does not place him beyond the pale of guilt, yet, on the other hand, the assault cannot be said to have been made "in a secret manner," except where the person assaulted is unconscious of the presence as well as of the purpose of his adversary till the striking or shooting begins. The law permits juries to consider the fact that one fights on unequal terms, and without warning uses a deadly weapon, when death ensues, and when death does not ensue the courts consider such circumstances in aggravation, in sentencing upon conviction for a common assault. It is not necessary to discuss the question whether, when the statute makes the "intent to kill" an essential element of the offense, the intent to shoot will be held synonymous with the intent to kill. His honor told the jury that if the defendant had formed the purpose, not of killing, but "of shooting, the said Cowan, and came upon him suddenly, and concealed from him his purpose to assault him, and gave him no notice of his purpose, and made the assault so suddenly

that there was no opportunity to guard against it, that the assault was committed in a secret manner." In prosecutions for murder, it is established as a rule in this court that the use of a deadly weapon raises a presumption of malice (*State v. Fuller*, 114 N. C. 885, 19 S. C. 797), but not of premeditation and deliberation. It is not necessary, however, to decide this question, or proceed further in the discussion of it, than to note the fact that it arises. Being unwilling to give the broad range to the statute that is indicated by the instruction to the jury, we conclude, without further discussion of this last question, that the defendant is entitled to a new trial.

(42 S. C. 545)

ARCHER et al. v. LONG, Sheriff.

(Supreme Court of South Carolina. Dec. 18, 1894.)

## DISMISSAL OF APPEAL—REINSTATEMENT.

Supreme Court Rule 11, as amended in June, 1894, to take effect July 1, 1894, providing for the reinstatement of cases wherein an appeal has been dismissed, does not apply to an appeal dismissed by order dated May 21st.

Action by Sarah J. Archer and others against J. G. Long, sheriff. From a judgment for defendant, plaintiffs appealed, and their appeal was dismissed. They now move to have the case reinstated. Motion denied.

Waddy Thomson, for the motion. D. E. Hydrick, opposed.

**PER CURIAM.** This was a motion, made on the day assigned for the hearing of counsel from the Seventh circuit, to reinstate an appeal dismissed at the last April term of this court. The grounds of the motion are stated in the notice, which, together with affidavits, were read to the court and are now on file in the clerk's office. On the 19th December, 1894, the court, by the chief justice, refused the motion, saying, substantially, as follows: This is a motion made at this term of the court, in behalf of the appellants, to reinstate on the docket the appeal in the case dismissed at the last April term of this court, under rule 11, for failure by appellants to comply with the requirements of rule 8. This rule 11 was amended at the last April term of this court, and under that rule, as it now reads, an appellant may move to reinstate an appeal so dismissed if good cause be shown; but the rule contemplates a motion at the same term, if practicable, the language being: "Provided, however, that the court, in its discretion, may reinstate an appeal dismissed for such default, if good cause be shown therefor, under a motion to that effect, of which at least one day's notice shall be given to the attorney of the opposite party, such motion to be made during the time assigned for the call of cases from the circuit from which such appeal comes, or as soon thereafter as it is practicable to give the required notice." The ap-



peal in this case was dismissed by order dated 21st May, 1894. 19 S. E. 696. Rule 11 was amended, 2d June, 1894, to take effect on July 1, 1894. The rule as amended cannot, therefore, govern this motion. In addition, the court is of opinion that no sufficient showing has been made to excuse the failure by appellants to comply with the requirements of rule 8. Therefore, the motion must be refused.

(42 S. C. 483)

**COLUMBIA WATER-POWER CO. v. COLUMBIA LAND & INV. CO.**

(Supreme Court of South Carolina. Dec. 15, 1894.)

Petition for rehearing. Denied.  
For former report, see 20 S. E. 378.

**PER CURIAM.** After a careful consideration of this petition, the court is unable to discover that any material fact or principle of law has either been overlooked or disregarded, and there is therefore no ground for a rehearing. It is therefore ordered that this petition be dismissed, and that the stay of the remittitur heretofore granted be revoked.

(42 S. C. 528)

**RABB et al. v. PATTERSON.**

(Supreme Court of South Carolina. Dec. 11, 1894.)

**TRESPASS ON LAND—WHAT CONSTITUTES—TAKING POSSESSION IN GOOD FAITH—LIABILITY FOR RENTS—SURVIVAL OF ACTION—JUDGMENT—EFFECT ON PERSONS NOT PARTIES—COSTS.**

1. A person taking possession of land as the bona fide purchaser at a sale under a judgment of foreclosure against the person holding the legal title is not a trespasser, although his title is subsequently adjudged void.

2. When a person takes possession of land under a bona fide claim, which is subsequently adjudged to be unfounded, he is liable only for such rents and profits as he actually receives.

3. A cause of action arising from one's trespass on land does not survive against his executrix except to the extent of enabling a recovery for the amount which actually inured to the benefit of the estate from the trespass.

4. Defendant took possession under a mortgage on land conveyed by F. to the mortgagor. Subsequently it was adjudged that F. never had title to the land, and that it was in plaintiff. Thereafter defendant enjoined plaintiff from entering the land. *Held*, that defendant's liability for rents and profits began at the time he took possession of the land.

5. In an action by the owner of land for rents and profits received by defendant, plaintiff is not precluded from recovering by her failure to assert her claim in a previous action by defendant against plaintiff to restrain her, under Code Civ. Proc. § 243, from taking possession of the land.

6. Where, by the terms of a trust deed, the cestui que trust is to receive the rents of the trust lands, such rents, when collected constitute a trust fund.

7. A decree dismissing an action by the cestui que trust for the recovery of trust lands, which was reversed on appeal, did not release the trust.

8. F., who wrongfully held trust lands, assigned for the benefit of his creditors, and his assignee collected the rents and profits of the lands. Subsequently defendant's testator, who claimed title to the lands, recovered a judgment against the assignee for such rents and profits. Thereafter the cestui que trust recovered a personal judgment against F. for such rents and profits, in an action to which neither the assignee nor testator was made a party. *Held*, that the cestui que trust was not thereby precluded from recovering from testator's estate the amount realized by him on his judgment against the assignee.

9. Except in equity cases, where the circuit judge may order differently, costs follow the result of the action.

10. The objection that plaintiffs are debarred from recovering costs, because they violated an injunction in bringing suit, cannot be raised for the first time on appeal.

Appeal from common pleas circuit court of Fairfield county; Ernest Gary, Judge.

Action by Edwin J. Rabb, as trustee of Cassandra H. Rabb, and Cassandra H. Rabb, against M. Virginia Patterson, as executrix of the will of Giles J. Patterson, deceased, and James A. Brice, to recover rents. Judgment for plaintiffs against defendant Patterson, and said defendant appeals. Modified.

A. S. & W. D. Douglass, for appellant.  
Ragsdale & Ragsdale and McDonald, Douglass & Obeor, for respondents.

**POPE, J.** This appeal presents some additional phases in a controversy that has been conducted in our courts since the year 1884. Its history may be traced in Rabb v. Flenniken, 29 S. C. 278, 7 S. E. 597; *Id.*, 32 S. C. 194, 10 S. E. 943; and Patterson v. Rabb, 38 S. C. 138, 17 S. E. 463; and, having been so fully ventilated already, will require but little further statement. Some reference to the facts ought, however, to be made, to make the present issues intelligible. A tract of land lying in Fairfield county, in this state, was conveyed to a trustee in 1867. In 1877, that trustee, in flagrant violation of his trust, conveyed the land to one Flenniken, who was fully cognizant of that fact. Flenniken sold the land to an unlettered colored man, taking his bond and mortgage to secure the purchase money. This bond and mortgage were assigned to Giles J. Patterson for value. After the assignment thereof to said Patterson, the colored man reconveyed the land to Flenniken. Action was brought by the cestui que trust named in trust deed against Flenniken to report the conveyance to him of the trust lands in 1884, and a notice of lis pendens was then filed. In 1885 said Flenniken conveyed his entire estate to James A. Brice, as assignee for the benefit of his creditors. Giles J. Patterson brought an action against James A. Brice, as assignee, and to foreclose his mortgage, and refused to make Cassandra H. Rabb a party to his suit; and this action of Patterson ripened into judgment in June, 1877, including therein a requirement that James A. Brice, as assignee, pay to said Patterson



\$201, which Brice, as assignee, had realized from rents of the trust lands. Patterson purchased the lands under his judgment, and went into the possession thereof in 1888. The supreme court filed its judgment in favor of Rabb, and against Fleniken, in 1890. In order to retain his possession of the land as the owner thereof, Patterson began his action in 1890, which transacted adversely to all his claims in 1893. However, in 1891, Mrs. Rabb and her new trustee began her action against Patterson to collect the \$201 which had been collected by him from Brice for the rents in 1886 and 1887, and also to have him pay the five years' rent which had accrued while he was in possession; and this is the action we are now called upon to consider. It should be stated that, Patterson having died in December 1891, the action was continued against his personal representative, Mrs. Patterson, as his executrix. She vigorously denied any responsibility therefor, on several grounds. All the issues came on to be tried before his honor Judge Ernest Gary, who, after all the evidence, oral and documentary, had been considered by him, filed his decree in January, 1894, wherein he judged that the plaintiffs recover of the defendant Mrs. Patterson, as executrix, \$800, for rents and profits during the five years the land was in Giles J. Patterson's control, and an additional sum of \$201, received by him of Brice, as assignee, for rent; but the complaint was dismissed as to Brice, as assignee. From this decree, Mrs. Patterson has appealed, upon 10 grounds, which we will consider in their order.

"(1) Because his honor erred in holding that on the 26th day of July 1893, Judge Witherspoon passed an order continuing said cause in the name of the executrix, the said M. Virginia Patterson." Strict accuracy in stating the result of the order of Judge Witherspoon was not observed by Judge Gary in his decree, for really Judge Witherspoon declined to pass the order referred to, on the ground that, under a decision of court (*Parnell v. Maner*, 16 S. C. 348), the plaintiffs had the right to continue the cause against the executrix without any order therefor from the circuit court. However, this inadvertency on the part of Judge Gary is immaterial, and needs no further attention.

As we will discuss the principles of law governing the second, third, and fourth exceptions, we will consider them in a group. They are as follows: "(2) Because his honor erred in finding and holding that Giles J. Patterson entered into and was in possession of the premises described in the complaint in this action simply as a trespasser. (3) Because his honor erred in his conclusion of law that the defendant M. Virginia Patterson, as executrix of the will of said Giles J. Patterson, deceased, is chargeable with the rental value of the said premises for the years covering the period the said Giles J. Patterson was in possession of

the same, and in directing judgment to be entered against said defendant, as executrix as aforesaid, for the sum of eight hundred dollars, after deducting therefrom sixty-four and 17/100 dollars, the amount of taxes paid by Giles J. Patterson on said premises. (4) Because his honor erred in not holding that the said defendant, as executrix as aforesaid, if liable at all in this action, can only be held liable for the rents and profits actually received, which were shown by the testimony to amount to \$502.18, out of which taxes assessed on said premises were paid amounting to \$64.17." It seems to us that the circuit judge erred in holding that appellant's testator went into possession of the land in question as a bold trespasser. On the contrary, we think he took possession under a bona fide claim of right, as authorized by a judgment of the court. The fact that the court has eventually held that the claim of the testator was unfounded cannot affect the character of his possession. There is no doubt of the fact that Mr. Patterson went into possession as the purchaser at a sale made under a judgment of foreclosure obtained in an action for the foreclosure of a mortgage brought against a person who then held the legal title to the mortgaged premises; and there is as little doubt that he then supposed, and had reason to suppose, that he had acquired a good title to the premises, for the proceedings show that two of the circuit judges and one of the justices of this court were manifestly of that opinion. We think, therefore, that, even if Mr. Patterson were now living, he could only be required to account for the rents and profits actually received by him, and not for the "rental value" of the premises. As was said by Johnson, Ch., in his circuit decree in *Johnson v. Lewis*, 2 Stro. Eq., at page 160 (affirmed afterwards by the court of appeals): "The rule is that, if one come tortiously into possession of an estate, he ought not to be spared, and ought to be charged to the extent of what it was capable of producing; but if he enter rightfully, and can show what the actual income was, that will determine the extent of his liability. \* \* \*

The same principle ought, I think, to apply where the party in possession believes that the right of property was in himself, and has been thrown off his guard by the belief that he was not liable to account." This view was fully sustained by the cases of *Jones v. Massey*, 14 S. C. 292; *Thomson v. Peake*, 38 S. C. 440, 17 S. E. 45, 725; *Bradford v. Buchanan*, 39 S. C. 239, 17 S. W. 501. It seems to us that the point of distinction lies in the fact that one who goes into the possession of the land of another as a bold trespasser, or, as some of the cases express it, acquires the possession by force or fraud, is entitled to no consideration at the hands of the court, and the strictest rule of accountability is therefore applied to him; but when one goes into possession under a bona fide claim of right,

though it may eventually prove to be unfounded, he is not to be punished for his honest mistake, but is only required to account for such rents and profits as he has actually received, and not for the "rental value" of the premises. To show that the fact that one goes into possession under an honest, though mistaken, belief of right, is not to be treated as a trespasser when called upon to account for rents and profits, see what is said by Johnson, Ch., in his circuit decree in *Rainsford v. Rainsford*, McMul. Eq., at page 336, and by Harper, Ch., in delivering the opinion of the court of appeals in *Riddlehoover v. Kinard*, 1 Hill (S. C.), at page 381. The cases cited by counsel for respondent are not in conflict with this view; for in *Boyce v. Boyce*, 6 Rich. Eq. 302, the defendant Stair not only went into possession as a bold trespasser, but he also acquired possession by an open defense of an order of injunction made in a case to which he had made himself a party by proving his claim. In *Kirkpatrick v. Atkinson*, 4 S. C. 120, the defendant Atkinson acquired possession by fraud; and in *Maner v. Wilson*, 16 S. C. 469, the defendants went into possession under a paper which, though in the form of an absolute deed, they knew was intended as a mortgage. But, even if *Giles J. Patterson* could be regarded as a trespasser in taking possession of this land (and we have just held that such was not the case), it is very clear that his executrix cannot be charged with anything more than the amount actually received,—the amount that actually inured to the benefit of her testator's estate. The foundation of plaintiffs' claim—their cause of action, so to speak—was the alleged trespass of the testator; and, under the maxim "*Actia personalis moritur cum persona*," the plaintiffs' cause of action against the testator would not survive against his executrix except to the extent of enabling plaintiffs to recover against appellant whatever amount may have been incurred to the benefit of her testator's estate from his alleged tort. See *Chalk v. McAlilly*, 10 Rich. Law, 92; *Chaplin v. Barrett*, 12 Rich. Law, 284; *Huff v. Watkins*, 20 S. C. 477. The act of 1892 (21 Stat. 18, approved December 20, 1892) cannot apply to this case, and has not therefore been considered. The principles here announced dispose of the second, third, and fourth exceptions.

The fifth exception is in these words: "Because his honor erred in not holding and adjudging that, under the circumstances of this case, the liability of *Giles J. Patterson* or his executrix to account for the rents and profits of said premises should be restricted to the 1st of April, 1890, when the deed of conveyance by *David R. Flenniken* to the plaintiff *Edwin J. Rabb*, as trustee, was made, under the decree in case of *Cassandra H. Rabb* and *D. R. Flenniken*, or to the 12th July, 1890, when the plaintiffs were enjoined from taking possession of said premises, under order

in the case of *Giles J. Patterson v. Cassandra H. Rabb et al.*" We are not impressed by this exception. *Giles J. Patterson* took possession of these lands early in 1888. He and his estate have had the rents and profits since that date. Under the decision of this court in *Patterson v. Rabb*, 38 S. C. 138, 17 S. E. 463, it has been determined that this property was not his on January 1, 1888, nor at any moment after that time. On the contrary, this court decided that this was the property of the plaintiffs all that time. Therefore, to excuse him or his estate from paying rent from January 1, 1888, to April 1, 1890, or July 12, 1890, would be to take the property of *Mrs. Rabb*, and give it to the estate of *Patterson*. We have been pointed to no good reason for such course on our part. In our judgment, it would be against equity and good conscience. Let this exception be overruled.

"(6) Because his honor erred in not holding and adjudging that the plaintiffs, by their neglect to demand and obtain judgment for rents and profits in the case of *Giles J. Patterson (M. V. Patterson, as trustee, for herself and children, subsequently substituted as plaintiff) against Cassandra H. Rabb et al.*, and by their failure to avail themselves of the reference or remedy in that action provided by section 243 of the Code of Procedure, are precluded from obtaining a decree for rents and profits in this action." It must be remembered that the action of *Patterson v. Rabb* was that brought by *Patterson* himself, for his own purposes,—namely, the upholding of his title to the trust lands,—and this was the issue *Mrs. Rabb* was brought to take part in settling. When *A. sues B.* to recover a specific tract of land or a specific sum of money, *B.* may content himself with defending himself against the claim of *A.*, as set up in his complaint; he need go no further, although he may go further if he chooses. Not so, however, with *A.* He must exhaust himself in regard to the specific tract of land or specific sum of money sued for. Afterwards he cannot make as a cause of action against *B.* any claim he had as to the land or to the money. So far as section 243 is concerned, it may be remarked that it does provide for bond to indemnify the opposite party from damages, and that this remedy may be had in the case to ascertain damages, "by a reference or otherwise"; but then this bond only operated from July 12, 1890, and if it was permissible to announce that it covered rents and profits, as well other items of "damages," what would become of the rents and profits for 2½ years before that date? And also what would become of the \$201 received from *James A. Brice*, as assignee, in 1887? We think it better to say that the term "damages" may cover rents and profits in some cases, but it must be evident that to so hold in this action would be to require the plaintiffs to split up their claims for

rent into several actions. Besides, it must be remembered that such damages, under the injunction bond, may not only be obtained under reference proceedings, but the same section of the Code provides that it may be done "otherwise" than under reference. To pursue the subject further is unnecessary; it is untenable.

The seventh exception is as follows: "Because his honor erred in holding that the said defendant, as executrix as aforesaid, is also chargeable with the sum of two hundred and one dollars, which was applied in part to pay costs and balance (\$185.63) paid to Giles J. Patterson under order of the court in the case of Giles J. Patterson v. James A. Brice, as assignee of the estate of David R. Flenniken, and in directing the entry of judgment therefor in favor of plaintiffs against this defendant, as executrix as aforesaid, when no appeal was taken from said order, and at the time of such payment there was no valid existing order impounding the rents in the hands of Brice, as assignee." The decree of the circuit judge, it seems to us, contains a slight error in the amount charged against the appellant, on account of the money received from Brice, as assignee by Patterson, and which was realized from the rents of the premises in question. While there is no doubt that the money in the hands of Brice, as assignee, arising from that source, was realized from the lands adjudged to belong to the plaintiffs, yet neither Patterson nor his executrix can be charged with anything more than they actually received; and the undisputed testimony is that Patterson received only the sum of \$185.63, and that the balance of the \$202 was applied to the costs incurred by Brice, as assignee, in the action for foreclosure. Brice was a party to this action, and the plaintiffs did not except to that part of the decree which dismissed the action as to him. All the plaintiffs can recover against Mrs. Patterson, as executrix, on account of this \$202, is the sum of \$185.63.

"(8) Because his honor erred in holding and concluding that the sum of money paid by James A. Brice to Giles J. Patterson under the order of court was a trust fund belonging to the plaintiffs, and that Giles J. Patterson received the fund with a knowledge of the trust attached to it, when Judge Wallace, by his decree, which was then of force, had dismissed the complaint in the case of Cassandra H. Rabb v. D. R. Flenniken. We do not see how these funds were not trust funds. They came as rent from the trust lands, and Cassandra H. Rabb, under the terms of the trust deed, was to receive such rents from her trustee. Certainly, Mr. Patterson knew all about these matters. So far as the decree of Judge Wallace dismissing the complaint operating to release the trust character from these funds, we cannot admit such a doctrine when it is recalled that an appeal was taken from such

decree, and was sustained by this court. The exception is not tenable.

"(9) Because his honor erred in not holding that the plaintiff Cassandra H. Rabb having elected to take a personal judgment for rents and profits embracing the years 1886 and 1887, against David R. Flenniken, in the case of Cassandra H. Rabb v. D. R. Flenniken, to which action neither James A. Brice, as assignee, nor Giles J. Patterson, was made a party, the claim of rents and profits for said years was merged in said judgment against David R. Flenniken, and there is no privity between the plaintiffs and Giles J. Patterson, or his executrix, or equity which would entitle the plaintiffs in this action to recover the said sum of two hundred and one dollars from the defendant M. Virginia Patterson, as executrix as aforesaid." We confess ourselves unable to see what connection Mrs. Patterson, as executrix of Giles J. Patterson, has with the proceedings of the plaintiffs against David R. Flenniken, and therefore we cannot perceive the pertinency of any inquiry by us into what entered in to make up that judgment. If it is true that Giles J. Patterson received \$201 of the trust estate belonging to the plaintiffs here, and that he had no legal right to any part of that fund, it makes no difference what other people have been unsuccessfully sued to try and recover this fund. To enable the present plaintiffs to recover this fund from the estate of Giles J. Patterson, deceased, no privity need exist. It is the old case of a trust fund being taken possession of by one not entitled to hold it. When the trustee or cestui que trust who is entitled to hold it comes and sues for it, they are entitled to a judgment for its recovery. Let the exception be overruled.

"(10) Because his honor erred in not adjudging that the plaintiffs, having commenced this action, in violation of the order of injunction made in case of Giles J. Patterson v. Cassandra H. Rabb et al., which restrained them, their attorneys, their agents and servants, from collecting, receiving, or intermeddling with the rents and profits of the premises described in the complaint, should not be allowed costs against the defendant." We are inclined to think this point as now made comes too late. Certainly, the circuit judge made no express order on the subject of costs. We will not undertake to pass upon a question of this character, raised for the first time in this court. At all events, costs follow the result, except in equity cases, when the circuit judge may order differently if he sees proper. It seems to us that this question, at best, comes too late. If plaintiffs were enjoined from suing, that should have been so adjudged. Not having been so adjudged, this court will assume that all things were rightly done in the court below, no showing to the contrary having been made.

It follows from our preceding observations that the circuit court decree must be modified by having that decree fix the liability of Mrs. Patterson, as executrix, for the sum of \$502.18, as the rents for which she, as said executrix, must pay in lieu of \$800, less the amount paid for taxes, as ascertained by the decree; and that she, as said executrix, must pay the sum of \$185.63, on account of the amount received by Gilles J. Patterson from James A. Brice, as assignee, instead of \$201; but that in all other respects the said decree shall be affirmed. It is the judgment of this court that the judgment of the circuit court be modified as herein indicated, and that in all other respects such judgment be affirmed.

McIVER, C. J., concurs.

(42 S. C. 211)

#### STATE v. MOREHEAD.

(Supreme Court of South Carolina. Dec. 15, 1894.)

#### HAWKERS AND PEDDLERS—STATUTE—CONSTRUCTION—WHO ARE.

1. Act 1893 (21 St. 407), provides that no person, "as hawker or peddler," shall sell any goods without a license; that the act shall not apply to vendors of newspapers, vegetables, etc., or to sales by sample by persons traveling for commercial houses, but shall apply to vendors of every other class of goods, "and to sales, by samples or otherwise, by such hawkers and peddlers of \* \* \* sewing machines, pianos, or organs." Held that, in order to make the sale of any of the prohibited articles without a license a violation of the statute, the seller must be a hawker or peddler. Gary, J., dissenting.

2. A person who solicits orders, by sample, for sewing machines and their parts and attachments, for a foreign sewing-machine company which has a store and stock of goods in the state, from which such orders are filled, is not a "hawker or peddler," within the meaning of such act, though he occasionally sells a sample machine out of his wagon.

Appeal from common pleas circuit court of Richland county; T. B. Fraser, Judge.

I. H. Morehead was convicted of selling goods as a hawker and peddler without a license, and he appeals. Reversed.

Andrew Crawford and Barron & Ray, for appellant. P. H. Nelson and Abney & Thomas, for the State.

McIVER, C. J. The defendant has been indicted for, and convicted of, a violation of the act of 1893, entitled "An act to amend the law as to hawkers and peddlers" (21 St. 407), and this appeal presents two questions: (1) Whether the defendant is a hawker and peddler, and as such amenable to the provisions of said act. (2) If so, whether the act is constitutional.

We do not understand that the act of 1893 purports either to define the long-established offense of hawking and peddling, or to enlarge its definition as heretofore recognized, but simply declares in its first section that "no person shall, as hawker or peddler, ex-

pose for sale, or sell, any goods, wares or merchandise," without a license. In its second section the act prescribes who shall issue the required license, and other particulars as to such license. In the third section certain public officers are required, and any citizen is authorized, to demand and inspect the license of any hawker or peddler, and cause to be arrested any hawker or peddler found without a license, and have him brought to justice. The provisions of the fourth section, upon which the first question in this case mainly turns, are as follows: "That the provisions of this act shall not extend to vendors of newspapers, magazines, vegetables, tobacco, provisions of any kind, or agricultural products, or to sales, by sample, by persons travelling for established commercial houses; but shall extend and apply to vendors of every other class and kind of goods, wares and merchandise and to sales, by samples or otherwise, by such hawkers and peddlers of stoves, ranges, clocks, lightning rods, sewing machines, pianos, or organs." The other provisions of this act, not being pertinent to our present inquiry, need not be stated. From this brief review of the provisions of the act it seems to us that there is nothing in the act to indicate any intention on the part of the legislature to give any new definition of the words "hawkers and peddlers," but the sole purpose was to regulate the granting of licenses to persons falling within the well-recognized definition of those words, to declare what classes of goods might and might not be sold by such persons, and to prescribe the penalties for violating the provisions of the act. Thus, by the express provision of section 4, any person, even though he may be a hawker and peddler, may with impunity sell newspapers, magazines, vegetables, tobacco, provisions of any kind, or agricultural products, or may sell by sample, if traveling for an established commercial house; but a sale by a hawker or peddler of every other class of goods, wares, and merchandise, or a sale, by sample or otherwise, of stoves, ranges, clocks, lightning rods, sewing machines, pianos, or organs, is expressly forbidden. It will be observed that in the permissive clause of this section any person may sell the classes of articles there specified, viz. newspapers, etc.; but in the prohibitory clause of the section the language used is not so general, but, on the contrary, the prohibition is confined to a particular class of persons, as is plainly shown by the use of the words, "by such hawkers and peddlers." Hence, in order to render one amenable to the penal provisions of the act, it must be shown, not only that he has sold one of the prohibited articles, but also that such sale was made by him as a hawker or peddler. Any other view would subject any citizen, who sells to his neighbor a sewing machine, a clock, or a piano, to the penalties of the act; and this, surely, was not the intention of the legislature.

Such being our construction of the law, the only remaining inquiry is whether the conceded facts of this case are sufficient to bring the appellant within the provisions of the act. The facts are stated in the "case" as follows: "On and prior to the 29th day of March, 1894, defendant, who is a resident of Richland county, was in the employment of the Singer Manufacturing Company, a corporation organized under the laws of the state of New Jersey, and doing business in the state of South Carolina, as well as in other states. Said corporation has a place of business, storerooms, and warehouses in the city of Columbia, South Carolina, to which place they ship sewing machines, parts, attachments, needles, and thread, which are kept on sale at said store in the city of Columbia for any customers who desire to purchase any of said articles there, and are sold at said store in the usual course of business; and said company pays its taxes on its business and property in the city of Columbia, as do other commercial houses, to the state, the county of Richland, and the city of Columbia. The defendant, on and prior to said 29th day of March, 1894, was employed by said company, and by it furnished with a wagon, in order to travel about from place to place, in Richland county and elsewhere, for the purpose of selling sewing machines, parts, and attachments, and for the purpose of soliciting patronage for the business and store of said company at Columbia, S. C. \* \* \* The defendant has, since the 20th of December, 1893, to wit, on the 29th day of March, 1894, sold a sewing machine from his wagon while traveling from place to place, said sale having been made to one John Smith, in Richland county. \* \* \* The said sewing machine so sold by defendant from his wagon, as aforesaid, was shipped by said company from its store and warehouse at Columbia. As a rule, in the conduct of defendant's business as employé and salesman of said company, he carries about with him but one machine, which he exhibits to people residing in the country through which he travels. Sometimes, as upon the occasion above mentioned, defendant sells the machine from his wagon as he is traveling from place to place, and in that event he is supplied with another by said company from its storerooms and warehouse in the city of Columbia, and sometimes defendant secures orders for other machines, using the machine upon his wagon as a sample. Such orders so received are supplied and furnished by the company from its stores and warehouse in said city of Columbia." Now, while these facts do unquestionably show that a sewing machine was sold by the defendant at the time and place charged, yet we are of opinion that they entirely fail to show that such sale was made by him as a hawker or peddler. We do not think that the testimony brings the defendant within any recognized definition of the terms "hawker and ped-

dlar," for which see 9 Am. & Eng. Enc. Law, 307, 308; State v. Belcher, 1 McMul 40. See, also, City of Davenport v. Rice, 75 Iowa, 74, 39 N. W. 191, and Com. v. Farnum, 114 Mass. 267. This Massachusetts case was very much like the case under consideration. There the court, after stating the facts, used this language: "Upon these facts we think the jury should have been instructed that the defendant was not liable. He was an agent soliciting orders, and a carrier delivering machines ordered. He made no direct sales himself. He did not carry and expose goods for sale, within the meaning of the statute, and his acts did not come within the mischief the statute is intended to prevent. The article he carried was a sample of that which he proposed the purchaser should buy of the company. The fact that he occasionally delivered the sample machine to a purchaser desirous of obtaining one immediately cannot so change the character of his business as to bring him within the statute. Nor did the fact that he sold one attachment, and one tuck marker capable of being attached, render him liable; it distinctly appearing that it was not his practice to make such sales. The question is to be determined upon the general character and scope of his business. If this does not bring him within the statute, he is not liable for single sales, being exceptional, and not in the course of his ordinary employment." It seems to us that the defendant was nothing more than the clerk or salesman of the Singer Manufacturing Company, a foreign corporation, which had an established place of business in the city of Columbia, S. C., where it paid its taxes, state, county, and city, on its business and property in the city of Columbia; and its agent or salesman cannot, in any proper sense, be regarded as a hawker or peddler. Under this view of the case, the question as to the constitutionality of the act of 1893 does not necessarily arise, and therefore we do not feel called upon to express any opinion as to that question. The judgment of this court is that the judgment of the circuit court be reversed.

GARY, J. (dissenting). Being unable to concur in the conclusions reached by a majority of the court, I proceed to give the reasons for my dissent. The exceptions complain of error on the part of the court below on two grounds: (1) In holding that the defendant is amenable to the provisions of the hawkers and peddlers act; (2) in holding that the act is constitutional.

We will first consider whether the defendant is amenable to the provisions of said act. The act, it is true, is somewhat inartistically drawn, but when construed as a whole, and in the light of the evils it was intended to remedy, the intention of the legislature is apparent. The first, second, third, and fourth sections of the act are as follows:

Section 1: "That on and after the passage

of this act no person shall as hawker or peddler, expose for sale or sell any goods, wares or merchandise in any county in this state, unless he has received and is ready to produce and exhibit a license from the clerk of the court of common pleas of such county, so to sell or expose for sale goods, wares and merchandise in said county."

Section 2: "That said clerk shall issue licenses to hawkers and peddlers to be good in his county until the last day of December next after the date of its issue, upon receiving from the applicant such fee or fees therefor as the county commissioners shall at their first meeting in January after the passage of this act, and thereafter at their first meeting in January of every year, establish and fix fees for hawkers and peddlers in their county; and it shall be the duty of the county commissioners to fix and establish the said license fees in the several counties of this state. And each license shall specify the sum paid therefor and the privileges granted thereby."

Section 3: "It shall be the duty of every trial justice and every constable and of the sheriff and of his regular deputies to, and every citizen may, demand and inspect the license of any hawker or peddler in his or their county who shall come under the notice of any of said officers, and to arrest or cause to be arrested, any hawker or peddler found without a valid license, and to bring such hawker or peddler before the nearest trial justice to be dealt with according to this act."

Section 4: "That the provisions of this act shall not extend to venders of newspapers, magazines, vegetables, tobacco, provisions of any kind or agricultural products, or to sales by sample by persons travelling for established commercial houses, but shall extend and apply to venders of every other class and kind of goods, wares and merchandise, and to sales by sample or otherwise by such hawkers and peddlers of stoves, ranges, clocks, lightning rods, sewing machines, pianos or organs."

Section 5 simply provides a punishment for persons or officers violating the provisions of the act. Section 6 repeals all acts inconsistent with this act.

The following facts appear in the "case": "On and prior to the 29th day of March, 1894, defendant, who is a resident of Richland county was in the employment of the Singer Manufacturing Company, a corporation organized under the laws of the state of New Jersey, and doing business in the state of South Carolina, as well as in other states. Said corporation has a place of business, storeroom, and warehouses in the city of Columbia, South Carolina, to which place they ship sewing machines, parts, attachments, needles, and thread, which are kept on sale at said store in the city of Columbia for any customers who desire to purchase any of said articles there, and are sold at

said store to customers in the usual course of business, and said company pays its taxes on its business and property in the city of Columbia. The defendant, on and prior to said 29th day of March, 1894, was employed by said company, and by it furnished with a wagon in order to travel about from place to place, in Richland county and elsewhere, for the purpose of selling sewing machines, parts, and attachments, and for the purpose of soliciting patronage for the business and store of said company at Columbia, S. C.

\* \* \* The defendant has, since the 20th of December, 1893, to wit, on the 29th day of March, 1894, sold a sewing machine from his wagon while traveling from place to place, said sale having been made to one John Smith, in Richland county. \* \* \* The said sewing machine so sold by defendant from his wagon, as aforesaid, was shipped by said company from its store and warehouse at Columbia." The words "and to sales by sample or otherwise by such hawkers and peddlers of stoves, ranges, clocks, lightning rods, sewing machines, pianos or organs," at the end of section 4, were not in the bill as at first introduced, but were inserted as an amendment upon the recommendation of the senate committee. See Senate Jour. 1893, p. 154.

We will first consider the act without the aforesaid amendment. There can be no doubt that it was the intention of the legislature that the provisions of the act should not extend to venders of newspapers, magazines, vegetables, tobacco, provisions of any kind, or agricultural products, or to sales by sample by persons traveling for established commercial houses, but should extend and apply to venders of every other class or kind of goods, wares, and merchandise. Under the provisions of the act without the amendment, a person traveling for an established commercial house would have the right to sell a sewing machine by sample, but only by sample. What was the intention of the legislature by amending section 4 as aforesaid? According to the view which I take of the amendment, it was for the purpose of emphasizing the restrictive provisions of the act as to sales of "stoves, ranges, clocks, lightning rods, sewing machines, pianos or organs," and to prevent their sale, by "sample or otherwise," by the persons mentioned in the act, unless the person selling them had a license authorizing such sale. The connection in which the legislature uses the words "such hawkers and peddlers" in section 4 leads me to the conclusion that their intention was to use them in the sense of "persons traveling for established commercial houses." It will scarcely be contended, by those who are familiar with the sales of "stoves, ranges, clocks, lightning rods, sewing machines, pianos or organs," that it was the intention of the legislature to confer special privileges on those making such sales, or that the amendment was adopted for the purpose of enabling persons trav-

elling for established commercial houses to sell "stoves, ranges, clocks, lightning rods, sewing machines, pianos or organs," not only by sample, but otherwise, while such persons can sell other articles only by sample; yet this is the effect of the construction placed upon the act by the majority of the court. Such construction almost practically defeats the purposes of the act by exempting from its operation sales of sewing machines, etc. (mentioned in the amendment), conducted in the manner set forth in this case.

We will now consider the error complained of on the part of the court below in holding the act constitutional. Objection is urged against the constitutionality of the act because it provides that "it shall be the duty of the county commissioners to fix and establish the said license fees in the several counties of this state." Section 2. Section 8 of article 9 of the constitution of this state is as follows: "The corporate authorities of counties, townships, school districts, cities, towns and villages, may be vested with power to assess and collect taxes for corporate purposes, such tax to be uniform in respect to persons and property within the jurisdiction of the body imposing the same." Section 643 of the Revised Statutes of 1893, relative to county commissioners, is as follows: "They shall have jurisdiction over roads, highways, ferries and bridges and all matters relating to taxes and disbursements of money for county purposes, in accordance with provisions of law, and in every other case that may be necessary to the internal improvement and local concern in their respective counties." Section 1444 of the Revised Statutes of 1893 provides that such license fees shall be paid by the clerk of the court into the hands of the county treasurer for the use of the county. In the case of *State v. Columbia*, 6 S. C. 1, it was decided that a requirement of the payment of license fees for the exercise of an employment or calling is an exercise of the taxing power. The tax assessed by the county commissioners was for "the use of the county," and therefore for a "corporate purpose."

It is argued, however, that in section 2 of said act the legislature attempted to delegate its powers of taxation to the county commissioners, and that therefore the act is null and void. We cannot accept this view of the act. It is full and complete within itself, only leaving it to the county commissioners to assess and fix the amount of the license, which, when this is done, is definite and uniform as to all persons within that county. It comes under the principle laid down in the case of *Mining Co. v. Hagood*, 30 S. C. 524, 9 S. E. 686, in which it is said: "It is undoubtedly true that legislative power cannot be delegated; but it is not always easy to say what is, and what is not, legislative power in the sense of the principle. The legislature is only in session for a short period of each year, and during

the recess cannot attend to what might be called the business affairs of the state. From the necessity of the case, as well as the character of the business itself, that must be performed by agents appointed for that purpose, such as the railroad commission, regents of the lunatic asylum, the state board of canvassers of elections, sinking fund commission, etc. The numerous authorities cited in the argument show conclusively that, while it is necessary that the law should be full and complete as it comes from the proper lawmaking body, it may be—indeed must be—left to agents, in one form or another, to perform acts of executive administration which are in no sense legislative. Without incumbering this opinion with the authorities, we think the view is well stated in *Locke's Appeal*, 72 Pa. St. 491: "Then the true distinction, I conceive, is this: The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its nonaction depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend, which cannot be known to the lawmaking power, and must therefore be a subject of inquiry and determination outside of the halls of legislation." This view is also sustained by *Information v. Oliver*, 21 S. C. 325, which says: "In the case against *Columbia*, 6 S. C. 1, it was held that the legislature is not forbidden by the constitution from empowering municipal corporations to enforce taxes on business and avocations, and to fix a different rate for each distinct class of persons subject to the tax; that whatever, in this regard, the state herself could do, she might authorize a municipal corporation to do within its limits." Section 8 of article 9 of the constitution, which confers the right to vest such power in municipal corporations, likewise mentions, in the same connection, the corporate authorities of counties. The county commissioners are the corporate authorities of counties. The duties imposed upon the clerk of the court are purely ministerial. The requirement that he should specify in the license the privileges granted thereby was not to confer upon him the power to grant privileges, but simply to specify what articles the hawker or peddler was allowed to sell, for what length of time, and within what territory.

The objection that the law is not certain and uniform cannot be sustained. It was the intention of the act that the license fees should be established and fixed by the county commissioners at their first meeting in January after the passage of the act, and should be certain and uniform as to all persons within the county. Although the license fees might be different in the several counties, this would not render the act un-

constitutional. The law applicable to this case is expressed in *State v. Berlin*, 21 S. C. 295, in which the court says: "It seems to us that the rule upon this subject has been well expressed by Judge Cooley in his work on Constitutional Limitations (2d Ed.), at page 390: 'Laws public in their objects may, unless express constitutional provision forbids, be either general or local in their application. \* \* \* The authority that legislates for the state at large must determine whether particular rules shall extend to the whole state and all its citizens, or, on the other hand, to a subdivision of the state or a single class of its citizens only. The circumstances of a particular locality, or the prevailing public sentiment in that section of the state, may require or make acceptable different police regulations from those demanded in another. \* \* \* The legislature may therefore prescribe different laws of police \* \* \* in each distinct municipality, provided the state constitution does not forbid. These discriminations are made constantly, and the fact that the laws are of local or special operation only is not supposed to render them obnoxious in principle. \* \* \* If the laws be otherwise unobjectionable, all that can be required in these cases is that they be general in their application to the class or locality to which they apply; and they are then public in character, and of their propriety and policy the legislature must judge.' The whole matter is well summed up in a note on the same page, in the following words: 'To make a statute a public law of general obligation, it is not necessary that it should be equally applicable to all parts of the state. All that is required is that it shall apply equally to all persons within the territorial limits described in the act.'"

Objection was also urged against the constitutionality of the act on the ground that it is an interference with interstate commerce. In considering this objection it will be well to bear in mind the following facts in this case: The defendant is a resident of Richland county. The company had a place of business in the city of Columbia, where machines were kept on sale for any customer who might desire to purchase them. They were sold in the usual course of business. The company also pays its taxes on its business and property in the city of Columbia, as do other commercial houses, to the state of South Carolina, county of Richland, and city of Columbia. The machine was sold from the wagon while the defendant was traveling from place to place in Richland county, which machine was furnished by the company from its store in Columbia. The goods in Columbia had become part of the general mass of property in this state, and were therefore amenable to the laws of the state. It is not contended that the goods were sold in the original package. Under these circumstances the act

cannot be declared unconstitutional as interfering with interstate commerce. The case of *Robbins v. Shelby Co. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592, decided that the constitution of the United States does not prohibit the "imposition of taxes upon persons residing within the state or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce"; also: "As soon as the goods are in the state and become part of the general mass of property, they will become liable to be taxed as other property of similar character."

(93 Ga. 364)

### WEEMS et al. v. SIMPSON.

(Supreme Court of Georgia. Jan. 27, 1894.)

#### JUDGMENT—RES JUDICATA—DISMISSAL.

It appearing from a full review of all the pleadings and evidence that the court below was right in sustaining the plea of "res adjudicata," there was no error in withdrawing the case from the consideration of the jury, or in dismissing the same.

(Syllabus by the Court.)

Error from superior court, Wilkes county; Hamilton McWhorter, Judge.

Action by Kate Weems and another against Robert A. Simpson to recover real estate. There was a judgment for defendant, and plaintiffs bring error. Affirmed.

Colley & Sims, Wm. Wynne, S. H. Harde-man, and N. J. & T. A. Hammond, for plaintiffs in error. W. M. & M. P. Reese, for defendant in error.

LUMPKIN, J. This was an action brought by the Misses Weems against Robert A. Simpson for the recovery of certain realty in the town of Washington. By the abstract attached to the petition it appears that the plaintiffs claim title under a deed from their father and mother, John B. and Mary B. Weems, to Samuel B. Wingfield, trustee, dated November 16, 1861; plaintiffs being two of the four children specified in the deed, and claiming as beneficiaries thereunder. Besides the general issue and prescription, the defendant filed a plea of "res adjudicata," alleging that upon a bill in equity formerly brought by these plaintiffs for the same property, and claiming under the same title now relied on, against the administrator of one Nicholas Wylie, it had been adjudicated that they had no right to recover. This plea alleged, further, that defendant is in privity with the estate of Wylie, because the father of defendant, at a sale lawfully made by Wylie's administrator, after the final disposition of the above-mentioned bill, purchased all the right, title, and interest of Wylie's estate in the premises, and the defendant now holds the same under his father's will. After the evidence was in, the judge withdrew the case from the jury, passed an order sustaining the plea of "res



adjudicata," and dismissed the case; and our conclusion is that there was no error in the judgment rendered. The property in dispute was involved in the bill referred to, which was filed by Belle Virgin and the other children of John B. Weems and wife, including the present plaintiffs, against John T. Wingfield, as administrator of Wylie, many years ago. That case came to this court three times, is reported in 51 Ga. 139, 54 Ga. 451, and 56 Ga. 474, and finally resulted in a verdict and decree in favor of the defendant. The bill, as it originally stood, prayed for the cancellation, as clouds upon complainants' title, of the two deeds to Wylie mentioned in 51 Ga.; also, that an account be taken of the rents, issues, and profits of the property from the time Wylie took possession of it; that the amount of damage done by him, resulting from certain alleged acts of waste, might be fixed; that they recover of Wylie's administrator these several amounts of money, as well as the property itself; and that Samuel B. Wingfield be removed from his office as trustee, and some other person be appointed in his stead. On the trial of the present case the entire record of the former case was in evidence, and it was also shown that at a sale of the property which was made by John T. Wingfield, as administrator of Wylie, after the termination of the above-mentioned litigation, it was purchased by William W. Simpson, deceased, who was the father of the present defendant, under whose will the latter claims. The terms of the deed from John B. Weems and wife to Samuel B. Wingfield, trustee, are stated in the opinion of Chief Justice Warner, appearing in 51 Ga., *supra*. An examination of the reports of the former case in the three volumes above cited will not, however, by any means disclose all that will appear from an inspection of the papers constituting the entire record in that case. It is not our present purpose to set forth here that record. The case was so complicated, and in so many respects *sui generis*, that our ruling that the effect of the final decree rendered in it was to cut off the plaintiffs from any right to recover in the case at bar would be of but little value as a precedent. It is hardly probable that a state of facts precisely similar to, or even closely resembling, those now involved, will again arise. For these reasons we do not think the time and labor requisite to state and discuss all the facts involved, and to deal with all the various questions presented, would be profitably expended. The case, therefore, is not one specially calling for an opinion, but for the fact that the bringing of it was probably inspired by certain remarks of Chief Justice Bleckley in the case of *East Rome Town Co. v. Cothran*, 81 Ga. 359, 8 S. E. 737. We simply wish to show that what he said there is not inconsistent with our present judgment. Among the very important papers not disclosed by any of the reports of the *Virgin* Case may be

mentioned (1) a demurrer to the complainants' bill, filed by the defendant, setting up that they had no right to sue for or recover the property until after the death of their father, John B. Weems; (2) a judgment overruling this demurrer, which in effect adjudicated that they could maintain their bill and recover during his lifetime if they sustained their averments by evidence; (3) an amendment filed to the bill before the second trial in Wilkes superior court, containing numerous and important allegations; (4) the full charge given by the judge at the last trial in that court, showing clearly the issues then made and passed upon. It is unnecessary to set forth the contents or substance of these documents. Suffice it to say that, had they been set forth in the reports referred to, there would have been a much more complete exhibition of the nature of the litigation, and the legal effect of the final disposition of it upon the complainants' rights would have been more apparent. What the chief justice said in the *East Rome* Case must be considered in the light of the facts just mentioned. We quote from his opinion in that case the following language: "At first view, the case of *Wingfield v. Virgin*, 51 Ga. 139, would seem to militate with these decisions, but it is susceptible of an easy reconciliation with their purport. Upon looking at the terms of the conveyance in *Wingfield v. Virgin* it is obvious that the question of whether the children took a legal remainder, had it been directly made, could have been decided in the affirmative; but that question was not made, inasmuch as the purpose of the bill filed by the children and their mother was to reinstate the trust, and obtain an accounting for the income of the property, not after the death of the parents, but for a period which had elapsed while they were alive. The decision of the court was that the bill was barred. Why was it barred? Because Wylie, the purchaser, had bought in good faith, and held for seven years or more against the trust title; and that title, though it may have been limited to the life of Weems and wife, was barred by such holding. The trust estate was therefore gone, and of course, with it, the right to recover income to which the trustee or the beneficiaries, pending his term, would have been entitled. The court did not undertake to adjudicate how long the trust estate continued, but only that, the trustee being barred, the beneficiaries could not have the trust reinstated so as to have the trust term go on for their benefit, and so as to recover the rents and profits to which the trustee had the legal title. It was not, and never has been, decided that the children, after the death of Weems and wife, could not recover the property upon their legal title as remainder-men." 81 Ga. 362, 363, 8 S. E. 737. The last sentence contains an intimation that the present plaintiffs, after the death of their father and mother, might, recover the

property in dispute. It must, of course, be borne in mind that the chief justice was not then endeavoring to pass upon the merits of the present case. He simply referred to the Virgin Case where it was first reported, in 51 Ga., with a view to showing that it was reconcilable with other cases he had just cited. Even if he had examined the reports of the Virgin Case in 54 and 56 Ga., they would not have disclosed all of the record of that case now material, notably the parts above mentioned, viz. the demurrer to the original bill, the overruling of the same, the amendment filed by the complainants, and the charge of the court upon the last trial in the superior court. In order to determine definitely and authoritatively the question whether the Weems children are now entitled to recover upon their legal title as remainder-men, it is necessary to examine and consider the force and effect of the pleadings, and the verdicts and judgments rendered thereon, in Wilkes superior court in the prior litigation concerning this same property, in connection with all the proceedings and contentions of the parties; and, to do this properly, an inspection of the entire record of the former case is indispensable. Without such inspection, the remark of the chief justice that this court had never decided that the Weems children could not recover upon their legal title as remainder-men could in no fair view be treated as decisive of the controlling question presented in the present case. Indeed, that remark, when considered with reference to the record as disclosed in the report in 51 Ga., and even as disclosed in the reports in 54 and 56 Ga., was not only accurate in itself, but the intimation contained in it was perfectly correct. Those reports, as we have shown, by no means set forth the entire record of the former case, or disclose with certainty within what limits the contentions of the parties, as actually made and submitted, were confined. Having now before us the whole record, we have, after a thorough and careful examination of it, reached the conclusion that the plaintiffs in the present case were estopped by the final verdict and judgment in the former litigation, and that the court below was right in so holding. Judgment affirmed.

(23 Ga. 389)

**ATLANTA & C. AIR-LINE RY. CO. v. GRAVITT.**

(Supreme Court of Georgia. Feb. 26, 1894.)

**EVIDENCE AT FORMER TRIAL—INACCESSIBLE WITNESS—QUESTION FOR TRIAL COURT—DEPENDENT MOTHER—CUSTODIAN OF CHILD—NEGLIGENCE—WHEN IMPUTED TO PARENTS—RAILROAD COMPANIES—INJURY TO PERSONS ON TRACK—FAILURE TO GIVE CROSSING SIGNALS—EVIDENCE.**

1. There was no error in admitting the evidence of a witness introduced upon a former trial of the same case, when it appeared that the witness, since testifying, had removed to the state of Texas. Whether or not a witness

beyond the jurisdiction of this state is "inaccessible," in the sense in which that word is used in section 3782 of the Code, is, under all the circumstances of the particular case, a question for determination by the trial court, in the exercise of a sound discretion.

2. Where a boy 11 years old, whose labor was worth six dollars per month, and who resided with his parents, worked with his father on a farm, and rendered services to his mother about the house, in the performance of her household duties,—the benefit of his labor and services being thus realized by the parents in the support of themselves and their family, they being laboring people, and mutually dependent upon the labor of one another for a support,—the mother was dependent upon the boy, and he contributed substantially to her support.

3. Where a father intrusts his minor son, a youth of tender years, to the care and custody of another, such person becomes the legal representative and agent of the father in discharging the duty which the law imposes upon the latter of guarding and shielding the child from injury. Accordingly, if the child, by reason of the gross negligence of his custodian, in taking him upon a high and dangerous trestle, is run over by a passenger train and killed, such negligent conduct is, in law, imputable to the father himself. Such custodian could not, however, properly be regarded as likewise the representative or agent of the child's mother. By express statute, in this state, the father is vested with the control of his minor child, and the mother is not accountable for the conduct of a custodian for him chosen by the father. Nor, in a suit by the mother in her own right, as authorized by special statute, is she chargeable with the negligence of the father merely because of the conjugal relation existing between them.

4. Relatively to a person who, without license from the company, is walking upon a railway track on a trestle, though such trestle be situated between a blow post and a public crossing, the omission of the engineer to comply with the statutory requirements as to giving signals and checking the speed of the train is not negligence, inasmuch as these requirements raise no duty as between the company and strangers who may be upon the track elsewhere than at a public crossing.

5. The duty to observe all ordinary and reasonable care and diligence towards such person arises when his presence becomes known to the engineer, and not before. A failure in such care and diligence after that time, from which injury results, unless it could have been avoided by the use of ordinary care on the part of the person hurt or killed, will render the company liable.

6. Although omission of the statutory requirements, when a part of the *res gestae*, may be considered by the jury in passing upon the question of negligence relatively to the person injured or killed, yet, where the evidence, as a whole, shows there was no negligence imputable to the company or its servants, except failure to observe these requirements, the company is not liable for results occurring upon the track of its road elsewhere than at a public crossing.

7. The mere opinion of a locomotive engineer that a heavy passenger train, consisting of a locomotive and six cars, running down grade at 45 miles an hour, could be stopped within a distance of 100 yards, is not sufficient to overcome the positive and uncontradicted evidence of the engineer and fireman upon the identical train that all was done which could possibly be done to stop it, and that nevertheless it was not stopped within a distance of over 400 yards, especially when the evidence of these witnesses was strongly corroborated by others, who were experts in such matters.

(Syllabus by the Court.)

Error from superior court, Hall county; C. J. Wellborn, Judge.

Action by Elizabeth M. E. Gravitt against the Atlanta & Charlotte Air-Line Railway Company to recover for the death of plaintiff's minor son, caused by defendant's negligence. There was a judgment for plaintiff, and defendant brings error. Reversed.

Jackson & Jackson, Geo. Dudley Thomas, and S. C. Dunlap, for plaintiff in error. J. B. Estes, H. H. Perry, H. H. Dean, and M. L. Smith, for defendant in error.

LUMPKIN, J. The facts of this case, so far as material, will be stated in connection with the legal principles discussed.

1. One ground of the motion for a new trial alleged that the court erred in allowing the plaintiff to introduce, over objection of the defendant, the evidence of one Willingham, contained in a brief of the evidence taken at a former trial of this same case; it appearing that the witness, who had formerly resided in the county where the trial occurred, had removed to Texas, and that his place of abode in that state was well known to the officers of court, and also in the community in which he had resided before leaving Georgia. "That a witness is beyond the jurisdiction of the state is generally a sufficient cause for not producing him." See *Welch v. Manufacturing Co.*, 61 Ga. 448, citing 1 Greenl. Ev. § 163, and note on page 235, and also previous decisions of this court. And see the later case of *Gunn v. Wades*, 65 Ga. 537. After an examination of the authorities, and after some reflection, our conclusion is that whether or not a witness beyond the jurisdiction of this state is "inaccessible," in the sense in which that word is used in section 3782 of the Code, is, in each particular case, a question for determination by the trial judge, in the exercise of a sound discretion. We are unadvised as to whether or not there is any statute in Texas for compelling the attendance before commissioners of a witness whose testimony by interrogatories is desired in the courts of another state. In the absence of a law of this kind, there could be little doubt as to the inaccessibility of the witness Willingham; and, even if we knew of the existence of such a law in Texas, we are not prepared to say we would hold that the trial judge erred in deciding that the witness was inaccessible.

2. The boy killed by the defendant railway company was 11 years of age. The second headnote states substantially the nature and character of the services he rendered at his parents' home. There was evidence that his labor was worth six dollars per month in money. In order to authorize a recovery by the mother for the homicide of this child, it was essential for her to make it appear that he contributed to her support. *Clay v. Railroad Co.*, 84 Ga. 345, 10 S. E. 967. If he did contribute to her support, and she was substantially dependent upon the child,

in part, for support, the fact that she was also dependent upon her husband and her own labor would not defeat her right to recover. *Daniels v. Railway Co.*, 86 Ga. 232, 236, 12 S. E. 305. In the present case, we think the mother was dependent upon the boy, and that he contributed substantially to her support. This conclusion is sustained by the decision of this court, made after full and careful deliberation upon the question now under consideration, in *Railway Co. v. Glover*, 92 Ga. 132, 18 S. E. 406. See headnote 6, and the comments thereon by Chief Justice Bleckley. The only practical difference between that case and the one at bar is that there the son was between 15 and 16 years of age, while in the present case the boy killed was between 11 and 12. The principle applicable is the same in both cases.

3. The doctrine of imputable negligence is, to some extent, involved in the present case. Judicial opinion has not, in the past, been harmonious as to the extent or the application of this doctrine. The various questions which have arisen when it has been invoked have led to many perplexing doubts, and much conflict and confusion in the earlier decisions. We have therefore thought it not unprofitable to enter into a somewhat extended consideration of the doctrine, so far as it has any bearing on the facts now before us; for, though this discussion may not be absolutely essential to a correct and intelligible disposition of the present case, we are willing to undergo the considerable amount of labor required, in the hope that it may prove useful to this court, as well as to the judges of the trial courts, in determining questions which are likely to arise in the future in similar cases.

The plaintiff seeks to recover for the homicide of a minor son, 11 years of age. As any negligence of the child himself, or any negligence legally imputable to him, which would have defeated a recovery by him, had he been injured instead of being killed, and had brought an action for the injuries, would now defeat a recovery by the mother, it is important at the outset to determine how the child's rights in such an action would be affected by his own negligence, or that of another. Under the facts of this case, it is hardly necessary to go into the question of the child's own negligence, but the inquiry does arise whether or not the undoubted negligence of the person in whose charge he was when killed could or could not have been properly urged as a defense to an action brought in his behalf. As considerable conflict is presented by the numerous cases in which this inquiry has heretofore arisen, we shall attempt to review the leading decisions on the subject, with a view to ascertaining what the true law is.

The rule imputing to a child of tender years the negligence of its parent, guardian, or custodian was introduced into the law of this country by *Hartfield v. Roper*, 21 Wend.

615. The reasoning employed in support of this rule is thus stated by Cowen, J., who delivered the opinion of the court in that case: "An infant is not *sui juris*. He belongs to another, to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose, and, in respect to third persons, his act must be deemed that of the infant; his neglect, the infant's neglect." The principle thus announced has since been recognized, and is still adhered to, by the courts of the state of New York. *Mangam v. Railroad Co.*, 38 N. Y. 455; *Ihl v. Railroad Co.*, 47 N. Y. 317; *Cosgrove v. Ogden*, 49 N. Y. 255; *Morrison v. Railway Co.*, 56 N. Y. 302; *Thurber v. Railroad Co.*, 60 N. Y. 333; *McGarry v. Loomis*, 63 N. Y. 104; *Huerzeler v. Railroad Co.* (Com. Pl. N. Y.) 20 N. Y. Supp. 676.

The doctrine laid down in *Hartfield v. Roper* has received the approval of a number of other courts of equally high standing, and has been accepted and applied in Massachusetts, California, Minnesota, Indiana, Maryland, Maine, Kansas, and Delaware. *Gibbons v. Williams*, 135 Mass. 333; *McGeary v. Railroad Co.*, Id. 363; *O'Connor v. Railroad Co.*, 135 Mass. 352; *Holly v. Gaslight Co.*, 8 Gray, 123; *Wright v. Railroad Co.*, 4 Allen, 283; *Callahan v. Bean*, 9 Allen, 401; *Lynch v. Smith*, 104 Mass. 52; *Karr v. Parks*, 40 Cal. 188; *Schierhold v. Railroad Co.*, Id. 447; *Meeks v. Railroad Co.*, 52 Cal. 602, 56 Cal. 513; *City of St. Paul v. Kuby*, 8 Minn. 166 (Gil. 125); *Fitzgerald v. Railway Co.*, 29 Minn. 336, 13 N. W. 168; *Railroad Co. v. Vining*, 27 Ind. 513; *Railroad Co. v. Huffman*, 28 Ind. 287; *Hathaway v. Railway Co.*, 46 Ind. 25; *McMahon v. Railway Co.*, 39 Md. 438; *Railway Co. v. McDonnell*, 43 Md. 534; *Leslie v. Lewiston*, 62 Me. 468; *O'Brien v. McGlinchy*, 68 Me. 552; *Smith v. Railroad Co.*, 25 Kan. 738; *Railroad Co. v. Smith*, 28 Kan. 541; *Kyne v. Railroad Co.* (Del.) 14 Atl. 922. Yet the harshness of this rule seems to have been generally recognized, and even in those jurisdictions where it is still tenaciously adhered to, as sound in principle, the modern tendency has been to modify it, and to limit its application, as far as possible, consistently with the adjudged cases. Accordingly, it has been held that the doctrine of imputable negligence has no application in a case where, notwithstanding negligence on the part of parents in permitting their child to be exposed to peril, the child itself exercised due care. *O'Brien v. McGlinchy*, 68 Me. 552; *Lynch v. Smith*, 104 Mass. 52. Indeed, this modification of the rule announced in *Hartfield v. Roper* first found utterance in the very state where the rule itself was given birth. *Lannen v. Gaslight Co.*, 46 Barb. 264. *Hogeboom, J.*, in delivering the opinion of the court in that case, says on page 270: "But I know of no just or legal principle which, when the infant himself is free from negligence, imputes to him the negligence of the parent, when,

if he were an adult, he would escape it. This would be, I think, 'visiting the sins of the fathers upon the children' to an extent not contemplated in the decalogue, or in the more imperfect digests of human law." The later decisions in New York state have strictly conformed to this view: *Ihl v. Railroad Co.*, 47 N. Y. 317; *McGarry v. Loomis*, 63 N. Y. 104; *Huerzeler v. Railroad Co.* (Com. Pl. N. Y.), 20 N. Y. Supp. 676. The rule has received a further very material modification by the courts refusing in many cases to hold, as matter of law, that parents were negligent in not keeping constant and unremitting watch and restraint over their children, this question of negligence being left to the jury for determination. Examine cases cited *supra*. While in Maryland it is held that, though a parent may be negligent in exposing a child to peril, still, if the defendant could have avoided injury to it by the exercise of ordinary care, the child may nevertheless recover damages. *McMahon v. Railway Co.*, 39 Md. 438; *Railway Co. v. McDonnell*, 43 Md. 534.

Although, as has been seen, the rule announced in *Hartfield v. Roper* has received a very considerable following, its correctness has been doubted and severely criticised in many other jurisdictions. As early as 1850 the reasoning of that case was expressly repudiated by *Redfield, J.*, in *Robinson v. Cone*, 22 Vt. 213. While in the later case of *Whitley v. Whiteman*, 1 Head, 609, *McKinney, J.*, in speaking of New York's pioneer case, says: "This decision is no less opposed to the current of authority upon the point than to every principle of reason and justice. It is, literally, to visit the transgression of the parent upon the child." No less severe is the criticism of Chief Justice Brickell of Alabama, who says: "It seems repulsive to our sense of justice that, because the parent is negligent of his child, others may with impunity be equally negligent of its helplessness, and equally indifferent to its necessities." *Railroad Co. v. Hanlon*, 58 Ala. 82. Chief Justice Beasley, in *Newman v. Railroad Co.*, 52 N. J. Law, 450, 19 Atl. 1102, disposes of the question thus tersely: "The conversion of the infant, who is entirely free from fault, into a wrong doer by imputation, is a logical contrivance uncongenial with the spirit of jurisprudence." While in *Railroad Co. v. Snyder*, 18 Ohio St. 399, *Welch, J.*, aptly remarks that to impute the negligence of the parent to the child would be to recognize and apply "the old doctrine of the father eating grapes, and the child's teeth being set on edge."

Nor has the ruling in *Hartfield v. Roper* escaped the severe and unreserved disapprobation of the leading text writers. See elaborate discussion and criticism in *Whart. Neg.* (2d Ed.) §§ 313, 314; *Bish. Noncont. Law*, § 581 et seq.; *Beach, Contrib. Neg.* (1st Ed.) § 38 et seq.; *Id.* (2d Ed.) § 116 et seq. *Mr. Beach*, after citing cases to show that when a donkey

is carelessly run down in the highway, where he is negligently exposed by the owner, the defendant is held liable, or, where oysters are negligently placed in a river bed, it is an injury redressible at law for a vessel negligently to disturb them, sarcastically adds, "It appears, therefore, that the child, were he an ass or an oyster, would secure a protection which is denied him, as a human being of tender years, in such jurisdictions as enforce the English or the New York rule in this respect." It may be here incidentally remarked that, since the overruling of the celebrated English case of *Thorogood v. Bryan*, 8 C. B. 115, imputing to a passenger the negligence of the driver of a public conveyance, the position of the English courts upon the question now before us would seem to be left in doubt. *The Bernina*, 12 Prob. Div. 58, affirmed in *Mills v. Armstrong*, L. R. 13 App. Cas. 1. There may be later adjudications touching this question by the English courts, but we have not deemed it essential to ascertain definitely as to this by an absolutely exhaustive search, nor have we thought it profitable in this discussion to cite any of their previous decisions. As a matter of general information, however, it may be stated that what is commonly known as the "English rule" was first expounded in *Waite v. Railway Co.*, El. Bl. & El. 719. In that case it appeared that the plaintiff, an infant about five years of age, was in charge of its grandmother, who procured tickets for both at a railway station, with the intention of taking the train at that place. In crossing a track to reach a platform, they were run down by a train, under circumstances of concurrent negligence on the part of the grandmother and of the servants of the company. It was held that the action could not be maintained, because of the legal "identity" of the infant plaintiff with his guardian or custodian, whose negligence would be imputable to the child.

For a further discussion of the subject now under consideration, and full citation of authorities, reference is made to *Whit. Smith*, Neg. §§ 412-415; 1 *Shear. & R. Neg.* § 74 et seq.; *Deer. Neg.* § 28; *Patt. Ry. Acc. Law*, 76-78; 2 *Wood, Ry. Law*, 1284; *Pol. Torts*, 297-300; *Cooley, Torts*, 818 et seq.; *Bigelow, Torts*, 319; *Add. Torts*, 576, notes; 3 *Lawson. Rights, Rem. & Pr.* § 1210; 4 *Am. & Eng. Enc. Law*, 82-89. An examination of the above authorities, and of the cases therein referred to, warrants the assertion that the consensus of opinion now is that those decisions are wholly unsound, and without any foundation in reason to support them, which hold that the rights of the infant are identified with or dependent upon those of its parent, and that, upon the principle of agency, the act of the parent must, in law, be deemed that of the child. Judge Thompson remarks, in the vernacular of the present day, that the doctrine which these decisions seek to uphold "seems fast going by the board." 2 *Thomp. Trials*, § 1687. The decided weight of current authori-

ty is in accord with the view thus succinctly stated by Arnold, J., in the recent case of *Westbrook v. Railroad Co.*, 66 Miss., 560, 6 South. 321: "Infants have legal rights distinct from their parent, among which is the right to security from personal injuries occasioned by the negligence or willful wrong of others. Negligence or dereliction of the parent or custodian of children is no justification for others to injure them." Accordingly, it is held in Mississippi that, where the suit is brought by or in behalf of the infant, in its own right, contributory negligence on the part of its parents, or others standing in loco parentis, will not operate as a bar to recovery, or present any defense to the suit. Such is the rule which also obtains in: *Ohio—Railroad Co. v. Snyder*, 18 Ohio St. 399; *Railroad Co. v. Manson*, 30 Ohio St. 451; *Railway Co. v. Eadie*, 43 Ohio St. 91, 1 N. E. 519. *Pennsylvania—Railroad Co. v. Mahoney*, 57 Pa. St. 187; *Railway Co. v. Schuster*, 113 Pa. St. 415, 6 Atl. 269. *Virginia—Railroad Co. v. Ormsby*, 27 Grat. 455; *Railroad Co. v. Groseclose*, 88 Va. 267, 13 S. E. 454. *Alabama—Railroad Co. v. Hanlon*, 53 Ala. 70; *Iron Co. v. Brawley*, 83 Ala. 371, 3 South. 555. *New Jersey—Newman v. Railroad Co.*, 52 N. J. Law, 446, 19 Atl. 1102. *Michigan—Battisill v. Humphreys*, 64 Mich. 494, 31 N. W. 894; *Shippy v. Village of Au Sable*, 85 Mich. 280, 48 N. W. 584. *Nebraska—Huff v. Ames*, 16 Neb. 139, 19 N. W. 623. *Tennessee—Whirley v. Whiteman*, 1 Head, 609. *Vermont—Robinson v. Cone*, 22 Vt. 213. *Connecticut—Daley v. Railroad Co.*, 28 Conn. 591. *Iowa—Wymore v. Mahaska Co.*, 78 Iowa, 396, 43 N. W. 264. *Texas—Williams v. Railroad Co.*, 60 Tex. 205; *Railway Co. v. Moore*, 59 Tex. 64. *Missouri—Winters v. Railway Co.*, 99 Mo. 509, 12 S. W. 652, distinguishing *Stillson v. Railroad Co.*, 67 Mo. 671, and following *Boland v. Railroad Co.*, 36 Mo. 484. *Illinois—Railway Co. v. Wilcox*, 33 Ill. App. 450; affirmed by the supreme court, 138 Ill. 370, 27 N. E. 899. *Georgia—Ferguson v. Railway Co.*, 77 Ga. 102. While, in the case last cited, this court did not enter into a discussion of the question, it distinctly ruled that "the fault of the father, if any, is not attributed to the infant, the action being brought by the infant herself." In many of the text-books it is stated that the opposite view prevails in Illinois, and numerous decisions of the supreme court of that state are cited in support of this statement, seemingly with good reason. Be this as it may, however, that state, by its recent decisions, has "wheeled into line," and joined the procession of those jurisdictions which have repudiated the doctrine of *Hartfield v. Roper*. The appellate court of Illinois took the initiatory step in this direction in the case of *Railway Co. v. Wilcox*, cited supra; Gary, J., remarking "that a child suing for wrong done him shall be cut off from remedy because others neglected their duty to him is a doctrine going into 'innocuous desuetude.'" On appeal of this case to the higher court,

the judgment therein was affirmed. In delivering the opinion of the supreme court, Mr. Justice Bailey reviews exhaustively the former decisions of that court, and seeks to distinguish the case then in hand from those which apparently recognize the New York or English rule. In conclusion, he says: "This court, however, cannot fairly be said to be committed to a doctrine, upon the principle of stare decisis, by its recognition or assertion in a case which does not call for its application, and the decision of which rests wholly upon other grounds. Not being concluded, therefore, by any of our former decisions, we are disposed to adopt the rule which seems to us to be most reasonable, and most in conformity with the recognized principles of the common law, viz. that, where a child of tender years is injured by the negligence of another, the negligence of his parents, or others standing in loco parentis, cannot be imputed to him, so as to support the defense of contributory negligence to his suit for damages."

We will now pass, as next in order, to a consideration of what are the rights of a parent, in an action brought in his own behalf for the injury or homicide of an infant child, occurring under circumstances of concurrent negligence on the part of both such parent and of the defendant to the suit.

Quite a different rule prevails where the suit is brought, not by the child himself, or by another in his behalf, but by the child's parent, or by one standing in loco parentis, and having a legal interest in his life. In such case, negligence on the part of the child's parent or custodian may utterly defeat a recovery. The reason for this is apparent, and has been uniformly recognized and sanctioned. It rests upon the broad ground of common justice, that one whose negligence has brought about a calamity to a little one, whom he is legally bound to watch over and protect from injury, cannot be allowed to profit by the results of his own inexcusable, if not criminal, neglect and misconduct. There is no conflict among the decisions upon this question. Even in those jurisdictions which have repudiated the doctrine of imputable negligence as announced in *Hartfield v. Roper*, there has been no departure from this just and equitable principle, and this rule has been universally recognized and strictly enforced. *Westbrook v. Railroad Co.*, 66 Miss. 560, 6 South. 321; *Shippy v. Village of Au Sable*, 85 Mich. 280, 48 N. W. 584; *Glassey v. Railway Co.*, 57 Pa. St. 172; *Railway Co. v. Schuster*, 113 Pa. St. 412, 6 Atl. 209; *Railway Co. v. Snyder*, 24 Ohio St. 670; *Railway Co. v. Eadie*, 43 Ohio St. 91, 1 N. E. 519; *Williams v. Railroad Co.*, 60 Tex. 205; *Railway Co. v. Wilcox*, 33 Ill. App. 450, affirmed by the supreme court 138 Ill. 370, 27 N. E. 899; *Iron Co. v. Brawley*, 83 Ala. 371, 3 South. 555; *Huff v. Ames*, 16 Neb. 139, 19 N. W. 623; *Railroad Co. v. Groseclose*, 88 Va. 287, 13 S. E. 454; *Wymore v. Mahaska Co.*, 78 Iowa, 396, 43 N. W. 204.

And see the following text-books: *Beach, Contrib. Neg.* (1st Ed.) §§ 44, 45; *Id.* (2d Ed.) § 131 et seq.; 2 *Thomp. Neg.* 1191; *Whart. Neg.* § 310; 3 *Lawson, Rights, Rem. & Pr.* 2135; *Bish. Noncont. Law*, §§ 578-580.

It is equally well settled, as will appear from an examination of the authorities just cited, that though the father was not himself present, but the injury to the child occurred while it was under the care and in charge of another person, to whom its safety had been intrusted, the rule would still apply in all its strictness. It being the imperative legal duty of a father to guard and shield his child from injury, if he delegates that duty to another he is legally responsible for the conduct of that other, whose every act is, in legal contemplation, the act of the father himself. This principle is clearly stated in *Railway Co. v. Snyder*, cited above, which was a suit by the father for an injury negligently inflicted by the defendant upon his child, while the latter was in the custody of an elder sister. It was in that case announced that: "What a party does by his agent, he does himself, and the case stands no otherwise than it would have stood had the father himself been present, taking charge of the child. In order to render the principal accountable for the acts or omissions of his agent, it is by no means necessary to show the incompetency of the agent, or that the principal was at fault in his selection and appointment. However competent the agent, and however careful and prudent the principal may be in his selection and appointment, the agent acts at the peril of the principal, who stands accountable in law for all the agent's acts and omissions."

Whether the rule barring a recovery should be extended to cover a case where an administrator sues for the wrongful homicide of a child, caused by the concurrent negligence of the child's parents and of a third person, but to which suit neither of the parents is a party plaintiff, is a question not so easy of determination. In Illinois it had been said that the reason for the rule applies equally well to such a case, because the inevitable result of a recovery by the administrator would be to enrich the child's parents, who would inherit his estate, and thus profit by their own gross neglect of duty. *Railway Co. v. Grable*, 88 Ill. 441; *Railway Co. v. Schumilowsky*, 8 Ill. App. 613; *Railway Co. v. Wilcox*, 33 Ill. App. 450, 138 Ill. 370, 27 N. E. 899. But a contrary view was expressed in *Wymore v. Mahaska Co.*, 78 Iowa, 396, 43 N. W. 204, where this point was directly raised and passed upon. *Robinson, J.*, directs attention to the fact that the administrator "seeks to recover in the right of the child, and not for the parents," and adds: "It may be that a recovery in this case will result in conferring an undeserved benefit upon the father, but that is a matter which we cannot investigate. If the facts are such that the child could have recovered,

had his injuries not been fatal, his administrator may recover the full amount of damages which the estate of the child sustained." The same position was taken by the supreme court of appeals of Virginia in Railroad Co. v. Groseclose, 88 Va. 267, 13 S. E. 454. Even where the suit is by the child himself, it might probably result, in the event of his subsequent death, that his parents would derive the full benefit of his recovery. So it would seem that the sounder view is that entertained by the courts of Iowa and Virginia, especially when it is considered that the object of the rule is not to shield a negligent defendant from the penalty of his wrongdoing, but merely to deny aid to a plaintiff who, though equally guilty, nevertheless comes into a court of justice, and demands the fruits of his own unpardonable neglect of both a moral and a legal duty.

In the present case it appeared that the deceased was in charge of his uncle at the time he was killed. The uncle intended making a journey on foot to a neighboring village, and by permission of the father the boy was allowed to accompany him. The mother of the boy, who is the plaintiff in this suit, was dutifully informed by her son of the permission which his father had granted him, but, it seems, raised no objection to his going. There was a good and safe dirt road leading to the village, but the uncle chose to walk on the railroad track, which lay parallel thereto. Coming to a high trestle, some 380 feet long, he attempted to cross in company with the boy, and, while yet upon the trestle, both were run over and killed by a rapidly approaching passenger train. That this conduct on the part of the uncle amounted to almost criminal negligence, there can be no doubt. Indeed, it can hardly be considered otherwise than just that he should have paid the penalty he incurred for thus ruthlessly exposing so young a boy to such obvious and imminent peril.

In the light of these facts, and in view of the foregoing discussion of the law applicable thereto, it is clear that while the youth, had he lived, would not have been affected by this negligence on the part of his uncle, the father would thereby be utterly precluded from recovering damages for the homicide of his son. So far as the father is concerned, it is the same as though he himself had deliberately led his son into this death trap. But the question presented by the record is whether the plaintiff, the mother of the boy, is also barred of recovery. It can be contended that she is only upon the idea either that the uncle was the agent of herself, as well as of her husband, or that the negligence chargeable to her husband was imputable to her, and, in legal contemplation, should be considered her own. We shall first consider whether the uncle can properly be considered as representing her, as well as the father, in undertaking to provide for the safety of her son. By express statute, in this state, "until

majority, the child remains under the control of the father." Code, § 1793. And, if the marriage relation remains undisturbed until the death of the father, it is not until then that the mother has any legal right to exercise such control. Id. § 1794. As matter of fact, in the present instance, it was the father who intrusted the child to his uncle's care. This the father had an undoubted right to do, being, of course, held strictly accountable for the manner in which the uncle performed the delegated duty of watching over and shielding the child from danger. To this selection by the father of a custodian for his child, the mother gave, at best, merely a silent acquiescence, by offering no objection. Whatever moral right she may have had to voice the claims of motherhood, and protest against the selection of an untrustworthy person to watch over her offspring, certainly there was no legal duty devolving upon her to oppose her husband's will or take any part in the matter whatsoever. The father alone was accountable to the law for the manner in which he exercised the control vested in him by statute; and the person to whom he delegated the duty of caring for his child could not properly be considered the agent of any one save the father himself, the mother having had no voice in such agent's selection and appointment. If the child was left by the father in charge of its mother, of course, it would be the duty of the latter to take proper means to protect it; and, if she intrusted this duty to another, such person would then be her agent. But this could only occur when the duty of guarding the child devolved upon her,—certainly not at a time when the father was present, and exercising his control by taking the child out of the mother's care, and placing it in charge of another, acting for the time being as his agent. Under the facts of this case, there is nothing to warrant the conclusion that the uncle of the deceased was, in any legal sense, acting as the agent or representative of the plaintiff.

The remaining point to be dealt with is whether the mother would be precluded by the negligence chargeable to the father, on the ground that the interests of husband and wife are identical, and a recovery by her would also inure to the benefit of her husband, who would thus be allowed to profit by his own wrong. For the purposes of this discussion, the father may be treated as though he had himself taken his child upon the trestle and was guilty of actual, rather than implied, negligence. Upon the question whether the negligence of the husband can properly be imputed to the wife, some conflict of opinion is presented by past decisions of the courts of this country. In *Huntton v. Trumbull*, 2 McCrary, 315, 12 Fed. 844, this question was ruled in the affirmative; and, upon the theory of "identity," it was therein held that "the knowledge of the husband (who is the driver) concerning the disposition of the horse is the knowledge of the wife." In the case of



City of Joliet v. Seward, 86 Ill. 402, the negligence of the husband in leaving his wife unattended in a buggy to which a spirited pair of horses were attached was held to be imputable to the wife, although she herself was free from negligence. Similar rulings were made in *Yahn v. City of Ottumwa*, 60 Iowa, 429, 15 N. W. 257; *Peck v. Railroad Co.*, 50 Conn. 379; *Carlisle v. Town of Sheldon*, 38 Vt. 440; *Railway Co. v. Greenlee*, 62 Tex. 344. It is fair to state, however, that in all the cases last cited it appeared that the wife was being driven in a private vehicle by her husband, and doubtless the courts were influenced by the doctrine which still prevails in some jurisdictions, that the driver of a private carriage is to be regarded as the servant or agent of one who is riding with him, and trusting to his skill and discretion. The opposite view was entertained in *Platz v. City of Cohoes*, 24 Hun, 101, wherein it was ruled that "the plaintiff was not responsible for any carelessness on the part of her husband in driving, unless she did some act encouraging it." In the more recent case of *Hoag v. Railroad Co.*, 18 N. E. 648, decided by the court of appeals of New York, it was ruled that, under similar circumstances, the negligence of the husband was not to be imputed to the wife, and *Platz's Case*, 89 N. Y. 219, is cited with approval. For other cases upon the same line, see *Sheffield v. Telephone Co.*, 36 Fed. 164, and *Shaw v. Craft*, 37 Fed. 317, decided in the circuit court of the United States for the Northern district of Ohio. In *Davis v. Guarneri*, 45 Ohio St. 470, 15 N. E. 350, the rule was laid down that the negligence of a husband would not be imputable to the wife unless she had expressly constituted him her agent for the purpose in hand. This, we think, is the test which, in every case, should be applied. In support of the correctness of this view, we quote from the opinion of McBride, J., in *Railway Co. v. Creek*, 130 Ind. 139, 29 N. E. 481, who says: "A husband and wife may undoubtedly sustain such relations to each other, in a given case, that the negligence of one will be imputed to the other. The mere existence of the marital relation, however, will not have that effect. In our opinion, there would be no more reason or justice in a rule that would, in cases of this character, inflict upon a wife the consequences of her husband's negligence, solely and alone because of that relationship, than to hold her accountable at the bar of Eternal Justice for his sins because she was his wife." This admirable statement of the law, we think, should be decisive of the question with which we are now dealing. In the subsequent case of *Railroad Co. v. Spilker*, 33 N. E. 280, the supreme court of Indiana again applied the wise and just rule above indicated, and Howard, J., cites numerous decisions bearing upon the subject. In California the negligence of the husband is imputed to the wife, or, rather, bars her recovery, for a reason peculiar

to that state. By the California Code, the damages recovered in such a case would become the joint property of the husband and wife, and the court holds that it would be inequitable for him thus to share in the proceeds of his own wrong. *McFadden v. Railway Co.*, 87 Cal. 464, 25 Pac. 681. This rule would seem to be fully as unjust to the innocent wife as the other rule would be to the wrongdoer, and one would think that an innocent person was entitled to protection before a wrongdoer. Be this as it may, however, the reason given by the court in the case cited does not also obtain in this state. In Georgia, by express statute (Acts 1887, p. 43), a mother is given an independent right of action for the homicide of a child negligently killed (upon certain conditions, not pertinent to the subject now under discussion); and it is expressly provided that a recovery by her in accordance with the terms of the statute shall be her separate and individual property, not subject to any debt or liability of the husband. Under the facts of the present case, the father was in no sense acting as the agent of, or in any manner representing, his wife. Only upon the idea of identity of interest could the act of one be regarded as that of the other. We have already shown that the rule which once obtained, whereby, upon the theory of "identity" or agency, the negligence of a father was imputed to his infant child, has been utterly repudiated in most jurisdictions, and no longer has any firm footing in the law of this country. The same reasons which have been urged against the injustice and harshness of that rule apply equally well to so indefensible a doctrine as that which would seek to charge a wife with the negligence of her husband simply because of the marital relation existing between the two. Like the child, the wife has distinct, individual, legal rights, which cannot be defeated simply by showing that another, to whom she was related by ties of wedlock, but over whom she exercised at the time no control, was guilty of negligence concurrent with that of the defendant. Incidentally, the husband might derive some benefit from a recovery by her; indeed, upon her death, might inherit her estate, including the money so recovered. This, however, would likewise be true in a case where a child was allowed to recover, despite the negligence of its father; and yet this is universally held not to be a sufficient reason for unjustly depriving the child of its legal rights, as against a wrongdoer entitled to no protection whatsoever, as to liability growing out of his own gross misconduct. It would seem that the efforts on the part of the courts of an earlier day to formulate rules which would extend the doctrine of imputable negligence so as to include persons other than those who actually sustained towards each other the relation of master and servant or principal and agent, or who were jointly engaged in the prosecution of a common



enterprise, have proved to be entirely unsuccessful legal ventures. Such rules have already met the fate which must inevitably, sooner or later, have befallen them, for they stand upon no foundation of logic, wisdom, or justice. In *Railway Co. v. Markens*, 88 Ga. 60, 13 S. E. 835, this court summarily disposed of the question whether the negligence of the driver of a public hack could be imputed to a female passenger, and quoted with approval the rule laid down in the *American and English Encyclopaedia of Law* (volume 16, p. 447), that, "in order for the negligence of one person to be properly imputable to another, the one to whom it is imputed must stand in such a relation of privity to the negligent person that the maxim '*qui facit per alium facit per se*' is directly applicable." It follows inevitably from what has been said that the doctrine of imputable negligence cannot, under the facts of the present case, be successfully invoked, so as to defeat the plaintiff's right to recover.

4. We come now to deal with the proposition announced in the fourth headnote. It is one of very great importance, and we have given it long and anxious consideration. Our own cases are not in perfect harmony on this subject, but, after a careful review of them, and an examination of a very large number of authorities, we believe we have reached the true law of the question. This question was also involved, but not discussed, in the case of *Railway Co. v. Leach*, 91 Ga. 419, 17 S. E. 619, which was an action by Mrs. Leach for the homicide of her husband, who was the uncle of the plaintiff's son, having him in charge when killed, and who, as already stated, was himself killed at the same time and place. Mrs. Leach's right to recover was so plainly and manifestly defeated by the gross negligence of her deceased husband, irrespective of other considerations, that we were content to rest our decision of that case on that ground alone. We will now notice briefly, and in their chronological order, the cases decided by this court which bear upon the question under consideration. This list is intended to be exhaustive, and, though we may omit some cases which might be considered as somewhat in point, we think we have all of them really material, and some of these are not vitally so.

In *Railroad Co. v. McElmurry*, 24 Ga. 75, the injury complained of, which was the killing of a slave and the destruction of a cart, was evidently committed upon a crossing, or so near to it as to be practically upon it. The evidence is not set forth in the report, but the requests presented and refused, and the rulings of this court in connection with them, show that both court and counsel treated the case as one to which "the crossing law" was directly applicable. This is true, notwithstanding it was alleged in the pleadings that the injury was done "at or near" a crossing, and although Judge Lumpkin, in dealing with one of the requests, remarks

that a particular speed is required "at or near" the crossing. Thus understood, there is nothing in this case militating against what is ruled in the case at bar; but, on the contrary, many of the expressions used in the opinion are entirely in harmony with, and to some extent support, it.

The first distinct announcement by this court touching the question whether the law regulating the speed of trains in approaching crossings was applicable in a case where the injury occurred elsewhere than at a public crossing was in *Holmes v. Railroad Co.*, 37 Ga. 593. The injury for which the action was brought was the killing of a slave on the track of the railroad, which took place at a point from 60 to 80 yards distant from a public crossing, but on a part of the track very much used by foot passengers. There was a verdict against the company, and a new trial was granted by the superior court, whose judgment was affirmed by this court, upon the actual merits of the case. Counsel for the plaintiff in error endeavored to show that the company was liable for disregarding the provisions of the law in question, it being the act of January 22, 1852 (Acts 1851-52, p. 108), and which is now, except as to certain changes immaterial to the present inquiry, embodied in sections 708-710 of the Code. Upon this contention, Judge Walker plainly and unequivocally stated that: "This act was intended for the protection of persons and property at public crossings of the road. The public have a right to cross the railroad track at the public road crossings. When traveling the highway, persons are lawfully on the railroad track at the point of crossing; and, if an injury is done at such public crossing, then the provisions of the act of 1852 become material. In this case, the accident having occurred elsewhere, the provisions of this act are not applicable. The fact that so many persons traveled on foot over the portion of the road where the negro was killed did not make the railroad a public crossing" This case has never, in terms, been overruled in the manner prescribed by statute; and, the decision having been made by a full bench, the doctrine announced in it is therefore still of force. The clear and distinct statement of Judge Walker is in no sense qualified because he adds that: "In deciding the question of what would be reasonable care and diligence, possibly this fact [meaning the fact that many persons traveled on foot over the portion of the road where the negro was killed] might be taken into consideration, in connection with all the other facts of the case." The liability of a railroad company for running over and killing or injuring people at places along its track which the public is known to frequent, and where it is probable they will be found, depends upon legal rules entirely distinct from the law prescribing what they shall do in approaching public crossings.

In the case of *Railroad Co. v. Main*, 64 Ga.

649, the railroad company was held liable for the killing of a cow between a signal post and a public crossing; and it is inferable from the statements contained in the opinion of Crawford, J., that the servants of the company in charge of the train had failed to obey the provisions of section 708 of the Code, and this failure seems to have been regarded as a ground of liability. It is impossible to reconcile the charge of Judge McCutchen, which this court approved, with the Case of Holmes, *supra*.

Again, in Railroad Co. v. Jones, 65 Ga. 631, the injury for which the company was made liable was the killing of a horse at a point just beyond a public crossing. In so far as these two cases conflict with that of Holmes, the doctrine of the latter, for the reason stated in the above comments thereon, must prevail.

The case of Railroad Co. v. Brinson, 70 Ga. 207, which was an action for personal injuries inflicted by a moving train, not at a crossing, was decided by two justices, who did not themselves fully agree upon the question with which we are now dealing, in so far as it was then involved. After a careful examination of the opinions of Jackson, C. J., and Hall, J., we find nothing in that case which would require a holding upon this question different from the one now made. The Case of Holmes, *supra*, is cited by both, but there is no intimation that it should be overruled.

In Railroad Co. v. Bloomingdale, 74 Ga. 604, which was an action for personal injuries sustained on the track at a point other than at a crossing, Branham, J., presiding in the place of Chief Justice Jackson, who was disqualified, distinctly stated that the portion of the charge of the court below in reference to ringing the bell when approaching public crossings was not applicable to the facts, and cited the Holmes Case as authority for this proposition. The charge referred to, as appears from a footnote made by the reporter, was in the following language: "In determining whether the agents of the company exercised such care and diligence, you will look to the evidence. If they were going at a greater rate of speed than was accorded by the ordinance of the city, if within the city limits, or if they were within four hundred yards of a public crossing, and were not ringing the bell of the engine as required by law, or if they failed to have signal lights or persons to look for danger, or if they failed to have headlights, if the exercise of ordinary and reasonable care and diligence required these things, all these would be circumstances, if they are shown to exist by the evidence, that ought to be considered by you, in determining whether the defendant's agents exercised all ordinary and reasonable care and diligence." This charge, so far as now pertinent, at most, merely stated that evidence showing the violation of a city ordinance or the breach of

a statutory duty in approaching a public crossing might be considered by the jury, in passing upon the question of negligence actually involved in the case. Upon this particular subject, brief comment will be made in a subsequent division of this opinion. Just here, however, it may be remarked that we do not understand the decision of the majority of this court in Railroad Co. v. Williams, 74 Ga. 723, where the injury occurred 200 yards beyond the crossing, as really going further than to hold that the failure of the company to observe the statutory requirements in approaching crossings might be given in evidence, and considered by the jury, in determining the question whether the injury was caused by the company's negligence. If the decision in that case means that disobedience of these statutory requirements would, of itself, make the company liable, we would simply say it was a decision by two justices only; and we agree with Justice Hall, who dissented, in holding that such a view would be in conflict with the Holmes Case, *supra*, and not with Chief Justice Jackson, who seemed to think otherwise. Justice Hall also thought that the above-cited cases from the sixty-fourth and sixty-fifth volumes of our Reports did not necessarily conflict with the Holmes Case. As to this, we think he was mistaken; but, if those cases do conflict with the Holmes Case, the latter must be followed, as the true law binding on this court.

In Railroad Co. v. Meigs, 74 Ga. 857, the writer, who was then on the circuit bench, presided in the place of Jackson, C. J. It was an action by Mrs. Meigs for the homicide of her husband, and it was simply held that, "although the injury in this case occurred a considerable distance from the Foundry street crossing, the rate of speed with which the train passed that crossing, and the ordinance above mentioned, had some bearing on the question of negligence at the place where the deceased was struck, and were therefore properly admitted to go to the jury for what they were worth." This case also belongs to the class already mentioned, where the fact of a failure to observe a city ordinance or statutory requirements as to speed was held to be admissible in evidence on the trial of actions of this kind.

The case of Railroad Co. v. Smith, 78 Ga. 694, 3 S. E. 397, was an action for personal injuries sustained by the plaintiff, who was hurt by a moving train 65 or 70 yards from a crossing. Justice Blandford did not preside. It was there held that the violation of a valid municipal ordinance in running trains would be negligence *per se*, and that the court might so instruct the jury. The rule thus stated has, in the recent case of Railroad Co. v. Golden, noticed below, been limited in its application to cases where negligence of this nature is negligence relatively to the person injured. The ordinance in question in Smith's Case regulated

the speed only upon crossings, but the court gave it in charge as if it was applicable to every portion of the town, which was inappropriate. The judgment was reversed, and a new trial granted. The second trial of this case in the superior court resulted in a nonsuit, which was affirmed by this court. See *Smith v. Railroad Co.*, 82 Ga. 801, 10 S. E. 111.

In *Railroad Co. v. Ralford*, 82 Ga. 400, 9 S. E. 169, though the plaintiff below was injured upon a crossing, or very near to it, he was not at the time using the highway for the purpose of crossing the railroad, but was using the track for the purpose of walking upon it; and it was held that though the statutory diligence as to giving signals in approaching public crossings was required of railroads primarily for the benefit of persons crossing the track, and not those walking upon it, yet, relatively to the latter, a failure to comply with the statute was evidence of negligence to be considered by the jury. This case does not squarely hold that such failure would alone make the company liable. It really does not, we think, go further than the class of cases referred to in connection with the *Meigs Case*, supra; but, even if it can be construed as holding that the failure in question would of itself be a ground of recovery, it does not conflict with what is ruled in the case at bar, for in the *Ralford Case* the injury was practically upon a crossing, although the plaintiff was not making a proper use of it.

It appeared in *Railway Co. v. Phinizy*, 83 Ga. 192, 9 S. E. 609, that the plaintiff's mule was killed upon a trestle between a blow post and a public crossing, probably 150 yards from the crossing; and it was held that according to the principle ruled in *Jones' Case*, 65 Ga. 631, there was no error in giving in charge to the jury sections 708 and 710 of the Code. Chief Justice Bleckley said: "If they are pertinent when stock are beyond the crossing, we can see no reason why they are not so when the stock are on the hither side of the crossing. The sections, and the conduct of the company's employes under them, are simply for consideration by the jury. Their importance is nothing like the same when the injury occurs at a distance from the public crossing, as when it occurs upon the crossing. Still, they have some relevancy in either case." The chief justice doubtless overlooked the *Case of Main*, 64 Ga. 649, which was precisely in point. We dispose of the *Phinizy Case* as we did of the two cases just mentioned in this connection.

In *Railroad Co. v. Denson*, 84 Ga. 774, 11 S. E. 1039, the plaintiff below recovered for the homicide of her husband, which occurred between a blow post and a public crossing, and the judgment in her favor was affirmed by this court; *Simmons, J.*, dissenting. Although the question of negligence in failing to observe the requirements of

section 708 of the Code was somewhat involved in the case, we think a close examination of it will show that the recovery was allowed to stand, not because of the mere failure of the employes in charge of the train to obey this particular statute, but upon the idea that the fact of the killing changed the burden of proof, and that, as the company introduced no evidence, the jury were authorized to infer these employes were guilty of gross and wanton negligence.

The case of *Ivy v. Railway Co.*, 88 Ga. 71, 13 S. E. 947, was decided by two justices, who affirmed the granting of a nonsuit, although the train was running too fast, and the bell was not rung in approaching a crossing, it appearing that the injury did not take place at a crossing, but some distance beyond it; also that it did not directly result from any negligence of the company, but really from that of the plaintiff himself.

The record in *Railroad Co. v. Daniel*, 89 Ga. 463, 15 S. E. 538, shows that the plaintiff was injured a few yards from a crossing, in the direction of an approaching train, and that he was at the time using the track as a footway. It was held that, under the particular facts of that case, the engineer had no right, as a matter of law, to assume, on first seeing the man on the track, that he would get off in time to save himself; and also that it would not have been appropriate, in a case of this kind, to instruct the jury, without proper explanation and qualification, that the statutory requirements as to blowing the whistle, ringing the bell, and checking the speed were not for the protection of persons using the track as a thoroughfare; and, further, that instructions on the subject should conform to what was ruled in *Ralford's Case*, supra.

The case of *Railroad Co. v. Golden*, above mentioned, and which was decided January 8, 1894 (93 Ga. —, 21 S. E. 68), has some bearing on the question now under consideration. It was an action for personal injuries caused by a collision with a train more than 200 yards from a public crossing which the train was approaching. We then held it was not error, in charging the jury, to recite sections 708-710 of the Code. This harmonizes with the rule, already frequently mentioned, as to the admissibility of evidence showing a violation of these sections. It was, however, also held that while the failure to observe the requirements of these sections might, in the abstract, be negligence per se, it might be no negligence at all relatively to a person thus injured, and that in *Golden's Case* it really amounted to no more than a fact to which the jury could look in ascertaining whether, relatively to him, the company was negligent or not.

In connection with all the above cases, see, also, the following, which, while not bearing directly upon the question in hand, may throw some light upon it: *Morgan v. Railroad Co.*, 77 Ga. 788, in which Justice Hall

remarks that the provision requiring continuous checking of speed is a harsh one, and suggests legislation modifying it. In that case it was held that the statute, being penal in its nature, should be strictly construed, and should not be held to apply to a train working exclusively within the blow posts. *Harris v. Railroad Co.*, 78 Ga. 526, 535, 3 S. E. 355, where it was held the statute had no application when a train started at or upon a public crossing. *Crawley v. Railroad Co.*, 82 Ga. 190, 8 S. E. 417, where stock was killed between the blow post and a crossing, and it was held that the law does not require the speed of the train to be checked before reaching the blow post, and, if the train be under such control that it may be stopped at the crossing, no liability would attach because of its running too fast to be stopped at any intermediate point between the blow post and the crossing.

There is one other Georgia case, which has not been before mentioned because the "crossing law" was not involved in it, but it is, in principle, applicable here. We refer to *Holland v. Sparks*, 92 Ga. 753, 18 S. E. 990, which sustains the doctrine that the breach of a given duty is not negligence relatively to one to whom the duty in question was not due.

We will now notice some of the leading text-books, and, later on, some of the decisions of other courts in connection with the question in hand, and, with but little comment, make extracts from the same, many of which will illustrate the pertinency of the case last cited to the present discussion. Before proceeding further, however, it may be well to observe that the law requiring the checking of trains in approaching crossings seems to be peculiar to Georgia; and we therefore cite authorities relating to the giving of signals, and to other matters which, by strong analogy, are in point.

The following is from Bishop's *Noncontract Law* (section 446): "To sustain an action for negligence, the plaintiff must have suffered a legal injury, whereof he is entitled to complain. Therefore, however great the defendant's negligence, if it was committed without violating any duty which he owed directly to the plaintiff, or to the public in a matter whereof he had a right to avail himself, \* \* \* there is nothing which the law will redress." And in section 1038, referring to trespassers on the track, this eminent author applies the rule by saying: "Though the failure to give a signal required by the law or a rule of the road is negligence in its management, not always, perhaps never, in just doctrine, can a trespasser so avail himself of the omission as to charge the road. \* \* \* In reason, rules requiring signals, prohibiting dangerous fast running, and the like, should be construed as intended to protect persons to whom the road owes a duty, not trespassers; so that the former only can found rights

upon them." "If there is no duty, there can be no negligence. If the defendant owes a duty, but does not owe it to the plaintiff, the action will not lie." 1 *Shear. & R. Neg.* § 8. To the same effect, see *Cooley, Torts*, \*659 et seq. This distinguished jurist illustrates the application of the rule as follows: "The general duty of a railway company to run its trains with care becomes a particular duty to no one until he is in a position to have a right to complain of the neglect. The tramp who steals a ride cannot insist that it is a duty to him; neither can he when he makes a highway of the railway track, and is injured by the train. A man may be careless, to the degree of criminality, who leaves poisoned food about, where others will be likely to pick it up and be injured by it; but he owes in this regard no duty to the burglar who breaks into his house, and to despoil it. So it may not be wise or prudent for one to have upon his premises an uncovered pit, but he is under no obligation to cover it for the protection of trespassers." See, also, *Patt. Ry. Acc. Law*, 160, 162, where cases are collected with reference to the duty, relatively to different classes of persons, of giving signals.

We find the following in the *American and English Encyclopedia of Law* (volume 16, tit. "Negligence," pp. 411, 412): "In order to maintain an action for a negligent injury, it must appear that there was a legal duty due from the person inflicting the injury to the person on whom it was inflicted, and that such duty was violated by want of ordinary care on the part of the defendant. It is not sufficient that there be a general duty to the public, which is violated, but in all civil cases the right to enforce such duty must reside in the individual injured because of a duty due him from his injurer, or he cannot recover." In an article entitled "Crossings," appearing in this same most valuable and useful work (volume 4, pp. 922, 923), the penal nature of many of the statutes requiring the giving of signals on the approach of trains to public highways is commented upon, and allusion is made to the familiar rules by which violations of penal laws are generally treated as willful, and the wrongdoer often held responsible for even remote consequences of his acts of omission or commission. But the author adds that "It is not usual, however, to apply these quasi criminal law doctrines to cases involving the omission of statutory signals by railroad companies, and they are generally determined by the rules that govern in cases of negligence." In a note to which reference is directed, it is further said: "This sufficiently appears from the numerous cases cited throughout this article, wherein omissions to comply with statutory requirements are treated as merely negligent. It is proper to so treat them, because the statutory requirements are generally only intended to raise the standard of care, and make precautions necessary that

would not have been required at common law."

Disobedience of a criminal statute forbidding a thing *malum in se*, is a much more serious matter than the violation of a statute which simply makes a given act *malum prohibitum*; that is, forbids something innocent in itself, and renders it unlawful on the ground of public policy, and in the common interest of good government and the public welfare, for the purpose of compelling a higher standard of care with regard to certain persons or things, and, to this end, placing under proper restrictions a business dangerous in itself, and likely to prove hazardous to life or limb if not conducted with abundant caution. Accordingly, while every one is responsible for the direct consequences of any criminal act, and oftentimes for the remote consequences of a criminal act which is *malum in se*, it does not follow that every one is responsible for all the consequences, direct or remote, of an unlawful act which is merely *malum prohibitum*. In *Gorris v. Scott*, L. R. 9 Exch. 125, it was said: "Where a statute creates a duty with the object of preventing a mischief of a particular kind, a person who, by reason of another's neglect of the statutory duty, suffers a loss of a different kind, is not entitled to maintain an action in respect of such loss." Accordingly, notwithstanding the statute in question imposed penalties to secure the observance of its provisions, it was held that as its object was to prevent the spreading of contagious diseases among animals while being transported by vessel, and not to protect them against perils of the sea, the plaintiff could not base upon this statute a right to recover because of a failure to furnish, as it required, separate pens for his sheep, by reason of which omission to comply with the statutory duty a number of them were washed overboard and drowned. An interesting case in this connection is that of *Atkinson v. Waterworks Co.*, 2 Exch. Div. 441, in which it was held that the mere fact that the breach of a public statutory duty, for which a penalty recoverable by a common informer was imposed, has caused damage, does not vest a right of action in the person suffering the damage against the person guilty of the breach, and that whether or not such right of action arose from the breach must depend upon the object and language of the particular statute. An examination of the facts, and of the opinions of Lord Cairns, L. C., Cockburn, C. J., and Brett, L. J., will show that this case is very much in point. It reversed the judgment of the court of exchequer in the same case (L. R. 6 Exch. 404), which followed *Couch v. Steel*, 3 Bl. & Bl. 402, L. J. 23 Q. B. 121.

It appeared in *Railway Co. v. Payne*, 29 Kan. 186, that the plaintiff drove to a mill, situated about 100 yards from a public railway crossing, tied his team to a hitching-post, and went into the mill. Shortly there-

after, his team became frightened by the noise of an approaching train, broke loose, ran in the direction of the crossing, and there collided with the train. The company failed to comply with the statutory requirement as to sounding the whistle upon approaching the crossing, for which neglect of duty the statute provided a penalty. Plaintiff sought to recover damages on the ground that, had the company complied with the statute, he would have had an opportunity to look after his team, and thus have avoided the accident. It was held that: "As plaintiff was not traveling on the highway, at or near the railroad crossing, the company owed him no duty, under the statute, to sound the whistle for the purpose of giving him notice, so that he might leave the mill and hold or look after his team, to keep it from breaking loose and running away."

The following is the headnote in *Williams v. Railroad Co.*, 28 N. E. 661, 135 Ill. 491: "Negligently omitting to whistle or ring a bell when approaching a crossing, as required by [statute], does not render the company liable to a farmer who is plowing in his field near the crossing, and who is injured through his horses taking fright at the train, since the statutory requirement is only intended for the benefit of travelers on the highway." The opinion in that case, delivered by Magruder, J., is strong and pointed. He cites many authorities, including our *Holmes Case*, *supra*.

In *Morrissey v. Railroad Co.*, 15 R. I. 271, 3 Atl. 10, it appeared that the company had failed in the duty imposed upon it by law of guarding its track by the erection of fences along its right of way. The plaintiff, a child four years of age, strayed across the track in front of his home to the opposite side, and, there being no fence to obstruct his passage, went thence upon land adjoining the company's right of way, and was there injured by falling into a trench filled with water. The court sustained a demurrer to the declaration on the ground that the obligation of a railroad company to guard its track by fences is chiefly for the purpose of protecting persons and cattle from the danger to which they would be exposed by going upon the company's premises, and that this obligation did not extend to guarding a person against danger to which he might be exposed on the premises of its neighbors. In delivering the opinion of the court, Stiness, J., quotes the rule previously laid down in *O'Donnell v. Railroad Co.*, 6 R. I. 211, and in *Smith v. Tripp*, 13 R. I. 152, that: "In an action for neglect of duty, it is not enough for the plaintiff to show that the defendant neglected a duty, and that he would not have been injured if the duty had been performed; but he must also show that the duty was imposed for his benefit, or was one which the defendant owed to him for his security from the injury." *O'Donnell's Case* is very often cited in this connection. In harmony with

the rule just quoted, it also holds that the statutory requirement as to ringing the bell of the locomotive before crossing any public highway "was exclusively designed for the benefit of persons crossing" such highway; "and hence a person who is injured by the engine whilst he is walking along the track of the railroad, and not at any crossing, cannot recover damages against the railroad company for such injury upon the ground that the injury was caused by their neglect to ring the bell upon their locomotives, as required by the statute."

*Metallic Compression Casting Co. v. Fitchburg R. Co.*, 109 Mass. 277, 280, was an action against the railroad company for damages alleged to have been caused by negligence in running a train over a line of hose stretched across the track, and being used in extinguishing a fire. A few hundred feet above this point, the defendant's track was crossed by another railway. It was held that the defendant's failure to comply with the statutory requirement of stopping before crossing another railroad at grade had no bearing upon the question of negligence. *Chapman, C. J.*, says: "But the object of the statute was solely to prevent the collision of trains at crossings, and had no reference to the extinguishment of fires. It is not applicable to this case."

A penal statute of New Hampshire prohibited railroad companies from obstructing with their cars or locomotives any public highway, for a period exceeding two minutes. In *Hall v. Brown*, 54 N. H. 495, it was held that the purpose of this statute was to protect travelers against unreasonable delay at railway crossings, and a violation of it could not be relied on by the plaintiff as a ground of recovery in an action alleging that, being delayed at a crossing for more than two minutes by a train unlawfully obstructing the same, his horse, when an engine was attached and the train started, became frightened, ran away, and was killed.

The plaintiff in *Pike v. Railroad Co.*, 39 Fed. 754, was a watchman on one of defendant's bridges, and was injured while attempting to cross a bridge located within about half a mile of a public railroad crossing. In passing upon a demurrer to his declaration the circuit court of the United States, citing previous decisions of the supreme court of Missouri construing the statute requiring the giving of signals in approaching railway crossings, held that the statute could not be invoked in the plaintiff's behalf as a ground of negligence, but that he must rely solely for a recovery upon the question whether the defendant owed him a common-law duty of giving notice of the approach of the train; plaintiff's duty requiring him to pass over the bridge, from time to time, to enable him to inspect it. In the opinion, *Thayer, J.*, says: "The plaintiff, who was not hurt at the crossing, but was injured at a bridge a half mile east of the

crossing, cannot assign the violation of the statutory duty—consisting of not sounding the whistle or ringing the bell at the crossing—as the proximate cause of the injury which he sustained. The statute was not enacted for his benefit."

It was held in *Elwood v. Railroad Co.*, 4 Hun, 808,—a case in which it appeared that plaintiff's intestate was walking along the track near defendant's depot, when he was struck by a work train approaching in his rear, and killed,—that "the fact that the working train did not give the signal required by statute on crossing a street before reaching the depot was not an act of negligence towards the intestate, who was not on the street, or where he had any business to be."

In *Railway Co. v. Elvinger*, 114 Ill. 79, 29 N. E. 196, it was held that: "A requirement of a railway company to keep a flagman at a public street crossing in a large city, to give warning of the approach of trains, is intended for the protection of persons crossing the railroad tracks at such crossing, and not for the benefit of persons walking along the railroad track, employing it as a footpath. To the latter the company does not owe the duty in respect to a flagman."

The law is thus stated in *Harty v. Railroad Co.*, 42 N. Y. 468: "A statute of New Jersey requiring railroad companies to ring the bell or blow the whistle on approaching highway crossings at grade, and to maintain signboards of warning thereat, imposes no duty towards a person walking on the track, but not at the crossing." This case and that of *O'Donnell*, supra, are both cited in *Randall v. Railroad Co.*, 109 U. S. 478, 485, 3 Sup. Ct. 322, which is itself in point.

The following was announced in *Bell v. Railroad Co.*, 72 Mo. 50: "The requirement of section 806, Rev. St., that the bell shall be rung or the whistle sounded at the approach of a railroad train to the crossing of a public highway, is for the benefit of persons on the highway at or approaching the crossing. Failure to comply with the statute will furnish no ground of complaint to a person injured on the track at a distance from the highway."

We might multiply, almost indefinitely, the citation of cases, but surely enough has been presented to establish the doctrine of the fourth headnote. We do not, of course, mean to say there are not cases to the contrary, among which may be mentioned that of *Lonerger v. Railway Co.* (Iowa) 49 N. W. 852, in which a rehearing was granted. See 53 N. W. 236, where the case is reported as "*Lonerger*" against the same company. It appeared that the plaintiff was lawfully on defendant's depot grounds, unloading grain into a crib, which was near two highway crossings, when defendant's engine passed without giving a signal, and frightened plaintiff's team, causing the animals to run away and injure the plaintiff. It was held that under a statute providing that no railroad

engine should approach a highway crossing without giving a signal, and making the neglect to give such signal a misdemeanor, the defendant was liable, though the plaintiff was not attempting to use either crossing. Rothrock, J., cites *Railroad Co. v. Williams*, 74 Ga. 723, and *Railroad Co. v. Ralford*, 82 Ga. 400, 9 S. E. 169, in support of the conclusion reached by the supreme court of Iowa. The comment we have already made upon these two cases is sufficient, we think, to show that they do not really sustain the doctrine of the Iowa case; but, even if they were appropriately cited in that case, they do not, as has been shown, constrain us to now follow that doctrine.

5. We have not, of course, intended to even intimate, by anything already said, that the duty is not upon railroad companies to observe all ordinary and reasonable care and diligence to avoid injuring or killing a human being on the track elsewhere than at a public crossing, when his presence becomes known to the engineer. It is undoubtedly true that a failure in such care and diligence, after that time, from which injury results, will render the company liable, unless it could have been avoided by the use of ordinary care on the part of the person hurt or killed. There is, however, to some extent, a distinction between what would be the duty of persons in charge of a railroad train with reference to cattle or other domestic animals, and with reference to human beings upon the track. The company's servants ought to endeavor to stop the train as soon as animals are seen on the track, because there is no presumption that they will leave it so as to escape the danger; but, as has been often ruled, the persons in charge of the locomotive need not always begin to immediately check the speed of the train, or endeavor to stop it, when a human being, apparently without infirmity, is seen upon the track, for the presumption is that he will leave it, for his own protection. In a case like the present, however, it was the imperative duty of the engineer to endeavor to stop his train immediately upon seeing the man and the boy. They were upon a high trestle, and it was obviously out of their power to escape danger except by going forward to the end of the trestle. They could not leave their place of danger by going off to one side. It was therefore no place for a presumption that they would be able to take care of themselves. The evidence shows beyond all controversy that every possible effort was made to stop the train, and save the lives of this man and boy, as soon as they were observed by the company's servants. It is, therefore, under the law, as herein ruled, not liable in damages for the homicide of the child. The duty of stopping a train to prevent injury to cattle or horses, or to prevent destroying human life, exists when the danger becomes apparent. Irrespective of "the crossing law." This duty applies gen-

erally to all portions of a railway track, and the provisions of our statute regulating the duties of engineers in approaching public crossings are specifically applicable in cases where injuries have occurred upon such crossings.

6. If we have succeeded in showing that the proposition announced in the fourth headnote is sound law, it follows that where one is injured or killed upon the track of a railroad, elsewhere than at a public crossing, and there is no negligence imputable to the company, except the failure of its servants to obey the statutory requirements above mentioned, the company is not liable. In the present case, there was no evidence authorizing a finding that the company's servants were guilty of any negligence whatever, if the failure in the above respect be counted out, and we therefore think the verdict was wrong. In cases of this nature, however, the failure of the company's servants to obey the statute prescribing their duties in approaching public crossings is, when a part of the *res gestae*, admissible in evidence, and may be considered by the jury in passing upon the question whether there was or was not negligence on the part of the company, relatively to the person injured or killed; that is, negligence arising from a breach of duty due at the time and place of the calamity by the company to that person. This court, as will appear from its numerous decisions already cited, and from many others which could readily be found, is thoroughly committed to the propositions just stated, and has no disposition to recede from them. It is safe to say that whatever forms a part of the *res gestae* of any transaction or occurrence undergoing judicial investigation may be proved. The principal difficulty, in a case against a railroad company for an injury on the track, not at a crossing, consists in defining what use can properly be made by the jury of the fact that the servants of the company disregarded the requirements of the statute in approaching some crossing near the scene of the injury. Generally, any fact constituting a part of the *res gestae* has some bearing upon a proper determination of the real matter in controversy between the parties. Sometimes, a fact concerning the admissibility of which there can be no question is of very little consequence, and at other times the same fact may be vitally important. For instance, on the trial of an indictment for an assault and battery, it would usually be entirely immaterial whether the accused, at the time of the fight, wore a black coat or a brown one, but it is easy to conceive of circumstances under which this apparently trivial matter might become a vitally serious issue. It would be difficult to express in words a precise and accurate rule, applicable alike in all cases, for measuring the importance or lack of importance which should be attached to any given fact in determining a question of negligence. An hon-

est jury is more than apt to give each fact and circumstance its proper value without the aid of minute and detailed instructions from the court; and consequently it would generally be sufficient, on the trial of an action against a railroad company for an injury occurring upon its track in the vicinity of a public crossing, for the judge to inform the jury that the mere failure of the company's servants to observe the provisions of section 708 of the Code in approaching the crossing would not, of itself, be a ground of recovery against the company, but that they might take this failure into consideration in determining whether there was on the part of the company, in the given case, any act of negligence which would make it liable. And it would also be very appropriate for the judge, in this connection, to explain clearly to the jury the question of negligence really involved. In most cases of this kind, the plaintiff relies upon the statutory presumption of negligence against the company, and also strengthens his case by whatever available evidence he may have at his command. On the other hand, it usually happens that the company undertakes to vindicate its diligence by calling as witnesses its servants who were present when the injury was inflicted. In this manner, the issues submitted to the jury are formed. Where an employé of the company is put on the stand as a witness for the defendant, his entire conduct at the time of the transaction under investigation, whether such conduct be disclosed by his own testimony or by that of others, may be considered by the jury in determining what weight should be given to his testimony. Suppose, for instance, it was charged that an engineer, after seeing a person or an animal on the track, failed to take the proper precautions to prevent a collision, and rushed forward regardless of consequences, and that this charge was stoutly denied by him. Then, certainly, all he did at the time would be material in weighing what he said as a witness. If it appeared that he deliberately disobeyed a public law of the state, this fact might, in the opinion of the jury, throw some light upon the question as to whether or not he had disregarded any other duty devolving upon him. We do not say it ought to do so, but it is a matter for them. If, on account of the exigencies of commerce and travel, the law as to crossings is generally and notoriously disobeyed by all railroad companies, the fact that no attention was paid to it in a given instance would be of less importance, as a basis of reasoning, than would be the case with respect to some other law, which is almost universally obeyed. Again, to run a train without checking over a public crossing but little used would tend in a far less degree to show that the engineer was a reckless man than would the running of a train at a high rate of speed over a crossing in a populous district, or in a city, where crowds of people were constantly in the habit

of using the crossing. If a railroad company had a rule requiring its engineers to run over bridges at a low rate of speed, and it appeared that an engineer had violated this rule by running over a given bridge at a dangerous rate, this fact might have some bearing upon the question whether or not he was reckless or negligent in the infliction of an injury immediately thereafter upon a person or property upon the track. This would be so, although the act of negligence mentioned was merely the breach of a duty which such engineer owed to his employer, and not a violation of a duty which the company owed to the person injured, or a matter as to which the latter had any right to complain. The instances above given are not exhaustive, and are intended to be merely suggestive. We leave the law, as announced, to operate as the general rule, and will trust to the trial courts and juries to make the proper application of it in each particular case.

7. Willingham, the witness mentioned in the first division of this opinion, testified to his knowledge of the place where the homicide occurred, and gave it as his opinion that at such a place a train running at the rate of 45 miles an hour could be stopped within a distance of 100 yards. The evidence of all the witnesses shows beyond question that the train which killed the plaintiff's son consisted of a locomotive and six cars, and, at the time of the catastrophe, was running down grade at about that rate. Willingham, as has been seen, was not introduced as a witness on the trial, but his testimony, as taken down on a former trial, was read to the jury. If his evidence does not relate to a train of this kind, running down grade at the rate specified, it is inapplicable; if it does, it amounts to no more than the expression of an opinion on his part that such a train could, under these circumstances, be stopped within a distance of 100 yards. We do not think his mere opinion sufficient to overthrow the positive, and otherwise uncontradicted, evidence of the engineer and fireman, who were upon the identical train in question, that all was done which could possibly be done to stop the train, and that nevertheless it was not stopped within a distance of over 400 yards. Besides, the testimony of these two witnesses is entirely consistent with common knowledge and every day experience, and was strongly corroborated by other witnesses, who were experts in such matters, and who testified positively that under the circumstances such a train could not have been stopped in time to avoid the catastrophe. It also appeared that the engineer and fireman manifested the greatest concern for the safety of the man and the boy on the trestle, and there is nothing in the entire record to indicate the slightest disposition to wantonly kill these unfortunate persons. Under these circumstances, no jury would be authorized to accept as correct the unsupported, and apparently unreasonable,



opinion of a single witness as to the distance within which the train could have been stopped, and utterly ignore the overwhelming testimony to the contrary. Judgment reversed.

(39 W. Va. 472)

**ROHRBOUGH v. BARBOUR COUNTY COURT.**

(Supreme Court of Appeals of West Virginia.  
Dec. 15, 1894.)

**LIABILITIES OF COUNTY—DEFECTIVE BRIDGE—OBSTRUCTION IN ROAD—FRIGHTENING OF HORSE.**

Where an injury is the combined result of a horse becoming suddenly frightened, and shying away from a pile of rock beside the roadway, and the failure of the county court to provide a suitable guard rail along the approach to a bridge, the county is liable for the damages sustained by reason thereof.

(Syllabus by the Court.)

Error to circuit court, Barbour county.

Action by A. B. Rohrbough against the county court of Barbour county. There was a judgment for plaintiff, and defendant brings error. Affirmed.

W. T. Ice and C. F. Teter, for plaintiff in error. Sam. V. Woods, for defendant in error.

DENT, J. The plaintiff in this case obtained a judgment against the defendant in the circuit court of Barbour county for the sum of \$125, for injuries alleged to have been occasioned by the negligence of the defendant. The facts in the case are as follows, to wit: About 8 o'clock p. m., on a very dark night, the first Sunday in August, 1890, the plaintiff was driving up the approach of a county bridge at the town of Philippi, in the county of Barbour, when his horse became suddenly frightened at a pile of large rock lying beside the roadway, and began turning around, and before plaintiff could arise to his feet, or do anything to control the horse, backed over the unprotected wall of the approach to the bridge, throwing plaintiff out, and falling upon and destroying the buggy. If a suitable railing had been along the approach, the accident would not have happened. The horse was spirited, but not vicious, and, as the evidence appears to indicate, the whole matter was almost an instantaneous occurrence, there being not sufficient time between the fright of the horse and the accident to enable the plaintiff, being a man of ordinary prudence, to regain control of his horse.

The only question presented is the liability of the defendant for the damages sustained by the plaintiff. In the case of *Smith v. County Court*, 33 W. Va. 713, 11 S. E. 1, this court held that the county was not liable for injuries sustained by reason of a horse frightened at two calves, backing a buggy over the side of a narrow road, as the accident was not occasioned by a failure to keep the road in proper repair, but by the un-

manageableness of the horse, caused by the sudden appearance of the calves and the unskillfulness of the driver. The supreme court of Massachusetts, in the case of *Titus v. Northbridge*, 97 Mass. 266, says: "When a horse, by reason of fright, disease, or viciousness, becomes actually uncontrollable, so that his driver cannot stop him, or direct his course, or exercise or regain control over his movements, and in this condition comes on a defect in the highway, or upon a place which is defective for want of a railing, by which an injury is occasioned, the town is not liable for the injury, unless it appear that it would have occurred if the horse had not been so uncontrollable. But a horse is not to be considered uncontrollable that merely shies or starts, or is momentarily not controlled by the driver." And in the case of *Palmer v. Andover*, 2 Cush. 608: "It is the ordinary course of events, and consistent with a reasonable degree of prudence on the part of the traveler, that accidents will occur; horses may be frightened; the harness may break; a bolt or screw may be dropped. To guard against such accidents, the law requires suitable railings and barriers, a proper width, to the road, and whatever may be reasonably required for the safety of the traveler." The law is also stated as follows, to wit: "Where the injury is the combined result of an accident and a defect in the highway, and would not have happened but for the defect, the town is liable." *Palmer v. Andover*, ut supra; *Kelsey v. Glover*, 15 Vt. 708; *Davis v. Dudley*, 4 Allen, 557. From these authorities the proposition is deduced that if sufficient time elapses between the fright of the horse and the accident to permit the driver, being a man of ordinary prudence, to make a proper effort to regain control of the frightened animal, even though he should fail, the county would not be liable for its negligence, as the injury must be attributed to the viciousness of the horse, rather than to the defect in the highway. But if no such time intervenes, but the fright and accident are concurrent events, then the county would be liable, for the very purpose of the law in requiring dangerous approaches to bridges to be protected by a sufficient railing is to guard against just such accidents, rendered unavoidable by reason of their suddenness. In this case it is not made to appear whether any time intervened between the fright of the horse and the accident, but it appears to be conceded that they were both almost instantaneous occurrences. Before he was able to make any effort to control the horse, the driver, buggy, and horse had gone over the wall of the approach to the bridge. Neither want of due care, under the circumstances, can be imputed to the driver, nor viciousness to the horse. It is true that the accident would not have occurred if the horse had not become frightened; neither would the fright of the horse have occasioned the accident

if the legal guard rail had been there, to have prevented it. The plaintiff was not guilty of contributory negligence in attempting to cross the bridge after night. It was open for travel, and he had the right to presume, in the absence of knowledge to the contrary, that the county had discharged its duty, and made it safe for travelers, even on a dark night. The best of horses will become suddenly frightened, and no human foresight can foresee and guard entirely against such fright; but dangerous bridge approaches can and should be protected by suitable railings. From the certificate of facts as ascertained by the judge of the circuit court, who visited and viewed the place of the accident, we are unable to say that his conclusion and judgment are wrong, in the light of the foregoing decisions; and therefore the judgment is affirmed.

(39 W. Va. 475)

**SHEETS v. OHIO RIVER R. CO.**

(Supreme Court of Appeals of West Virginia.  
Nov. 17, 1894.)

**LIABILITY OF CARRIER — EJECTION OF PASSENGER  
— MISTAKE OF CONDUCTOR.**

Where the proper official of a railroad company fails to inform a conductor of a change in its rules and regulations as to the sale of tickets and the stoppage of its trains, and such conductor, acting through want of the necessary information, wrongfully refuses to carry a passenger to his destination, and ejects him from the train, the company is liable to such passenger, in an action on the case, for the damages sustained by reason of the wrong committed.

(Syllabus by the Court.)

Error to circuit court, Ohio county.

Action by Lee Sheets against the Ohio River Railroad Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Leonard & Archer and J. B. Sommerville, for plaintiff in error. Ewing, Melvin & Ewing and J. C. Palmer, for defendant in error.

DENT, J. This is an action of case, instituted by Lee Sheets against the Ohio River Railroad Company, in the circuit court of Ohio county, in which there were a verdict and judgment for the plaintiff on the 12th day of October, 1892, for the sum of \$400, with interest and costs. The defendant claims that the circuit court erred—First, in overruling the defendant's demurrer to plaintiff's declaration and each count thereof; second, in overruling defendant's objections to the evidence of plaintiff as set out in bill of exceptions No. 1; third, in overruling the defendant's objections to plaintiff's testimony as set out in bill of exceptions No. 2; fourth, in overruling defendant's motion to exclude plaintiff's evidence as set out in bill of exceptions No. 3; fifth, in overruling defendant's motion to set aside the verdict rendered by the jury in said cause (see bill of exceptions No. 5); sixth, in refus-

ing to give the instructions asked for by defendant as set out in bill of exceptions No. 6.

This case, as to all the objections raised, to wit, as to the declaration, the admission of testimony, form of action, instructions given, and amount of damages, is exactly in point with, and fully controlled and settled by, the case of *Boster v. Railway Co.*, 36 W. Va. 318, 15 S. E. 158. The only real contention herein not settled by that case is because of the refusal of the circuit court to give the following instruction, to wit: "The jury are instructed that, even if they believe from the evidence that the ticket agent at Salama was authorized by the superintendent of the defendant to sell round-trip tickets from Salama to St. Mary's for defendant's train No. 3, still they cannot find for plaintiff on that account, unless they further believe from the evidence that Conductor Hinde was informed of such authority." The facts are as follows, to wit: The plaintiff purchased at Salama, a station of the defendant, of its agent, a round-trip ticket to St. Mary's, another station of the defendant north of Salama, which he was informed was good for passage and return on all the defendant's passenger trains. He made the upward trip, and boarded the defendant's passenger train No. 3 to return. When he offered his return ticket to the conductor, he was informed that it was not good for passage on that train, as it did not stop at Salama, unless he had passengers either from or north of another station, called "Sardis," being a station further north than St. Mary's, and that he had no such passengers on the train, and would not therefore stop at Salama, but that the plaintiff would have to leave the train at the next station, called "Belmont," about five miles short of his destination. The plaintiff was anxious to get home, owing to the dangerous illness of his daughter, and insisted on the conductor receiving his ticket. But the conductor compelled him to leave the train at Belmont. The plaintiff was a very large man, and badly crippled, and, through his anxiety to reach home, walked all the way from Belmont to Salama. The train No. 3 did stop that day at Salama; the conductor supposes because it was flagged. The uncontradicted testimony of the agent at Salama establishes the fact that he was authorized by the superintendent of the defendant to sell round-trip tickets to St. Mary's good for passage either way on train No. 3, but the excuse of the defendant is that the conductor had not yet been informed of this instruction or regulation, and he, acting under his abrogated or modified instructions was justified in his course, and the defendant thereby relieved from liability in this action. In the case of *McKay v. Railway Co.*, 34 W. Va. 65, 11 S. E. 737, the conductor was in the right, and the passenger in the wrong. In this case the passenger is in the right, and the conductor, acting through want of instruction, is in the wrong. The plaintiff had his ticket, and under the common law

(section 9, art. 11, of the constitution of this state), and according to the then existing regulations of the defendant, had the right to transportation to the place of his destination. This he was wrongfully refused. Ignorance of the company's instructions may be a good excuse for the conductor to give the company for his conduct on this occasion, but it does not relieve the company from liability to the passenger who has been wrongfully treated. The law will not permit a railroad company to have conflicting rules or regulations governing its different officers and agents, and, for this reason, grant it immunity from liability for the wrongful treatment of its passengers. The agent made no mistake in selling the ticket, but he acted strictly in accordance with the instructions of the defendant; but the conductor made the mistake and committed the wrong. Neither the passenger nor the conductor is to blame, but the responsibility falls upon the defendant alone, who must suffer the consequences. The plaintiff, having been wrongfully treated, in the language of Judge Holt in the case of *Boster v. Railway Co.*, supra, is entitled to receive "a reasonable and fair compensation for his physical discomfort and inconvenience, his mental suffering and pain, the insult and humiliation, all following as the direct proximate result of having been driven from the train wrongfully." "We cannot say that the damages found are so excessive as to warrant the belief that the jury must have been influenced by some mistake, partiality, prejudice, or passion;" and therefore the judgment is affirmed.

(39 W. Va. 619)

**BOWMAN v. DULING et al.**(Supreme Court of Appeals of West Virginia.  
Dec. 15, 1894.)**VENDOR AND PURCHASER—ACTION FOR PRICE—INTEREST.**

1. It is not error to decree for the payment of annual interest due on deferred installments of purchase money in accordance with the contract of purchase.

2. Where a vendee would escape the payment of purchase money, either in whole or part, because of a defective title, he must show by at least a preponderance of testimony that such defect clearly exists.

(Syllabus by the Court.)

Appeal from circuit court, Roane county.

Suit by A. Bowman against C. F. Duling and another. There was a decree for plaintiff, and defendants appeal. Affirmed.

Schilling, Vandale & Starkey and Atkinson & Flick, for appellants. J. W. O. Armstrong and S. E. Boggess, for appellee.

DENT, J. On the 15th day of September, 1892, A. Bowman, plaintiff, instituted a chancery suit in the circuit court of Roane county against C. F. and John W. Duling, partners as C. F. Duling & Son, to enforce payment of the vendor's lien retained in the following

deed, to wit: "This deed, made this 25th day of July, 1891, between A. Bowman, party of the first part, and C. F. Duling and John W. Duling, doing business under the firm name of C. F. Duling & Son, parties of the second part, all of the county of Roane and state of West Virginia, witnesseth, that in consideration of the sum of fifteen hundred dollars, two hundred and fifty dollars of which is in hand paid, the receipt whereof is hereby acknowledged, and the residue to be paid as follows, to wit, \$250.00 to be paid July 9, 1892, \$250.00 July 9, 1893, \$250.00 July 9, 1894, \$250.00 July 9, 1895, and \$250.00 July 9, 1896, for which said deferred instalments of purchase money the said parties of the second part have executed their notes of even date herewith, bearing interest from the 9th day of July, 1891, until payment, said interest to be paid annually, the said party of the first part doth grant and convey unto the said party of the second part the following real estate, situate in the town of Spencer, county of Roane and state of West Virginia, and bounded and described as follows, to wit: Beginning at a stake on Market street, corner to C. C. Riddles and others; thence N., 31 E., 20 poles and 22 links, to a stake at Spring creek; thence with Spring creek N., 47 W., 24 poles, to Tanner's run, and bounding thereon S., 24½ W., 8 poles, S., 17 W., 5 poles, S., 51 W., 9 poles, to a stake (elder not found); thence S., 48 E., 14 poles and 20 links, to a stake; S., 42 W., 1 pole; thence S., 60 E., 10 poles, to the place of beginning,—containing three acres and 15 poles, be the same more or less. The said party of the first part hereby excepts from this conveyance the right of way 60 feet wide heretofore conveyed to the R. S. & G. Railway Company by deed recorded in Deed Book No. 19, page 320, & 1 of Roane County Court Clerk's office. A vendor's lien is expressly retained herein to secure the payments of the deferred instalments of purchase money and interest which shall accrue thereon, and the party of the first part covenants to warrant generally the property hereby conveyed. Witness the following signature and seal: A. Bowman. [Seal.]" Such proceedings were had in the suit that on the 31st day of March, 1892, the court entered a decree in favor of the plaintiff for the sum of \$334.58, being for the amount of the note then due, and the annual interest on the payments not yet due, and ordered a sale of the property. From this decree the defendants appeal, and assign as errors (1) that the amount decreed for included the annual interest due and unpaid on the deferred instalments of purchase money not yet due; (2) that the court failed to cancel the contract or allow defendants any deduction or damages on account of the alleged defects in the title to the property.

The interest question is plainly settled by the case of *Genin v. Ingersoll*, 11 W. Va. 549. The interest being due and unpaid by the terms of the contract, the plaintiff had a

right to sue for and have it decreed to him; and the language of the deed, to wit, "A vendor's lien is expressly retained herein to secure the payments of the deferred instalments of purchase money and interest which shall accrue thereon," is broad enough to include all interest due.

The defects alleged by the defendants in the title to the property are three in number, to wit: (1) That the town of Spencer claims a strip off one side of the lot; (2) that William Woodyard claims and is possessed of a strip off another side; (3) that the land belonging to Alexander West, Jr., laps on another side. It is the well-settled law of this state that if the vendee would escape payment of the purchase money, in whole or in part, he must show that the title is clearly defective. *Heavner v. Morgan*, 30 W. Va. 335, 4 S. E. 406; *Smith v. Parsons*, 33 W. Va. 644, 11 S. E. 68. This the defendant has failed to do.

1. As to the claim of the town of Spencer, the evidence shows that the plaintiff had maintained a fence on the line between himself and the street for upward of 10 years. If there is or was a dispute about this line (which is not at all clear by the evidence), 10 years' peaceable and adverse possession would bar the rights of the town. *Teass v. City of St. Albans*, 38 W. Va. 1, 17 S. E. 400.

2. As to the William Woodyard claim, the evidence clearly shows that the plaintiff only sold to a fence that had been maintained by himself and said Woodyard as the dividing line for upward of 30 years, and that the plaintiff made no pretense to sell the defendants any land on the Woodyard side of said line. On this question the evidence undoubtedly preponderates in favor of plaintiff.

3. Finally, the West claim. The plaintiff originally purchased to the bank of Spring creek, the title to which was at the time in Alexander West, Jr. For years no person has claimed title to the bed of Spring creek, or paid taxes thereon. The plaintiff, many years ago, to protect the bank from being washed away, planted willows along it, which had caused an accumulation of soil of several feet in width, and forced the bank further away from plaintiff's line. He thereupon took possession of this strip up to the creek, and sold it to the defendants, and they had been in the undisputed and peaceable enjoyment of the same ever since. The evidence shows that if Alexander West, Jr., ever had title to the bed of Spring creek, he had long since abandoned it, and it became forfeited to the state. The bed of the creek thus being in the public, the alluvium caused by accretion would naturally accrue to the benefit of the adjacent landowner. He having bought to the bank of the creek, if not entitled to go to the center, as is usually the case, is entitled to follow the bank up if it is changed by gradual and imperceptible accretion; otherwise, he might be cut off from use of its waters. If the creek is un-

der private ownership and control, a different rule might apply, as the owner would have the right to fence the waters against the use of abutting property. In this case private ownership is not shown. 1 Am. & Eng. Enc. Law, 136; 2 Am. & Eng. Enc. Law, 504. It is plain, from what has been said, that the defendants have failed to present such a case as would entitle them to resist payment of the purchase money in whole or in part, and therefore the decree of the circuit court was right, and is affirmed.

(39 W. Va. 479)

#### GILL v. STATE.

(Supreme Court of Appeals of West Virginia.  
Nov. 17, 1894.)

EXECUTION FOR FINE—ON WHAT LEVIED—SEPARATE PROPERTY OF MARRIED WOMAN—TORTS OF WIFE—LIABILITY OF HUSBAND.

1. A writ of fieri facias upon a judgment of a circuit court for a fine against a person convicted of a misdemeanor ought to run against goods and chattels and real estate.

2. Such execution against a married woman may be levied upon her separate estate, personal or real.

3. Torts by wife; liability of husband and wife discussed.

(Syllabus by the Court.)

Error to circuit court, Harrison county.

Motion by Margaret A. Gill to quash certain writs of fieri facias issued on judgment against her for fines. From a judgment overruling the motion, she brings error. Affirmed.

John Bassel, for plaintiff in error. T. S. Riley, Atty. Gen., for the State.

BRANNON, P. Eleven writs of fieri facias were issued from the circuit court of Harrison county in favor of the state against Mrs. Thomas Gill upon judgments against her for fines imposed for misdemeanors, and she made a motion to quash the same and levies of them, which being overruled, she has brought the case here.

Her ground for quashing the writs of fieri facias is that upon their face they require the fines and costs to be levied of the goods, chattels, and real estate, and she says that an execution for a fine cannot be levied out of real estate. Is this so? At common law an execution for a debt or liability of a private person to another could not be levied of realty, but one in favor of the king or state could be. Opinion in *Leake v. Ferguson*, 2 Grat. 484; *Freem. Ex'rs*, § 172; *Jones v. Jones*, 18 Am. Dec. 327. Our Code, in chapter 35, § 5, expressly exacts or continues this common-law prerogative of the state by providing that "in a writ of fieri facias upon a judgment or decree against any person indebted or liable to the state" the command shall be to levy the money out of the "goods, chattels and real estate" of the defendant. It is contended that this provision applies, not to fines imposed for criminal or

penal offenses, but to debts or some mere money liability; that it is found in a chapter of the Code whose very title imports such debt or money liability, not money penalty imposed for crime, the title of the chapter being "Of the Recovery of Claims Due the State"; and that the chapter provides motions and actions as means of recovery of the claims here meant, "processes" not meaning the recovery of fines by indictment; and that the words in section 5, "indebted or liable to the state," must be given the same meaning as in section 3, which provides that "the action or motion at law may be against any person indebted or liable in any way whatever to the state." These considerations have force, but they are not conclusive, and are outweighed by others. In the first place, section 5, c. 35, is to be liberally construed, because it is purely a remedial enactment giving process of execution to enforce judgments for money in favor of the public, and as its purpose is to realize public dues it should not be given a narrow technical application. Its broad language is that a writ of fieri facias "upon a judgment or decree against any person indebted or liable to the state" shall run against real as well as personal estate. Its use of the words, "person indebted or liable to the state," would include, not only one owing a simple debt, but any money liability existing by judgment, no matter on what the judgment is based. When the prosecution for a public offense has ended in a judgment imposing a fine, it is no longer an unascertained penalty or liability, but has become fixed in amount, and has become a debt, and that of the highest character,—a debt of record, payable instant, and the lawful process of execution may go upon it at common law and under our statute. *Rex v. Woolf*, 1 Chit. 401, 18 E. C. L. 225, 229, 230; *Kane v. People*, 8 Wend. 203; 1 Bish. Cr. Proc. § 1304; Code, c. 36, § 12. The position taken above,—that a judgment for a fine is a debt,—is not only supported by cases just cited, but our case of *State v. Burkeholder*, 30 W. Va. 593, 5 S. E. 439, supports it, as it holds the state, under its claim to a fine, to be a creditor, and the demand such a debt as will authorize the state to appeal to a court of equity to avoid a deed to the prejudice of the state as to its fine. Award of execution is not an integral part of a judgment, as it need not contain it, and such execution as the law points out may issue upon it; and the well-considered cases, cited above, of *Rex v. Woolf* and *Kane v. People*, hold that by common law, on a judgment for a fine, a writ of capias ad satisfaciendum, to take the body, or of levavi facias, to take the goods and the issues of the whole land of the defendant, could be issued, just the same as on a judgment for a debt; and it seems to me that our legislation does not intend to deprive the state of the right to go against the land

given by the common law and delay its steps in collection of money due the public treasury by compelling it to resort to chancery to enforce its recovery. A large fine is just as much a debt, and just as essential to the treasury's needs, as a debt against a defaulting sheriff. Why withhold from the state an efficient remedial process in the one case and grant it in the other? Such a judgment for a fine being a fixed debt and liability, it falls under the wide letter of section 5, and, as I have shown, it falls within what must be considered its spirit and remedial purpose. From the mere circumstance that section 2 of chapter 35 provides that claims due the state may be recovered by motion or action, and that section 3 says that it may be against "any person indebted or liable" to the state, we are not bound to conclude that as the words "indebted or liable" are found in both sections, we must give them exactly the same construction for all purposes, and restrain the beneficial operation of the section to not giving execution, but defining what property shall be liable to recoveries by action or motion, and excluding recoveries by indictment. We must look at all the statutory provisions, and the objects they contemplate. Chapter 35 of the Code treats of the recovery of claims due the state, while chapter 36 treats of the mode of recovering fines, but they both relate to the recovery of moneys due to the state. We may say that when chapter 35 says that claims due the state may be recovered by action or motion it means, in respect to the process of recovery of judgment, claims other than for fines, and that when chapter 36 says that where fines are imposed by law they may be recovered by indictment or presentment and warrants before justices it means fines, not other claims. But these provisions relate in terms to the form of proceeding, and I suppose only those forms can be used, because the language is express; but, as to fines, section 12, c. 36, authorizes a fieri facias to issue without saying what property it shall run against. Does it run against land? We turn to section 5 of chapter 35, and find that it commands that a writ of fieri facias upon a judgment against any person indebted or liable to the state shall run against land. The two sections afford a remedy for gathering the fruits of the same thing,—a recovery by judgment by the state; and as one simply gives a fieri facias, without limiting it to goods and chattels, and the other makes a state's execution run against goods and lands, we do not make the sections clash by saying that an execution for a fine shall operate upon land, since there would be no inconsistency between them, as they are to be construed together as in *pari materia*, both relating to remedy by execution on state recoveries. The argument is made by counsel that, if we allow executions for fines to operate upon lands, then,

as some fines are recoverable before justices, land may be sold under executions issued by justices. This is not so; for section 5 of chapter 36 enacts that proceedings before justices for fines shall conform to sections 219 to 230, inclusive, of chapter 50, and we find that one of those sections (227) limits the collection of such justices' executions to personal estate. This, so far as it does go, goes to support the position taken in this opinion that an execution for a fine runs against land, because it imports that the lawmakers, when limiting a justices' execution for a fine to personal property, thought that without such limitation it would bind land. The law allows a state's execution to be levied on land only in default of the defendant's having personalty. If he has not personalty, must he be allowed to avoid payment of fine, though he has land? It may be said every execution for a petty amount might be enforced against land. So might a chancery suit be brought for a petty amount to sell land, since I suppose no one would deny that a judgment for a fine is a lien on land under section 5, c. 139, and the state has like remedy to enforce as individuals. *State v. Burkeholder*, supra; *Com. v. Ford*, 29 Grat. 683. In the opinion in *State v. Burkeholder*, Judge Johnson pointedly expresses the opinion that under section 5, c. 35, an execution for a fine runs against land, and under it land can be sold. This is said to be an obiter dictum. It was germane to the discussion of the subject before the court, if not in point, and, I think, expresses the correct construction of the statute. So we conclude that a state's fieri facias for a fine ought to run against goods and chattels and land, and therefore the fact that those involved in this case did so is no ground for quashing them.

The ground relied upon for quashing the levies made under these executions is that they are upon real estate which is the separate property of a married woman, and it is contended that an execution cannot be levied on the separate estate of a married woman. A judgment at law against a married woman upon a contract made during coverture is void. *White v. Manufacturing Co.*, 29 W. Va. 385, 1 S. E. 572. But these judgments are for fines for public offenses, not on contract. We are not considering the question of the married woman's liability for the offenses, as that was a matter to be raised before the judgment, but only whether her property can be taken to pay the judgments. Simple as this question seems, it is not without difficulty of decision. No authority bearing on it is cited, and I have found little pointed authority upon it. We can find everywhere authority upon the question of when and how a married woman is answerable for torts and crimes; when the husband is alone liable for her acts; when they are jointly liable; when she is separately liable,—but not much exactly on the question whether her separate estate can be tak-

en for fines against her. One would hastily say that, if a judgment can be rendered against her, execution can be levied upon her estate. We are not here considering how far contracts bind her estate. For her torts I understand the common-law rule to prevail in this state,—that the husband is liable for them. If he is present, he is liable for her tort, though he protest against it. If he is absent and knows nothing of it, he is liable to satisfy her torts. There is a case in Illinois holding that the acts enabling married women to take and hold separate estate impliedly repealed the common-law rule making a husband liable for the torts of the wife done by her without his consent, or in his absence, without his instigation; but the court was nearly evenly divided. See *Martin v. Robson*, 65 Ill. 129. In *Norris v. Corkill*, 32 Kan. 409, 4 Pac. 862, it is also so held. Mr. Freeman, in note to *Brazil v. Moran*, 83 Am. Dec. 777, seems to see it likewise. This opinion is based on the theory that, at common law, by marriage, the husband became, in short, entitled to all his wife's personality and her earnings, and the rents and profits of her realty during coverture, and clothed with power to restrain and direct her conduct, even by personal chastisement, and therefore it was reasonable he should be responsible for her wrongful conduct; but as, since the statutes touching her separate estate and earnings, he gets nothing of her estate by marriage, and is not entitled to her earnings, and the right of chastisement is gone in these more civilized and polite times, the whole reason for the rule ceases, and so, too, ought the rule itself cease, under that maxim of law, "*Cessante ratione cessat et ipsa lex*" (the reason ceasing the law itself ceases), and thus these statutes repeal or abrogate the common-law rule by implication. But this is nothing but judicial repeal,—a dangerous road, in so important a matter, for courts to travel. If there ever was reason for the rule, much of it yet continues. The husband still, outside of the property rights, has a potential influence over the wife. His counsel may restrain her from wrong, his counsel may instigate her to it. He might encourage her to the grossest wrong against others secretly, and it would be utterly out of the power of the victim of her wrong to prove his agency in it. We may say that his moral influence over her, his capacity through her to injure others with impunity, was an element that entered into the adoption of the common-law rule somewhat or largely, and it yet exists. So the unity of person is not entirely gone. She cannot contract generally. The rule did not arise solely from the consideration that by marriage he was invested with her property rights. And so it seems that not all the reasons suggesting the rule are gone. Courts do not favor repeals of settled principles by mere implication. The New York, Pennsylvania, and Iowa courts have held that these married women's acts do not change the common-law rule of the husband's

liability for the wife's torts. *Baum v. Mul-len*, 47 N. Y. 577; *Mangan v. Peck*, 111 N. Y. 401, 18 N. E. 617; *Quick v. Miller*, 103 Pa. St. 67; *McElfresh v. Kirkendall*, 36 Iowa, 228; *Wells*, Sep. Prop. 569; 1 Bish. Mar. Wom. § 909. Thus it seems that sufficient reason exists against uniting in such judicial repeal. As remarked in *Withrow v. Smithson*, 37 W. Va. 761, 17 S. E. 816, and by Mr. Bishop in his work on *Married Women* (volume 1, § 909), this liability of the husband is unjust, and ought to be repealed.

As the husband is liable for the wife's torts committed before and during coverture, it might be inferred that she is not liable; but this is not so. If her tort is committed in his presence, and by his coercion, he alone, and not she, is liable; and where he is present such coercion is presumed until it appear that he objected, or she acted from her own impulse as the more active party, and then both are liable. If the act be done not in his presence, both are liable, no matter whether he did or did not instigate it; and where she is liable both are sued jointly, and judgment goes against both. 1 Minor, Inst. 345; *Roadcap v. Sipe*, 6 Grat. 213; *Com. v. Neal*, 10 Mass. 152, 6 Am. Dec. 105, and full note; *Manufacturing Co. v. Hell*, 115 Pa. St. 487, 8 Atl. 616, 2 Am. St. Rep. 575, and full note; *Appeal of Franklin's Adm'r* (Pa. Sup.) 6 Atl. 70; *Brazil v. Moran*, 83 Am. Dec. 773, and full note; 2 Kent, Comm. 149; *Schouler Husb. & W.* § 134; *Schouler*, Dom. Rel. 103; 1 Bish. Mar. Wom. §§ 43, 905; 2 Tuck. Bl. Comm. If he die before suit, she remains liable to suit alone. If he die before judgment, pending suit, she remains liable. 2 Bish. Mar. Wom. § 254. It is even said he may be acquitted and she found guilty. Opinion in *Roadcap v. Sipe*, 6 Grat. 213; 1 Minor, Inst. 346. Thus she is liable to judgment. How is it to be paid? Take a judgment against husband and wife for tort, she owning land, before the separate estate act, in which he has a life estate, and she the reversion in fee. Surely the whole fee, including her reversion, would be liable. Otherwise the judgment would be vain as to her. 1 Bish. Mar. Wom. § 908; *Fox v. Hatch*, 14 Vt. 340; *Moore v. Richardson*, 37 Me. 438. But is her separate estate liable to such civil judgment for tort? It must be so, else all the law just stated that asserts her liability for tort would be unmeaning. She owns a legal estate, under our statute, in her separate estate. She is a single woman as to it. The statute making her estate separate in words says it shall be separate to her as if she were a single woman. A judgment for a tort is a personal judgment. *Van Metre v. Wolf*, 27 Iowa, 341. Why does it not bind her separate estate? It would seem to be an anomaly and absurdity to implead her in court, and render judgment against her, and yet say that judgment is fruitless, though she is legal owner of estate to satisfy it. The power to give judgment implies the power to enforce it. Author-

ity which I regard adequate to support this position has come under my observation. In *Merrill v. City of St. Louis*, 88 Mo. 244, it was held that "a general judgment against a husband and wife for a tort of the latter, not committed in the husband's presence or by his coercion, is binding upon both, and the separate property of the wife may be taken in execution." In the opinion it is said: "It is suggested that such a judgment could not be enforced on general execution. In the present attitude of married women in this state, and specially towards their separate estate, I perceive no such difficulty and embarrassment as the ancient common law threw around them. It does seem to me that learned judges have exhibited too much timidity, or reverence for legal antiquities, in adhering to rules after the reason for their existence has given away before our advancing civilization and broadening jurisprudence." In *Smith v. Taylor*, 11 Ga. 22, the judge said, in a tort suit: "If there is a recovery, the judgment passes against both. If the wife has a separate estate, it may be taken in execution; and she may be, together with her husband, arrested on final process." See 1 Bish. Mar. Wom. § 908; *Musgrave v. Musgrave*, 54 Ill. 186; Opinion in *Richmond v. Tibbles*, 26 Iowa, 475. *Freem. Ex'ns*, 128, says: "Judgments against them [married women] are generally binding to all intents and purposes, and are capable of being enforced in the same manner as judgments similar in other respects. Hence, when a personal judgment for money is entered against a married woman, either alone or in conjunction with other defendants, it is commonly conceded that execution may be issued, under which the sheriff may seize and sell her separate property." What reason can be given to show the nonliability of her separate estate for torts? Is it that it required a statute to enable her to make a contract to bind her estate, and that it is bound only so far as statute allows, and there is none declaring it bound for torts? There was necessity for legislation to enable her to hold separate estate, and to contract, as her contracts are void at common law; but when was the time that the common law did not assert her liability to tort? It required no legislation to enable her to become liable for her tort, and being liable, and having property, it logically follows that it must answer that liability. There is no prohibition in any statute. (See note at foot of this opinion.) Is she liable for fines for her offenses against the state? If, as I have sought to show above, she and her estate are liable in civil actions for tort, more so is she liable for penal offenses. I need not cite authority to show her responsibility for crime. She is a jurisdictional person in a criminal law court. It can take jurisdiction over her and render judgment against her. It can hang or imprison her. It can impose a fine upon her. The very power to impose the fine of necessity implies the power to collect it.

It is a personal judgment, beyond doubt, and binds her estate as such. There is no statute limiting the liability. It requires none to declare it. It occurred to me that the very power to give judgment carried with it as a consequence the liability of her estate to it. And so I find Mr. Freeman, in his work on Executions (section 22), says: "It would be a contradiction in terms to say that all persons may be bound by judgments, and then to declare that some persons are exempt from having executions issued against them. The decisions in regard to the persons who may be parties to judgments are not perfectly harmonious; but wherever, under the law as understood in any particular state, a person, or class of persons, may be made parties litigant, and bound by judgments against them, it must follow, in the absence of statutes to the contrary, that the same persons may by executions be made to satisfy such judgments. In other words, when a judgment is valid against a defendant, an execution upon it, unless expressly forbidden by statute, must be equally valid. Execution may, therefore, issue against a lunatic and also against a married woman." Mr. Bishop, in 1 Cr. Proc. § 1304, says: "A fine is treated as a judgment debt, and binds a married woman." In this state we assess separate fines against husband and wife for one act of selling liquor or assault and battery, under a joint indictment. *Com. v. Hamor*, 8 Grat. 698; *Com. v. Ray*, 1 Va. Cas. 262. Who pays the wife's fine? I find it stated in 1 Hawk. P. C. c. 1, § 13, and Tyler, Inf. & Cov. 359, that the husband is liable for a forfeiture under a penal statute for the offense of the wife. And in *Hasbrouck v. Weaver*, 10 Johns. 247, in a quietam action, a husband was held liable for a penalty for a liquor sale made by his wife. But I should doubt his liability, and, even though he were liable, it does not follow that her estate is not liable. I conclude that these executions were leviable out of the separate personal or real estate of the defendants. Therefore we affirm the judgment.

NOTE BY BRANNON, P. Since the above opinion was filed, I have met with some law confirming the opinion expressed therein that the separate estate of a married woman is liable for her torts, which I think proper to add by note. 1 Biah. Mar. Wom. § 842, says: "Unless a wife is acting under what the law deems coercion from her husband, she can bind herself by her civil torts the same as though she were discoverd. On the other hand, she has no such general power in respect to contracts, though that branch of the law which is administered in equity tribunals gives her a good deal of liberty in this respect. But it should be observed this liberty pertains merely to the thing contracted about, and does not extend to her person. Thus, if a wife commits a civil tort, though when sued during coverture her husband must be joined, yet on his death the judgment abides as a debt running alike against her and her property. But if a wife enters into a contract, she cannot be sued at law." "Since she can commit crime, she would seem a fortiori to be responsible for her civil torts, there being a difference between her torts and her contracts." *Id.* § 43. In volume 2.

§ 165, Bishop says: "She can commit a tort subjecting her personally to a suit jointly with her husband, and the reversionary property to be taken on the execution," etc. In 14 Am. & Eng. Enc. Law, 661, the point I stated above—that, being, unlike as to contracts, capable of incurring liability for torts, therefore her estate is liable—is confirmed by the statement that, if it be for a cause of action for which she may be liable, the judgment is valid, as if unmarried, and, on page 647, that the judgment for her tort may be "satisfied out of all her property."

(39 W. Va. 489)

EWING et al. v. WINTERS et al.  
(Supreme Court of Appeals of West Virginia.  
Nov. 17, 1894.)

DECREE AGAINST INFANT—REOPENING AFTER MAJORITY—JURISDICTION OF SUPREME COURT.

An infant, after he has attained the age of 21 years, files his petition asking to be permitted to show cause in this court against a decree, under section 7 of chapter 132 of the Code. *Held*, that this court has no original jurisdiction in such case, and his application is refused.

(Syllabus by the Court.)

Petition by James Winters, after obtaining his majority, to reopen a decree. Denied.

W. W. Arnett, for petitioner. Caldwell & Caldwell, J. B. Sommerville, and I. F. Jones, for opponents.

HOLT, J. This is an appeal which came to this court from the circuit court of Marshall county on the 30th day of March, 1889. The cause was argued and submitted on June 6, 1890, and decided June 21, 1890. See case of *Ewing v. Winters*, 34 W. Va. 23, 11 S. E. 718, and record therein. The two decrees of the circuit court—one of April 5, 1888, and one of June 23, 1888—were reversed and annulled, and the final decree of December 31, 1888, was likewise reversed, except so much thereof as confirmed the report of sale of the land, and directed a deed and possession and costs, and the cause was remanded to the circuit court for further proceedings. On the 16th day of April, 1894, James Winters filed his petition in this court alleging that, within the last five months preceding that day, he became 21 years of age, and that he and his brothers and sisters, who are still infants, were parties defendant in said two causes, and are the ones who, by this court, were adjudged to take a remainder in fee in the real estate called the "Old Homestead," under the will of James Winters. He complains, on various grounds, of the sale of his estate in the remainder, and of the substitution of the proceeds of sale in the place of such estate, and prays that under section 7, c. 132, of the Code, he may be permitted to show cause against such decree.

In *Jackson v. Turner* (1834) 5 Leigh, 119, it was held error to subject lands of infants to sale in certain cases, and not give them a day to show cause against the decree after their attainment to full age. To obviate such error, section 7 was passed in the re-



visal of 1849, which reserves such right to the infant, in a proper case, within six months after attaining the age of 21 years, to show such cause against the decree without such right being reserved. In such cases the infant may proceed by original bill, bill of review, or petition to rehear, according to the status of the case. See 1 Daniell, Ch. Pr. (6th Am. Ed.) top page 174. If this proceeding is to be regarded as one taken, or asked to be taken, in a pending cause, it cannot be entertained now in this court, because the cause of *Ewing v. Winters* and the cause of *Rine v. Winters*, consolidated, were finally decided here on the 21st day of June, 1890, and remanded to the circuit court of Marshall county for further proceedings, where petitioner says the consolidated cause is now pending. If it is to be regarded as an original proceeding taken, or asked to be taken, in this court, it cannot be entertained, or petitioner's prayer granted, because this is not a court of original jurisdiction. Nor is original jurisdiction in such cases anywhere given, expressly or by necessary implication. The remedy, if any, must be in some other court. Petitioner's prayer is therefore refused.

(39 W. Va. 544)

**SKIDMORE v. JETT et al.**(Supreme Court of Appeals of West Virginia.  
Nov. 24, 1894.)**MARRIED WOMAN'S CONTRACT—LIABILITY OF SEPARATE ESTATE.**

1. Where a married woman executes a joint and several note with her husband for the payment of money, her separate estate may be subjected in equity to the payment of the debt, although her husband may own a small amount of land which is insufficient to pay the debt.

2. Although said married woman be sued jointly with her husband on such note, and a demurrer is sustained as to the husband, and the bill is dismissed as to him, the cause may proceed to final decree against the separate estate of the wife.

(Syllabus by the Court.)

Appeal from circuit court, Randolph county.

Action by John C. Skidmore against W. P. Jett, Sarah Jett, and John C. Bowen to subject the property of defendant Sarah Jett to the payment of a promissory note. From a decree in favor of plaintiff, defendant Sarah Jett appeals. Affirmed.

Butcher & Harding, for appellant. E. D. Talbott for appellee.

ENGLISH, J. On the 10th day of April, 1884, W. P. Jett and Sarah Jett, his wife, executed to John C. Bowen a note under seal, whereby, 12 months after date, for value received, they or either of them promised to pay John C. Bowen, or his order, \$196.02, as witness their hands and seals the 10th day of April, 1884. On the 18th day of May, 1885, said John C. Bowen assigned said note to

John C. Skidmore, and said note was credited with \$8.59 as of the 31st day of October, 1885. At rules held for the circuit court of Randolph county on the first Monday in June, 1891, said John C. Skidmore filed his bill in equity against said W. P. Jett, Sarah Jett, and John C. Bowen, alleging the execution of said note, and exhibiting a copy of the same, alleging that said W. P. Jett had a tract of land (describing it) which plaintiff was not aware of at the time of the filing of said bill, and that, as soon as he ascertained that said W. P. Jett was the owner of said small tract of land, he brought suit before a justice against said W. P. Jett, and obtained a judgment against him for \$242.10 on the 2d day of May, 1891, with interest thereon from that date and costs. He also represented that said Sarah Jett was the owner of two lots in the town of Montrose,—one containing three-fourths of an acre, on which there is a dwelling house and outbuildings, and the other containing one acre, on which there is a dwelling house, in which the defendant resides; that said tract of land owned by W. P. Jett is worth but little, and will not sell for enough to pay off the plaintiff's judgment, which he charges is a lien thereon, which was then due and unpaid. He further charges that said note is a lien on the lands of said Sarah Jett, and that he is entitled to have the same rented for a sufficient length of time to pay the debt of plaintiff, provided the same cannot be satisfied by the sale of the small tract of land owned by said W. P. Jett; and he prays for the sale of the tract of land owned by the said W. P. Jett, and, in case it does not sell for enough to satisfy said judgment, then he prays that the two tracts of land owned by said Sarah Jett be rented for a sufficient length of time to pay off and discharge said debts. At the October term, 1891, said Sarah Jett and W. P. Jett appeared, and demurred to the plaintiff's bill, which demurrer was sustained to said bill, so far as the same sought to sell the property of W. P. Jett, and the same was dismissed as to said W. P. Jett. On the 22d day of January, 1892, the defendant Sarah Jett filed her separate answer to the plaintiff's bill, and the plaintiff replied generally thereto, in which she admitted the execution of said note, but claimed that she knew nothing of the assignment thereof until a short time before the suit was brought; that said note was executed to said Bowen for property purchased at his sale shortly before he left the state, and that at the time of the execution of said note said Bowen was indebted to her in the sum of \$181.75 for money loaned to him by her, and for money paid by her to C. G. Bowen at his instance and request; that at the time said note was executed she did not have her accounts with her, but the matter was then talked over, and it was there expressly agreed between said Bowen, and respondent and her said husband, that, if respondent would sign said note, said amounts, with

their accrued interest, should be credited thereon, and upon this promise she was induced to sign said note, and with no intention on her part of binding her separate estate, real or personal, for the payment thereof, further than to apply her account against said Bowen to the payment thereof; that, although said Bowen remained in the state some time after the execution of said note, he failed to call upon respondent and settle with her, and credit the amount so due her from him upon said note, but, some time after said note became due, her husband called upon said Bowen, and paid him the balance, of \$8.59, a sum sufficient to pay off and discharge the whole of said note after applying what was due from said Bowen to respondent; and that said last payment was made directly to said Bowen some time after said pretended assignment to Skidmore of said note, as appears by the indorsements thereon; and said defendant alleges that the whole of said note had been paid off and discharged before the institution of this suit. At the May term, 1892, the decree complained of was entered, in which the amount of said debt was ascertained after deducting said credit of \$8.59, and said note was decreed to be a charge upon the lands of said Sarah Jett from the date of the institution of the suit; and it was further decreed that the plaintiff have execution for the amount of the debt decreed to him, and the costs of the suit, with interest on said debt until paid, and that, unless the same be paid in 60 days, a special commissioner was to be appointed, who was directed to rent said lots at public auction upon the terms therein set out; and from this decree the said Sarah Jett obtained this appeal.

The first error assigned by appellant is in the action of the court in overruling the demurrer of said Sarah Jett to the bill of the plaintiff; but as no ground for the demurrer is assigned, and we can see no reason why it should have been sustained, we must regard it as properly overruled by the court.

The next error assigned is that the court erred in ascertaining the amount due on said note, claiming that, if it was proper to enter a decree therein at all, said amount should have been ascertained from said judgment as a basis. It will be perceived that the judgment referred to in this assignment of error was against W. P. Jett alone, and that on the joint demurrer of said W. P. Jett and Sarah Jett the bill was dismissed as to W. P. Jett, and after the dismissal of the suit as to W. P. Jett no decree was asked upon the judgment the plaintiff claimed to have against said W. P. Jett; and it would have been improper to have ascertained the amount due from Sarah Jett on said note from said judgment against W. P. Jett as a basis, and the court committed no error in ascertaining said amount from said note, said Sarah Jett being no

party to said judgment, which was recovered after the institution of this suit.

It is also assigned as error in the court in decreeing said Sarah Jett's lands to be rented before first exhausting the property of her husband, the defendant W. P. Jett. The note upon which the suit was predicated was the joint and several note of the husband and wife, and the amount could be recovered from either. The bill alleges that the property of the husband was small, and insufficient to pay the plaintiff's debt, which allegation is not denied by the answer, and must be taken as true; and this court has held, in the case of *Hughes v. Hamilton*, 19 W. Va. 367, that the proceeding in a court of equity by bill to subject the separate estate of a married woman to the payment of her debts is in the nature of a proceeding in rem, and also that the debt of a general creditor of a feme covert, after suit brought by such creditor to subject such separate estate to the payment of such debt, becomes a quasi lien, at least, upon such separate estate, and for the satisfaction thereof. So, also, in the case of *Dages v. Lee*, 20 W. Va. 584, this court held that "the separate estate of a married woman is liable for any simple contract debt which she would be liable for if she were a feme sole; and the consideration for said debt need not inure to her benefit, or that of her separate estate, but it may inure to the benefit of her husband or any third party, or it may be a mere prejudice to the other contracting party"; and in the case of *Camden v. Hiteshew*, 23 W. Va. 236, it was held that "the debts of a married woman for which her separate estate is liable are such as arise out of any transaction out of which a debt would have arisen if she had been a feme sole, except such as are not founded on a consideration." Under these rulings a quasi lien attached upon the lands of said Sarah Jett at the institution of the suit, and we see no good reason why her land could not be rented for the payment of her debt.

The fourth assignment of error is that the court erred in not finding, under the pleadings in the cause, that said note had been wholly paid off and discharged, and in not dismissing the same, with costs. It is true that the defendant Sarah Jett, in her answer to the plaintiff's bill, claims that she, at the time said note was executed, had an account against said John C. Bowen for \$181.75, and it was then understood and agreed between her and the said Bowen that her account was to be credited upon said note, and that said W. P. Jett afterwards paid to said J. C. Bowen the difference between her account and said note; but her answer was replied to, and no proof was taken to support the allegations of her answer, so that we cannot regard this assignment of error as well taken.

For these reasons the decree complained of must be affirmed, with costs and damages.

(39 W. Va. 802)

**JARRETT v. GOODNOW et al.**(Supreme Court of Appeals of West Virginia.  
Dec. 8, 1894.)**EQUITY — PLEADING — DEFENSES AVAILABLE AT  
LAW—SALE—IMPLIED WARRANTY—FRAUD  
—ENJOINING JUDGMENT.**

1. A party entitled to plead in an action at law the defenses specified in section 5, c. 126, Code 1891, need not plead them in the action, but may avail himself of them in equity without any excuse for not using them at law.

2. In sales of personal property by one in possession, there is an implied warranty of good title.

3. One selling personal property, knowing he has no title, and concealing that fact from the purchaser, is liable for fraud.

4. Though generally injunction does not lie against a judgment to let in setoffs, yet it will lie where the judgment creditor is insolvent.

(Syllabus by the Court.)

Appeal from circuit court, Taylor county.

Action by A. M. Jarrett against Jason S. Goodnow and others to enjoin the collection of a judgment. From an order overruling a motion to dissolve the temporary injunction, and allowing an amended bill to be filed, and from a decree for plaintiff, defendant Goodnow appeals. Affirmed.

W. R. D. Dent, for appellant. John H. Holt, for appellees.

BRANNON, P. Jarrett gave a promissory note to Newlon, which Newlon assigned to Goodnow, and Goodnow obtained a judgment against Jarrett by default before a justice, and Jarrett obtained an injunction to restrain its collection; and the court having overruled a motion to dissolve the injunction, and allowed an amended bill to be filed, and later perpetuated the injunction, Goodnow appealed. There is not a single citation of authority in the briefs on either side, and we have not the benefit of this help.

One of the grounds on which the injunction rests is that the note on which the judgment was recovered was given for an engine, boiler, and burrs, and that the consideration has wholly failed, inasmuch as Newlon had conveyed them to Durbin, trustee, to secure Newlon's creditors. Goodnow's counsel, in answer to this, contends that this defense ought to have been pleaded at law to defeat the recovery of the judgment, and that it cannot be made the subject of equity jurisdiction. This position is not tenable, as section 5, c. 126, Code, would give jurisdiction to equity on the three grounds of failure of consideration, fraud in the procurement of the note, and that of breach of warranty of title to personal property, and section 6 expressly gives right to make defense at law or omit that and go to equity, as the debtor prefers, without giving any excuse for not defending at law. *Bias v. Vickers*, 27 W. Va. 456. When a sale of chattels is made, there is

an implied warranty of good title by the vendor, where the goods are in vendor's possession. *Byrnside v. Burdett*, 15 W. Va. 702; *Benj. Sales* (6th Ed., by Bennett) § 627 et seq., and note 11, p. 631; full note to *Scott v. Hix*, 62 Am. Dec. 460; 2 Kent, Comm. 478. Some old English text-books lay down that there is no implied warranty of title, but Mr. Benjamin says no case was ever so decided there. That old rule, repugnant to reason, if it really existed, was long since "wellnigh eaten away," as Lord Campbell well said; and now it is settled in England that there is such implied warranty, and it is universally admitted in America. But there is no implied warranty of soundness or quality of goods sold. *Mason v. Chappell*, 15 Grat. 572; *Benj. Sales*, § 644, and note 13, p. 640. In this case the vendor, at the date of sale, had given a deed of trust on the property, and his warranty was broken at once. He was also guilty of fraud in the sale. *Benj. Sales*, § 628 says, "If the vendor knew he had no title, and concealed that fact from the buyer, he would be liable on the ground of fraud."

A second ground on which the injunction rests is that Newlon once sold to Jarrett a house and lot, with general warranty, and that a lien was found and adjudged to exist against the property, which Jarrett was compelled to pay, and did pay, long after the judgment, and Jarrett asked that what he paid to remove this lien be set off against the judgment. The amount of this lien was ascertained by decree. Equity will not enjoin a judgment to let in a defense pleadable in the action, where the party has had opportunity to do so, unless prevented by fraud, accident, surprise, or some adventitious circumstance beyond the party's control. *Shields v. McClung*, 6 W. Va. 79; *Hayner v. Price*, 17 W. Va. 523, 548. And as setoffs may be pleaded in defense, or made the subject of another action, equity generally will not enjoin a judgment to let them in. But it will do so where the party owing them is insolvent. *Beard v. Beard*, 25 W. Va. 486; *McClellan v. Kinnaid*, 6 Grat. 352; *Marshall v. Cooper*, 43 Md. 46; *Levy v. Steinbach*, Id. 212; *Lindsay v. Jackson*, 2 Paige, 581; 2 High, Inj. § 243. The bill alleged the utter insolvency of Newlon, and the answer does not deny it.

It is assigned as error that the process on the amended bill did not make Goodnow a party to it. It contained no new matter. It only repeats the original bill, and made Durbin, trustee, a party, and he not a necessary party. It contained nothing against Goodnow not in the original bill, and it was dismissed as to the trustee, thus leaving it out of the case, in a legal view, as the decree can be predicated on the original bill alone. We affirm order and decree.

DENT, J., not sitting.

(39 W. Va. 605)

**WELLS et al. v. GRAHAM et al.**  
(Supreme Court of Appeals of West Virginia.  
Dec. 8, 1894.)

**JUDGMENT—SCIRE FACIAS TO REVIVE—PARTIES.**

An assignee of a judgment cannot, in his own name, maintain a writ of scire facias to revive it.

(Syllabus by the Court.)

Error to circuit court, Wirt county.

Scire facias by S. F. Wells and William Beard on a judgment against R. B. Graham and D. H. Bumgardner, and in favor of C. S. Evans, by whom it was assigned to Wells and Beard. There was a judgment dismissing the scire facias, and such assignees bring error. Affirmed.

Leonard & Archer, for plaintiffs in error.  
R. F. Fleming, for defendants in error.

**BRANNON, P.** A writ of scire facias issued from the circuit court of Wirt county, reciting that C. S. Evans had recovered a judgment for money against R. B. Graham and D. H. Bumgardner, and that Evans had assigned it to S. F. Wells and William Beard, and citing the defendants to appear and show cause why Wells and Beard should not have execution on the judgment, and, upon demurrer and oyer of the judgment, the court dismissed the scire facias, being of opinion that it ought to have been brought in the name of the personal representative of Evans, deceased. Under our law, an assignment of a note, judgment, or other chose in action does not pass legal, but only equitable, title. The common law forbade their assignment, and then our statute legalized it, and gave a right of action in the assignee's name; and with Judge Carr, in *Garland v. Richeson*, 4 Rand. 266, if it were an original question, I would hold that the assignee takes legal title, but it is firmly settled otherwise in that case and *Clarke v. Hogeman*, 13 W. Va. 718, *Tingle v. Fisher*, 20 W. Va. 498, and other cases. Therefore, unless we can see a statute to otherwise allow, a scire facias or action on a judgment must be in the name of the plaintiff in the judgment, or his personal representative, because there is the legal title. It is, however, contended that section 4, c. 127, Code 1891, will sustain this scire facias, as it enacts that "in any stage of any case a scire facias may be sued out for or against \* \* \* the assignee or beneficiary party to show cause why the suit should not proceed in the name of him or them." This language is in some respects broad; but it uses the words "case" and "suit," which we usually interpret to mean a pending suit, and I think an inspection of other sections of this chapter will strengthen this conclusion. When a case has terminated in final judgment, it is at an end. It may be said it is for this purpose still a pending case. I think not. This would be straining the words pretty far.

After judgment, only execution remains to be done, and that is action, not in the action, but out of it. Except for section 10, c. 139, Code, we might with more readiness apply section 4, c. 127, to the case; but as section 10, c. 139, relates in terms to the revival of judgments, we must go by it, and not the other provision. It provides that an action, suit, or scire facias may be brought on a judgment. It does not give right to an assignee to revive. It is true, it does not give right to any particular person to use those remedies for revival, only giving such remedies; but I mean it is this section which gives the remedy for revival of a judgment, not section 4, c. 127. Seeing the remedies given for revival of judgments, we then appeal to the common law, or some statute, if to be found, to tell us who shall move in those remedies. The common law tells us it must be the plaintiff in the judgment, or his personal representative. 1 Black, Judgm. § 488; 21 Am. & Eng. Enc. Law, 858. There is no statute allowing an assignee of a judgment to sue in his own name by action or scire facias. Section 14, c. 99, Code, enables "the assignee of any bond, note, account or writing not negotiable" to sue in his own name, but does not include judgment. This is a circumstance strong against the contention of the appellants. They urge that the scire facias is an original action. This seems not to be so. 1 Black, Judgm. § 482; 21 Am. & Eng. Enc. Law, 855. If it were, they could not use it, as section 14, c. 99, does not give an assignee right to sue on a judgment in his own name. That equity allows a suit by assignee argues nothing, as it allows suit on equitable title. This scire facias suggests no death or cause of revival. It should have done so, if the plaintiff is dead, as the judgment says he is. There is no inconvenience to result from this holding, as execution can be awarded in the name of the plaintiff in the judgment, or his representative, which name the assignee has always a right to use, even beyond the control of that party, or, if preferable, the order of award of execution can recite that it is for the use of the assignee. Therefore, we affirm the judgment.

(39 W. Va. 535)

**ARGAND REFINING CO. et al. v. QUINN et al.**

(Supreme Court of Appeals of West Virginia.  
Nov. 24, 1894.)

**FRAUDULENT CONVEYANCES—PREFERENCES—CONSTRUCTION OF STATUTE.**

1. Under section 2 of chapter 74 of the Code of 1891, an insolvent debtor cannot prefer his creditor or creditors by a deed of trust formally executed upon his real estate subsequent to the passage of said act, but the same shall be taken and held to be made for the benefit of all the creditors of such debtor.

2. In interpreting a statute, it should be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous

or insignificant, and in construing a proviso or exception contained in the statute the same rule should be applied.

(Syllabus by the Court.)

Appeal from circuit court, Marshall county. Action by the Argand Refining Company and others against C. C. Quinn and others to set aside a deed of trust made for the purpose of giving preference to creditors, and to subject the real and personal property of defendant Quinn to the payment of his debts. From a decree declaring the deed of trust void, G. W. Johnson's Sons, beneficiaries thereunder, appeal. Affirmed.

Ewing, Melvin & Ewing, for appellants. S. G. Smith, White & Allen, Simpson & Showacre, C. C. Newman, and J. L. Parkinson, for appellees.

ENGLISH, J. On the 20th day of February, 1894, the Argand Refining Company, a corporation, and others, claiming to be creditors of C. C. Quinn, filed their bill in equity in the circuit court of Marshall county, alleging that on the 24th day of January, 1894, said C. C. Quinn was indebted to said company in the sum of \$87.71, and also alleging that said defendant was indebted in different amounts therein specified to other parties therein named; that on the 11th day of December, 1890 said C. C. Quinn and wife conveyed to T. J. Parsons, trustee, the south fractions of lots 127 and 128 in the city of Moundsville, in said county, to secure the Home Building & Loan Association the sum of \$1,800; that on the 13th day of December, 1890, said Quinn executed to Charles C. Newman, trustee, a deed of trust purporting to convey the same real estate in trust to secure three notes therein described, which notes they allege have been paid off and satisfied, with the exception of a note for \$300, which they allege is entitled to some credits; that on the 29th day of April, 1892, the said C. C. Quinn and wife executed to the said T. J. Parsons, as trustee, another deed of trust on said property, to secure to the Home Building & Loan Association the sum of \$600, and that on the 24th day of January, 1894, said Quinn and wife executed to George B. Peabody, as trustee, a deed of trust purporting to convey the same property, and also everything in the store room and warehouse where the said Quinn was conducting a hardware store for the sale of goods, wares, and merchandise, in the said city of Moundsville, purporting to secure to George W. Johnson's Sons the payment of a note for \$3,696.80, dated January 22, 1894, and payable six months after date at the Bank of Wheeling; that the goods, wares, and merchandise, at the date of said last-mentioned deed, in said store, had been purchased by said Quinn, and that a good many, if not most, of the debts named in said bill were contracted in the purchase of said goods, and that the said Quinn had very little other personal property,—only a few articles of household and kitchen furniture,—and that

he did not own any other real estate than that above mentioned; that at the time of the execution of said last-named deed of trust he was unable to pay his debts, and was utterly insolvent, and that his property was not and is not sufficient to pay his debts, and that said last-named deed of trust was a conveyance, transfer, and charge made by an insolvent debtor giving or attempting to give a priority or preference to a creditor of said insolvent debtor, Quinn, which provided or attempted to provide for the payment of a creditor of such insolvent debtor to the exclusion or the prejudice of the plaintiffs or other creditors of the said C. C. Quinn; and that said last-named deed of trust is void as to such priority, or preference, or payment, so attempted to be made, and that the same must and should be held and taken to be a conveyance, transfer, or charge made for the benefit of all the creditors of the said C. C. Quinn, and that all the estate, property, and assets named in said deed of trust named or referred to and sought to be conveyed should be applied upon the debts and paid to the creditors of C. C. Quinn pro rata. The plaintiffs further allege that said C. C. Quinn was not, at the time of the execution of the said deed of trust, indebted to the said George W. Johnson's Sons in the sum named in said deed of trust, and that the same was fraudulent, and made to hinder, delay, and defraud creditors, and among them the plaintiffs; that on the 25th day of January, 1894, said C. C. Quinn executed to T. J. Parsons, trustee, another deed of trust, purporting to convey the same real estate, for the purpose of securing to the Bellaire Stove Company a note dated January 10, 1894, for \$438.31, payable one year after date; that said deed of trust was made by an insolvent debtor, insolvent at the time of making it, giving or attempting to give a priority or preference to the creditor therein named, and for the payment of the debt of said insolvent debtor to the exclusion and prejudice of other creditors of the said insolvent debtor, Quinn, including the plaintiffs, and that said last-named deed of trust is void as to such priority, or attempted priority, or preference, and must be held to have been made for the benefit of all the creditors of him, the said Quinn, to whom he was indebted at the time said deed was given, including the plaintiffs, and should be so applied; that on the 26th day of January, 1894, the said C. C. Quinn and wife executed to J. A. Ewing, as assignee and trustee, a deed of trust purporting to convey the same property, real and personal, together with all his personal property, professedly for the purpose of securing all his creditors; and plaintiffs further allege that said three deeds of trust last referred to are parts of a general purpose and design on the part of said Quinn to defraud his creditors generally, and that they were intended to delay, hinder, and defraud his creditors, including the plaintiffs. And the plaintiffs prayed that an account be taken,

ascertaining the liens upon said property named in said deed of trust, together with their priorities; that the deed of trust of the 24th of January, 1894, be decreed null and void, and that it be set aside, or that the court would declare it to be taken and held as a conveyance and transfer made for the benefit of all the creditors of the said C. C. Quinn existing at the time it was made, and whose debts are not paid; that all said property might be sold under the direction of the court, and applied to the payment of the debts of the said Quinn under the direction and decree of the court; and for the appointment of a receiver. George W. Johnson's Sons filed an answer to the plaintiffs' bill, putting in issue all of the material allegations of the plaintiffs' bill as to the deed of trust executed by C. C. Quinn and wife to George B. Peabody, trustee, on the 24th day of January, 1894. In pursuance of a decree rendered in said cause on the 20th day of February, 1894, directing T. J. Parsons, one of the commissioners of the court, to ascertain the liens and their priorities upon the property, said commissioner returned and filed his report, ascertaining therein that a note executed by C. C. Quinn, dated January 24, 1894, for \$3,696.89, secured by deed of trust on real estate, was fifth in point of priority; and the plaintiffs excepted to said report—First, in so far as it reported said deed of trust as being a lien prior to other debts, and also so far as it gave any preference to said deed of trust in favor of the Bellaire Stove Works; second, in so far, also, as it gave or attempted to give the judgments named, or any of them, preference; third, because said Johnson's deed of trust should have been reported as operating as a general deed of trust for the benefit of all the creditors, then existing, of said Quinn. On the 30th day of March, 1894, said cause was heard upon the exception to said commissioner's report, and upon consideration thereof the court held that said deed of trust to George B. Peabody, trustee, dated the 24th day of January, 1894, and the deed of trust to T. J. Parsons, trustee, on the 25th day of January, 1894, being made by the defendant C. C. Quinn while he was insolvent, as reported by the said commissioner, and as shown by the testimony in the cause, were both void in so far as they secure or attempt to secure the debts respectively therein named, and that they operated for the benefit of all the creditors of the said C. C. Quinn at the time of the said deeds respectively, and sustained said exception; and also sustained the exception of the plaintiffs to such debts as the said report states had any priority by reason of the judgments therein named, in so far as applies to the distribution of the funds therein; and also ascertained the debts owing by the defendant Quinn at the time he gave each of the said deeds of trust, together with the priorities thereof. On the 7th day of April, 1894, the cause was further heard upon the report of C. C. Newman, who was appointed

by the court receiver to collect the rents and profits, and to sell the real estate mentioned and described in the bill, which report was confirmed, and said receiver was directed to disburse the proceeds of sale then in his hands—First, in payment of state and county taxes, \$77.25; second, taxes to the city of Moundsville, \$110.90; third, to the Home Building & Loan Association of Moundsville, \$1,240.36, with interest from the 28th of March, 1894, and then the Marshall County Bank, on J. R. and J. A. Daggs' note, \$358.50, with interest from the 28th day of March, 1894, and then the Home Building & Loan Association of Moundsville, \$499.64, with interest from the same date, and any of the other proceeds of said sale then in his hands or collected by him among the other creditors of said C. C. Quinn whose debts had been ascertained in this cause pro rata. And from this decree the said George W. Johnson's Sons applied for and obtained this appeal.

A proper determination of the questions raised by the exceptions filed to said commissioner's report involves a construction of that portion of section 2 of chapter 74 of the Code which reads as follows: "Every gift, sale, conveyance, assignment, transfer or charge, made by an insolvent debtor to a trustee, assigned or otherwise giving or attempting to give a priority or preference to a creditor or creditors of such insolvent debtor or which provides or attempts to provide for the payment in whole or in part of a creditor or creditors of such insolvent debtor, to the exclusion or prejudice of other creditors, shall be void as to such priority, preference or payment so made or attempted to be made, and all such gifts, sales, conveyances, assignments, transfers and charges shall be deemed void as to such priority, preference or payment, and every such gift, sale, conveyance, assignment, transfer or charge shall be deemed taken and held to be made for the benefit of all the creditors of such debtor except as hereinafter provided and all the estate, property and assets given, sold, conveyed, assigned, transferred or charged as aforesaid shall be applied upon the debts and paid to the creditors of such insolvent debtor pro rata, provided, that nothing in this section contained shall be taken or construed to change, impair or affect any prior lien, priority or incumbrance acquired by a creditor on the real estate of such debtor in any manner now prescribed by law." In the case we are considering, a deed of trust was executed on the 24th day of January, 1894, on certain real and personal estate, by an insolvent debtor, which, if held to be a good and valid lien, would be to the exclusion and prejudice of other creditors. Could such a deed of trust at the date it was executed by an insolvent debtor be regarded as a prior lien? It is true that, at the time the clause of the statute we are considering was enacted, an insolvent debtor might prefer his creditors; but it is equally true that after the passage

of said clause an insolvent debtor could not prefer his creditors. This deed of trust was executed several years after the passage of said section, and, it is conceded, was executed by an insolvent debtor. In order that this deed of trust should fall within the protection of the proviso contained in said section, it must constitute a prior lien, priority, or incumbrance on the real estate therein described, acquired in the manner now prescribed by law. Now, while it is true that this deed of trust and its execution may conform to the statutory requirements in force at the time of the enactment of the clause we are construing, yet, if we should hold that a trust executed when this one was, by an insolvent debtor, created a prior lien, priority, or incumbrance on the real estate therein described, it would be equivalent to holding that under this proviso an insolvent debtor could create a valid lien upon his real estate and prefer his creditors as if no change had taken place in the law, and that it was not the intention of the legislature that real estate should not be incumbered by its insolvent owner giving priority or preference to such creditors as he might select. When we refer to that portion of the enacting clause of the section which is applicable to the circumstances of this case, omitting such portions as have no application, it reads: "Every conveyance made by an insolvent debtor to a trustee, giving or attempting to give a priority or preference to a creditor or creditors of such insolvent debtor or which provides or attempts to provide for the payment in whole or in part of a creditor or creditors of such insolvent debtor to the exclusion or prejudice of other creditors shall be void as to such priority," etc. The language of the act does not limit the conveyance intended to personal estate, but says, plainly, "every conveyance to a trustee by an insolvent debtor"; and this conveyance corresponds in all respects to the requirements of that clause, which stamp it as entirely ineffective to create a prior lien. It surely was not the intention of the lawmakers, after using this plain language in the enacting clause, to follow it immediately with a proviso making a deed of trust executed by an insolvent debtor attempting to give preference to one of his creditors on his real estate a prior lien of such a character as to be unaffected by the terms of said enacting clause. It is true a deed of trust was one of the modes by which an insolvent debtor could prefer one or more of his creditors at the time said change was made in the statute, but at the date of this deed of trust the law was changed so that then an insolvent debtor could not execute such prior lien. In order that said deed of trust should be unaffected within the meaning of said proviso, it must constitute a prior lien. Prior liens under the statute might be created or acquired by judgment properly docketed, by an attachment properly levied, by mechanic's

lien recorded as required by statute, etc., but no one would contend that any of these liens were entitled to priority unless they were created in accordance with the statute under which they were created. On the 24th day of January, 1894, C. C. Quinn was not competent to convey his property, real or personal, to a trustee, and thereby create a prior lien in favor of one or more of his creditors. If he had then been solvent, he might have done so, because a deed of trust was one of the modes prescribed by law for creating such liens. When the proviso says that "nothing in this section shall be taken or construed to change, impair or affect any prior lien, priority or incumbrance acquired by a creditor on the real estate of such debtor in any manner now prescribed by law," it does not mean or intend that all subsequent deeds of trust, to create such priorities, and to be regarded as valid prior liens on real estate, must be executed in conformity to the statute existing prior to said change, but must be construed to intend, as applied to the case at bar, that a trust, being a manner in which such liens may be created, must be executed by a competent party, and in accordance with the law at the time it is executed, in such a manner as to create a lien. Were it otherwise, an insolvent man could still prefer his creditors upon his real estate, when the statute reads that every conveyance made to a trustee by an insolvent debtor, giving or attempting to give such priority to a creditor, shall be void as to such priority, etc. At the common law a debtor, though insolvent, could convey his property in trust, and prefer his creditor, although the conveyance transferred the entire estate. The statute under consideration was intended to change that law; and in interpreting that statute it should be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous or insignificant. See *Jackson v. Kittle*, 34 W. Va. 207, 12 S. E. 484. And it seems to me that great importance should be attached to the word "conveyance," as used in this statute, in arriving at its meaning and intention. Black, in his *Law Dictionary* (page 273), defines "conveyance" as "the transfer of the title of land from one person or class of persons to another"; and *Sutherland on the Construction of Statutes* (sections 247-253) says: "If a statute make use of a word the meaning of which is established at common law, the common-law meaning shall be given to it." And, applying this rule, the conclusion is irresistible that it was intended an insolvent debtor should not prefer a creditor by lien upon his real estate. In construing the proviso contained in said section the same rule must be applied. It reads: "Provided that nothing in this section shall be taken or construed to change, impair or affect any prior lien, priority or incumbrance acquired by a creditor on the real estate of such debtor in the manner now prescribed by law." It may

possibly be that this proviso was inserted to prevent the retrospective action of the section as to liens existing on real estate at the time the act was passed, but the legislature must be presumed to have known what the law was with reference to these liens at that date; and, conceding that such was not the intention under this proviso, it will be perceived that the thing which is to remain unaffected by the terms of the enacting clause must be a prior lien, priority, or incumbrance acquired by a creditor on the real estate of the debtor in any manner now prescribed by law. Where a deed of trust was the manner in which the lien was sought to be created, as it was in this instance, it must be such a deed of trust as complies with all the requisites necessary to create a prior lien. A deed of trust prior to this act might have been made by an insolvent debtor, and have the effect of giving to his creditor a prior lien. Subsequent to the act, in order to create a prior lien on his real estate in behalf of such creditor, the debtor must have been solvent at the time it was executed. The words in the proviso, "in any manner now prescribed by law," as I construe them, merely refer to the mode in which the prior lien was created, whether by trust deed, judgment, or otherwise; but, in order that such lien should fall within the exclusive effect of said proviso, if the prior lien is claimed by reason of a trust deed (as in this case), it must appear that such trust deed was executed, not only in accordance with the requirements of the statute, but by a competent grantor. And for these reasons the decree complained of must be affirmed, with costs and damages.

(39 W. Va. 536)

### THOMAS v. TOWN OF MASON.

(Supreme Court of Appeals of West Virginia.  
Nov. 24, 1894.)

#### MANDAMUS TO CITY — ENFORCEMENT OF CLAIM— CARE OF SICK PERSONS—DUTY OF CITY.

1. Where the common council of a municipal corporation has given its creditor an order on its treasurer for the payment of his claim, and then refuses to pay it or provide for its payment, mandamus is the creditor's proper remedy, and he is not required to first reduce his claim to judgment by one of the ordinary actions at law.

2. When there is an epidemic of smallpox or other dangerous contagious disease within the corporate limits, the council of such city, town, or village has power to provide for the medical treatment and care of poor persons residing therein. See sections 28 and 43 of chapter 47 of the Code. And when it has power to create a debt it can, in a proper case, be compelled by mandamus to provide funds for its payment.

3. The power given by the statute to the state and local boards of health is not, in such case, exclusive.

(Syllabus by the Court.)

Error to circuit court, Mason county.

Mandamus proceedings by J. D. Thomas against the town of Mason. There was a

judgment for defendant, and plaintiff brings error. Reversed.

C. E. Hogg, for plaintiff in error. John U. Myers, for defendant in error.

HOLT, J. J. D. Thomas had a claim of \$400 against the town of Mason, and, to compel the town to make a levy for its payment, he obtained an alternative writ of mandamus, which being served, the defendant, on the 1st day of May, 1893, in the county court of Mason county, appeared, and moved to quash and dismiss the same; and the motion, being argued, was sustained, the peremptory writ refused, and the case dismissed, and this writ of error was allowed the plaintiff, Thomas.

The facts averred in plaintiff's petition and the alternative writ are as follows: The town of Mason provides for its own poor, and therefore is not required to pay any poor levies assessed by the county court for the support of the poor outside of its corporate limits. See Code, § 43, c. 47. It has the power, and it is its duty, to prevent injury or annoyance to the public or individuals from anything dangerous, offensive, or unwholesome. See Id. § 28, c. 47. A smallpox epidemic is such dangerous and offensive thing. On and before the 18th day of July, 1892, an epidemic of smallpox prevailed in said town, among its residents. Dr. D. A. Thomas, a practicing physician of skill and experience, was employed by the town to treat certain poor persons for smallpox, who were proper residents of the town. Under such contract and employment, the doctor did carefully, faithfully, and skillfully treat such persons in the town of Mason for smallpox during the month of July, 1892; made out and rendered his account therefor to the common council, amounting to \$436. By compromise and agreement the sum was fixed at \$400, and was at a meeting of the common council on the 18th day of July, 1892, audited and allowed, and the council caused an order therefor, in due form of law, payable to the order of D. A. Thomas, to be delivered to him, dated July 18, 1892, and signed by the recorder, and addressed to the treasurer of the town of Mason. This order was by written assignment on the back, on the 19th day of July, 1892, for value, assigned and delivered by D. A. Thomas to plaintiff, J. D. Thomas, of which defendant then and there had notice. On the 3d day of April, 1893, the common council, at a special meeting, entered an order that the said allowance and order be set aside and held for naught, and refused and still refuses to pay the same, or to levy a tax for its payment. The plaintiff presents an order dated on the 18th day of July, 1892, addressed to the treasurer of the town of Mason, directing him to pay to the order of D. A. Thomas, plaintiff's assignor, \$400 for services in smallpox epidemic, signed by the



recorder. At a meeting of the common council of the town of Mason on that day, plaintiff's account, to the extent of \$400, was audited, allowed, and ordered to be paid, and the order, in due form of law, was issued, signed, and delivered.

By St. c. 99, § 14, the assignee of this non-negotiable instrument may maintain any action in his own name. Such orders, signed by the proper officers, are *prima facie* binding and legal, for the officers will be presumed to have done their duty. Such orders make a *prima facie* cause of action. Impeachment must come from the defendant. See Dill. Mun. Corp. (4th Ed.) p. 566, § 502, and note, page 562. This the defendant undertakes to do, and says: (1) The town of Mason has no authority, express or implied, under its charter or by general law, to levy a tax to support its poor, and that it must be clearly made to appear that the municipal corporation has such power, before it will be ordered to make the levy to pay the claim demanded. (2) Mandamus, in the absence of a statute authorizing it, will not lie to compel a levy for its payment before it has been reduced to judgment, and that we have no such statute. Plaintiff, in his alternative writ and petition, says that: (1) The town of Mason has such power to support its poor, and in point of fact exercises it, and by reason thereof has not paid, or been required to pay, any poor levies assessed by the county court for the support of the poor outside of its corporate limits. (2) That this debt was incurred in the exercise of the power conferred and the duty imposed by section 28, c. 47, of the Code (see Ed. 1891, p. 426), "To prevent injury or annoyance to the public or individuals from anything dangerous, offensive, or unwholesome." (3) But if the making of this contract and incurring this debt by the corporate authorities was *ultra vires*,—beyond their power,—yet the contract was executed by the plaintiff; and his time devoted to the staying of the spread of this pestilence, and this dangerous and irksome labor gone through, cannot be, the one restored, or the other recalled. The town has had his peculiar skill and services, and he cannot now be placed in *statu quo*. Therefore, they are, in consideration of this and of their said exemption, estopped to plead the want of power to contract, and if they can contract they can be compelled to pay. (4) That, under our statute and our cases, mandamus may be used to compel the levy before the claim is reduced to judgment, because our statute regulating the proceedings in mandamus conforms it, in the methods of making up and determining issues of law and of fact, to the pleading and practice in an ordinary action at law, and that, as the town has nothing that can be taken on execution, the judgment is, so far as satisfaction and fruition are concerned, a vain and idle thing, leaving him where he started, with the burden and

delay of resorting to mandamus as his only remedy to compel the payment of his debt. Something not disputed or denied would be established by the judgment,—that is all.

The writ of mandamus is as old as legal memory, and has not fallen into desuetude anywhere. It is now largely regulated by statute, and it is the common-law mode of compelling specific performance of duties of a public or quasi public nature, and duties in other cases where the law has established no specific remedy, and in justice there should be one. See High, *Extr. Rem.* (2d Ed.) §§ 1, 2. And where our two methods of procedure, at common law and in equity, have been blended into one, with the rights still distinct,—but, in case of conflict, equity furnishing the rule,—the writ of mandamus has quite a large and extended ancillary and supplementary use, in the nature of a mandatory injunction in aid of legal proceedings in general. For its character and use, see *Dew v. Judges* (1808) 3 Hen. & M. 1; *Runkel v. Winemiller* (1799) 4 Har. & McH. 429; *Dane v. Derby* (1866) 54 Me. 95, 89 Am. Dec. 722, 728, monographic note; *Coy v. City Council* (1864) 17 Iowa, 1, 85 Am. Dec. 539, 544, note; *Ray v. Wilson* (1892) 29 Fla. 342, 10 S. E. 613, and 14 Lawy. Rep. Ann. 773, and note. Our statute (chapter 100) regulating proceedings in mandamus treats the writ as an ordinary action at law. The proceedings proceed as in an ordinary common-law suit, till the parties are at issue in fact or in law; then these are tried as in an action at law between parties. *Fisher v. City of Charleston*, 17 W. Va. 595; *Fisher v. Mayor, etc.*, *Id.* 628; *Hutch. Treat.* p. 899, § 1272 et seq.; 2 Bart. Law Pr. (2d Ed.) p. 1203, § 291 et seq. It is the modern common-law mandatory injunction, with a tendency in our day, both at home and abroad, to widen rather than contract, as the discharge of the very duty or obligation is generally more satisfactory than damages for its breach. See 2 Dill. Mun. Corp. (4th Ed.) § 826 et seq.; *Id.* § 831a.

Has the town of Mason power to provide for its own poor? It has no such power, according to *Wells v. Town of Mason*, 23 W. Va. 456. Section 43 of chapter 47 of the Code says the inhabitants of a town which provides for its own poor shall not be required to pay any levies assessed by the county court for the support of the poor outside of said corporate limits, and section 82 says indirectly that the male resident of the town, if a pauper, shall not be required to work the roads and streets of the town; but there is no statute imposing the duty on the town, or directly exempting the inhabitants from the payment of county poor rates. But the power to relieve the indigent sick in times of epidemic disease is inherent in every municipal corporation, upon the ground of self-protection, if upon no higher ground; and, as the question is here presented, the town of Mason did provide for its own poor

within its corporate limits, and taxpayers were thereby relieved from the payment of county taxes for such purpose; but whether they were relieved or not, or, if relieved, it was without authority of law, is, in my opinion, immaterial to the decision of this case, for there is nothing in the law to forbid their providing for their own poor in such emergency, and, as a concession, they did so provide. I can see no reason why this case, as made by plaintiff's petition and writ (and by that, and that alone, on this motion, the case must stand or fall), does not come within the provision of sections 28 and 29 of chapter 47 of the Code; for section 28 expressly confers upon the town council, and imposes on it, the duty to take care to prevent injury or annoyance to the public or individuals from anything dangerous, offensive, or unwholesome, and section 29 says it shall have power to make and pass all needful orders, by-laws, ordinances, resolutions, rules, and regulations not contrary to the constitution and laws of this state. This petition says that smallpox is loathsome and contagious; that it prevailed in this town, among the indigent and others, as an epidemic, to the great damage and injury of the people of the town, and annoyance of the public in general. What is it, that we can take judicial notice of, that enables us to qualify or contradict these averments? They bring the case within the letter and the spirit of this law, no matter what other agencies may have duties to perform in such cases, such as the county court. See section 26, c. 39 ("The State and Local Boards of Health"). See chapter 150, p. 92, Code 1891. Therefore, they could create the debt. Under the law, they are under obligation to provide the means of payment, and the corporation can only do that out of taxes levied or to be levied; and that, in a proper case, the corporation can be compelled to do. Code, c. 47, § 30; Merrill, Mand. § 129.

As we have already seen, this municipal corporation is, by the general law, invested with express power to prevent injury to the health of the public generally, and to its individual inhabitants. This is said to be one of the chief purposes of local town government, and reasonable by-laws in relation thereto have always been sustained as within the individual authority of such corporations to ordain. 1 Dill. Mun. Corp. (4th Ed.) § 369 et seq., and notes. This is said to be one of the most important functions of a municipal corporation, and, when not expressly given, is conferred by implication upon all governing municipal boards, as a part of the police power of the state, delegated to them by the legislature, and in this state expressly given to enable them to carry into effect the so-enumerated powers; and to that end "the council shall have power to make and pass all needful orders, by-laws, ordinances, resolutions, rules and regulations not contrary to the constitution and laws of

this state,"—and surely to do what was done in this case is not contrary to our constitution and laws. Section 29, c. 47, of the Code. See 2 Beach, Mun. Corp. § 983; State v. Wordin (1888) 56 Conn. 216, 226, 14 Atl. 801. And the establishment of our state and local boards of health is not to be regarded as detracting from the general powers of municipal government unless such legislative intent clearly appears. 2 Beach, Mun. Corp. § 989; Hart v. Mayor of Albany, 3 Paige, 213; Kennedy v. Phelps, 10 La. Ann. 227. Under such circumstances, it is not necessary to discuss the doctrine of the defendant's being estopped to plead *ultra vires*, on the ground that the contract is executed on the part of plaintiff, and that such a plea would defeat the ends of justice, and constitute in itself a legal wrong; for, as we have just seen, what was done in this case was clearly within the general scope of their authority, as expressly given, and the right to rescind the order after plaintiff's right had vested can in this case only be determined on the issues of fact. As they now appear, the common council attempted to rescind it without cause. See 1 Dill. Mun. Corp. § 290.

Again, it is said that plaintiff's application for this writ is premature; he must first reduce his claim to judgment, and then apply; and it is added, on behalf of defendant, "When he sues at law we will meet him on the merits, and show that the facts alleged are not true, and that his claim is without merit." But the answer to that is, this writ and petition must be taken at their face value, and the facts alleged therein as true; and among them we find the averment that there is no money in the treasury of the town to pay this claim, and the town refuses to pay, or to lay a levy for that purpose, or in any way to provide for its payment. Upon principle, why sue in *assumpsit*? An ordinary suit at law, ending in an ordinary judgment, would bring him no nearer fruition than when he commenced. In this case, where no facts are in dispute, such a suit would be a vain and idle thing, with mandamus still to be brought as his only means of compelling payment; for this municipal corporation is possessed of nothing tangible,—nothing subject to levy. His right is undisputed, in our view of the law, but this action of *assumpsit* would leave its violation just as far from being redressed as when he put that remedy in motion, when to this remedy he must come at last, as his only means of obtaining satisfaction,—a remedy with all the judicial methods of making up and trying all issues of law and fact. There is no reason, and there can be none, which does not impliedly involve a flat contradiction of one or more facts which have been accepted as true. In this day, therefore, the plaintiff should not be sent this long way round to reach a point nearly and directly in view. Nor does the case of Johnson v. Town of Alderson, 33 W. Va. 473, 10 S. E. 815, as I

read it, so hold. That case went upon the ground that the order or certificate was made payable out of taxes of a fiscal year subsequent to the year in which the contract was made and the work was done, and out of the taxes of which year the plaintiff was to be paid. The certificates were void, and not binding on either party, because the agreement to take them was ultra vires. There the suit was on the account, and not upon the order of the town council, and did not come within the doctrine announced in the case of *Ratliff v. County Court*, 33 W. Va. 94, 10 S. E. 28. See, also, *Canby v. Board*, 19 W. Va. 93; 2 Dill. Mun. Corp. (4th Ed.) § 849 et seq.; *Gardner v. Haney*, 86 Ind. 17. These cases rule this case, and show that if the order in this case is a subsisting liability against this municipal corporation, and it refuses to pay, or provide funds for its payment, then the remedy may be by mandamus to compel it to levy, or in some way provide a fund for its payment. With this view of the law, the judgment complained of must be reversed, and the case be remanded for further proceedings.

(39 W. Va. 521)

## COURSON et al. v. PARKER et al.

(Supreme Court of Appeals of West Virginia.  
Nov. 24, 1894.)

AMENDMENT OF PLEADING—ACTION AGAINST PARTNERS—ALLEGATION AS TO PARTNERSHIP—SURPLUSAGE—ATTACHMENT AFFIDAVIT—SUFFICIENCY.

1. A variance between the writ and declaration may be amended at any time before judgment if substantial justice may be done thereby.

2. At common law, partners cannot be sued otherwise than in their individual names, and the allegation of a partnership name is merely for the purpose of identification, and description is immaterial, and need not be proven, and hence the unnecessary use of it may be regarded as merely surplusage.

3. "At least," used in an affidavit for an attachment, is synonymous with, and fairly equivalent to, the phrase "at the least," as used in the statute relating to such affidavits.

(Syllabus by the Court.)

Error to circuit court, Tyler county.

Action by Courson & Hannan against Parker & Wallace. There was a judgment for plaintiffs, and defendants bring error. Affirmed.

Robert McEldowney, for plaintiffs in error.  
Basil T. Bowers, for defendants in error.

DENT, J. L. W. Courson and Morris H. Hannan, partners as Courson & Hannan, instituted an action of assumpsit on the 16th day of September, 1892, in the circuit court of Tyler county, against Y. U. Parker and R. W. Wallace. Summons was served on the defendants personally. On the same day an affidavit was filed for an attachment, in which the defendants were styled "Partners, as Parker & Wallace," but the attachment

was issued against them individually. At the October rules, 1892, the plaintiffs filed their declaration against the defendants, in which they style them "Partners, as Parker & Wallace." At the same rules, defendants appear, and file two pleas in abatement,—the first to the action denying the partnership, and setting out that there was such a firm as Parker & Wallace, composed of M. C. Parker and R. W. Wallace, M. C. Parker being the wife of Y. U. Parker, and a resident of the city of Pittsburgh, state of Pennsylvania; the other, to the attachment setting up the same matters. Issue was joined and tried on the first of these pleas, and resulted in a verdict for the plaintiffs, which the court set aside for some reason not disclosed in the record. Without proceeding further with this issue, the plaintiffs, at the February rules, 1893, filed an amended declaration corresponding with the original writ, and simply omitting therein to style the defendants "Partners, as Parker & Wallace." Order of publication against and personal service were had on the defendants to answer this declaration. At the August term of court, the defendants appeared, and demurred to the declaration, which was overruled. The defendants pleaded non assumpsit, and tendered notice of recoupment. The court, deeming the issue on the plea of abatement no longer material, by reason of the amended declaration, set aside and gave judgment against the plaintiffs for the costs incurred by reason thereof. On the issue joined, the jury found a verdict for the plaintiffs, and assessed their damages at \$2,544. A motion to set aside the verdict was overruled, and judgment entered for the plaintiffs. The plea in abatement and motion to quash the attachment were overruled, and an order entered in favor of plaintiffs against the attached property. The defendants insisted on the following errors: (1) That the amended declaration was improperly filed; (2) that the affidavit for the attachment and the attachment were not quashed.

The only reason given to sustain the first proposition is that, the first declaration having described the defendants "Partners, as Parker & Wallace," the plaintiffs had no right to file a new declaration against them as individuals without dismissing their first and bringing a new and independent suit. Without deciding whether it was necessary or material for the plaintiffs to do so or not, it is sufficient to say they had a perfect right by amendment to correct any variance between the declaration and the writ at any time before trial. Code, c. 125, §§ 12, 15. All they did do in this case was to make the original writ and declaration correspond, and, as a matter of course, the amended declaration superseded the original, and the pleas filed thereto, except in so far as they might be proper under the amended declaration.

Two reasons are given why the affidavit and attachment should be quashed: (1) Because the defendants are styled "Partners, as Parker & Wallace"; and (2) because the words "at least" are used, instead of the words "at the least." The common-law rule is that a partnership name is a mere matter of description and identification, and is not an indispensable requisite to the existence of a partnership, and, when used, only raises a disputable presumption. The conception of a partnership at common law is that it is not a thing in any way distinct from the members composing it. A different rule prevails in courts of equity, where the partnership is sometimes regarded as having a separate existence or entity. 17 Am. & Eng. Enc. Law, 912, 918. "All contracts with partners are joint and several, and every partner is liable to pay the whole, and in what proportion the others are contributors is a matter merely among themselves. The plaintiff may, however, bring his action against one, but he may compel, by a plea in abatement, the plaintiff to join them; but if one partner is out of the kingdom, and not amenable to the process of the court, the plaintiff may proceed singly against the other." 2 Tuck. Bl. Comm. 141; 1 Wils. 7; Brown v. Belcher, 1 Wash. (Va.) 9. Partners must be sued in their individual, and cannot be sued in their partnership, names. Story, Partn. § 241, note 2. "An allegation that partners did business under a stated name is immaterial and need not be proved." Stickney v. Smith, 5 Minn. 486 (Gil. 390). It being shown that the defendants were partners or jointly liable is sufficient, and the name, whether any or not, under which they were doing business, is immaterial, and need not be alleged or proven. Hence we conclude that the use of the words "Partners, as Parker & Wallace," or "Wallace & Parker," in the affidavit and sheriff's return, were immaterial, and must be treated as mere surplusage, the defendants being fully identified without them.

The further question is presented whether the words "at least," as used in the affidavit, can be regarded under the recent decisions of this court as equivalent to the words "at the least," as used in the statute. If we literally follow the opinion of the majority of this court, as expressed by Judge Holt in the case of Altmeyer v. Caulfield, 37 W. Va. 847, 17 S. E. 409, and confirmed after more mature consideration in the opinion in the case of Crim v. Harmon, 38 W. Va. 596, 18 S. E. 753, we can reach but one conclusion, and that is that the affidavit is defective, and should be quashed. In the case of Altmeyer v. Caulfield, on page 849, 37 W. Va., and page 409, 17 S. E., the judge says that "the best rule to arrive at the meaning of the statute as amended is to abide by the words the lawmaker has used, so that no clause, sentence, or word shall be superfluous, void, or insignificant." And in the case of Crim v. Harmon, 38 W. Va. 599, 18 S. E.

753, he says: "The history of the statute forbids any such loose construction. The formula for the affidavit is the result of seventy-five years of legislative consideration, passing through three revisions,—that of 1819, 1849, and 1868; and it has brought together and methodized, shortened, and simplified, until that part has no superfluous or unmeaning words in it." To hold that the expression "at least," as used in this affidavit, is equivalent to the expression "at the least," as used in the statute, is to render the word "the" insignificant, superfluous, and unmeaning, and therefore positively and directly contravene the opinion of the court before quoted. Hence, to strictly follow the verbiage of these decisions, there is nothing for the court to do but to quash the affidavit and attachment. Yet the word "the," to carry these decisions to their legitimate result, in disregard of the language used, has no meaning, nor can it be given any, but is insignificant, superfluous, and void. If the statute is construed in accordance with the dissenting opinion in the case of Altmeyer v. Caulfield, supra, which is to the following effect, to wit: That the affiant, in stating the amount, should state it at the least sum he was justly entitled to recover, and it was no more necessary to use the words "at the least" in the affidavit than to use the word "amount," but the two should be construed as one word, descriptive of the sum to be stated,—the word "the" is given a meaning, and no word in the statute is rendered superfluous, insignificant, or unmeaning, although it is made unnecessary to express them in *haec verba* in the affidavit. To change the statute so as to make it read "stating the nature of the plaintiff's claim, and the amount at least which the affiant believes the plaintiff is justly entitled to recover," makes quite a difference from stating "the amount at the least" which affiant believes the plaintiff is entitled to recover, in my opinion. In one case it means that the affiant must state the amount to be at least such a sum. In the other case it means that the amount stated must be the least sum the affiant believes the plaintiff is justly entitled to recover. One deals with the manner; the other, with the substance; and yet, in legal effect, they amount to the same things. To make affidavit "that the plaintiff is justly entitled to recover \$500 at the least is nothing more than equivalent to saying that the plaintiff is justly entitled to recover at least \$500, except that the latter makes better English and better sense, with the unnecessary word "the" eliminated. The conclusion, therefore, follows that, when the majority of the court construed the statute so as to require the affidavit to state the amount claimed as a certain fixed sum "at the least," it really determined that the phrase "at the least" meant nothing more than, and was synonymous with, the words "at least," and thereby they rendered insig-

nificant, superfluous, and meaningless the word "the," although the broad and comprehensive language used points in an opposite direction.

There being no error apparent in the judgment rendered by the circuit court in this case, the same is affirmed.

(39 W. Va. 549)

STATE v. ALER.

(Supreme Court of Appeals of West Virginia.  
Dec. 1, 1894.)

CRIMINAL LAW—RECORD—PLEA—INDICTMENT—  
INUENDO.

1. In a criminal case the record must show the defendant's plea of not guilty, without which there can be no valid conviction; but the omission of the similiter or joinder by the prosecuting officer is, at most, a mere formal defect, at any time amendable, and it does not render the record bad.

2. It is an elementary rule of pleading that whatever is alleged must be alleged with certainty, and one of the means of insuring certainty in a complaint or indictment for slander or libel is an innuendo.

3. An innuendo may serve for an explanation to point a meaning where there is precedent matter expressed or necessarily understood or known, but never to establish a new charge.

(Syllabus by the Court.)

Error to circuit court, Berkeley county.

F. Vernon Aler was convicted of criminal libel, and brings error. Affirmed.

D. B. Lucas and J. Nelson Wisner, for plaintiff in error. Atty. Gen. T. S. Riley and U. S. G. Pitzer, for the State.

ENGLISH, J. On the 11th day of January, 1893, the grand jury of Berkeley county returned an indictment against F. Vernon Aler for libel, which is in the words and figures following, to wit: "State of West Virginia, Berkeley County. In the Circuit Court of said County, January Term, 1893. The grand jury of the state of West Virginia, in and for the body of the county of Berkeley, and now attending the said court, upon their oaths present: That, before the commencement of the offense hereinafter mentioned, one John Tallafarro, on the 14th day of August, A. D. one thousand eight hundred and seventy-four, was lawfully incarcerated and held in the county jail of Berkeley county, upon the criminal charge of having murdered one Annie Butler; and that in the nighttime of said 14th day of August, A. D. one thousand eight hundred and seventy-four, a mob of unknown persons, then and there, without due process of law, did take said John Tallafarro from said jail in said county, and unlawfully and feloniously hang him, until he, the said John Tallafarro, was dead; and that said unknown persons, constituting said mob, were then and are still unknown, and were not and have not been arrested and punished for the aforesaid felonious hanging; and that various persons, unlawfully and maliciously

contriving and intending to vilify and defame one George F. Evans, have falsely intimidated and charged him with abetting and aiding in the aforesaid lynching of the said John Tallafarro; and that on the twenty-fourth day of October, A. D. one thousand eight hundred and ninety-two, F. Vernon Aler, of the said county of Berkeley, was the proprietor and publisher of a newspaper in Martinsburg, county aforesaid, called and known as 'The World.' That said F. Vernon Aler, in an article and writing published by him in said newspaper, unlawfully and maliciously contriving to injure and vilify one George F. Evans, and to bring said George F. Evans into public scandal, contempt, ridicule, and disgrace, then and there, to wit, on the said 24th day of October, A. D. 1892, at Martinsburg, in Berkeley county, aforesaid, did publish in said newspaper aforesaid, called 'The World,' and circulated in said county, a false, scandalous, malicious, and defamatory libel of and concerning the said George F. Evans, containing divers false, scandalous, malicious, and defamatory matters and things of and concerning the said George F. Evans, of the tenor following, to wit: 'Saturday morning, Justice Wm. McKee's office was the scene of an unusual occurrence in the history of Berkeley county. The back or adjoining room to the main office was selected by Mr. George W. Feldt, prosecuting attorney of Berkeley county, and Mr. George F. Evans, an ex-officer of Judge Lynch's court (meaning that said George F. Evans had aided and abetted in the unlawful hanging of aforesaid John Tallafarro), for the purpose of devising some plan or scheme to counteract the effect of Edward Murphy's sworn statement with the general public, which was published in last Thursday's World. It was then agreed that Evans should swear out a warrant for Murphy's arrest at once, charging him with perjury, before Squire McKee, at the hearing some time prior to the term of the circuit court. Murphy was immediately arrested, and arraigned before Squire McKee. The editor of the World was sent for, who immediately went to Murphy's assistance. Upon inquiry, the latter did not know what he had been arrested for. The complainant demanded a trial at once, which would have been altogether bad for Murphy, as he had received no notice whatever, and had no time for preparation. The defense then waived a hearing temporarily, and, after the squire placing the amount of the bond at the highest possible figure allowed by law, Murphy was remanded to jail.' And in certain other part of which said newspaper article, writing, and publication there were and are contained certain false, wicked, malicious, scandalous, defamatory, and libelous matter of and concerning said George F. Evans, to the tenor and effect following, to wit: 'Why did he (meaning the said George F. Evans) resort to this action, and what can be his object? The

only answer any reasonable person can make is that he (meaning said George F. Evans) fears trouble, and wants to get Murphy out of the way. But we will say here: "Mr. Evans, you escaped an indictment at the last grand jury, but you are not yet through. The next one, which will convene on the second Tuesday in January, 1893, will find before it five witnesses, placed there by the World, who will make oath that you instructed and commanded Cornelius Veney to do the shooting. Now is your time to do your fighting, as your chances will be slim, and, furthermore, additional counsel will assist in a legitimate and just prosecution of your case. You (meaning said George F. Evans) might carry out Judge Lynch's laws (meaning that said George F. Evans had violated the law by hanging said John Talliaferro), and be protected by him in the hanging of negroes (meaning that said George F. Evans had been guilty of, but escaped punishment for, the hanging of said John Talliaferro, and that said George F. Evans had been and is guilty of feloniously and unlawfully hanging said John Talliaferro and other negroes), but this time the net will be woven somewhat close, and will unravel in a court of justice, before the eyes of an injured public,"—to the great scandal, injury, and disgrace of the said George F. Evans, against the peace and dignity of the state. Upon the information of George F. Evans, sworn in open court, and sent to the grand jury to give evidence on this indictment. U. S. G. Pitzer, Prosecuting Attorney." On the 31st day of January, 1893, the defendant, F. Vernon Aler, appeared, and demurred to the indictment; also pleaded not guilty to the charge in the indictment; and entered plea in justification; and the case was continued. On the 13th day of May, 1893, the demurrer to the indictment was considered by the court and overruled. The case was continued by successive orders until the 10th day of October, 1893, when the defendant asked leave to withdraw his pleas theretofore entered in the case, which leave was granted; and thereupon the defendant moved the court to quash said indictment, which motion was overruled, whereupon the defendant moved the court that the prosecution be required to give security for costs, which motion was overruled, and the defendant pleaded not guilty as charged in the indictment; and thereupon the case was submitted to a jury, who found the defendant guilty as charged in the indictment; whereupon the defendant, by his attorney, in arrest of judgment, moved the court to set aside the verdict, and grant him a new trial, which motion was overruled, and the defendant, by his attorney, excepted; and thereupon the court gave judgment upon said verdict, and sentenced the defendant to pay a fine of \$30, and gave judgment for that amount against him and costs, and the defendant applied for and obtained this writ of error.

The first error assigned and relied upon is that there is no record of any such indictment being found by the grand jury. This assignment, however, was made before there was a suggestion of a diminution of the record; and, when the record was completed by certiorari, it was found that the order had been casually omitted which showed the finding of the indictment; and, as matter of course, the assignment was not well taken.

The second error assigned is that there is no replication to the defendant's plea, and hence petitioner was tried without any issue being made up. Upon this question, Gould, in his admirable work on Pleading, on page 290, § 20, says: "Whenever one of the parties concludes to the country, and thus refers the trial to the jury, the issue is joined and made ready for trial by the opposite party's adding: 'And the said A. B. or C. D. does the like.'" This addition, which, from its concluding word, is called the "similiter," merely expresses the concurrence of the party to whom the issue is tendered with his adversary in referring the trial to the jury. It is, however, in strictness, no part of the pleadings, since it neither affirms nor denies any fact in maintenance of the action or the defense. The similiter should therefore seem on principle to be only matter of form, and as such the omission of it would seem to be aided by verdict; and so it has been determined in the states of Connecticut and Massachusetts. In the case of *Babcock v. Huntington*, 2 Day, 392, which was an action for libel, it was held that, "after a trial to the jury on the plea of not guilty and a verdict for the plaintiff, the omission of the similiter is not a sufficient ground of arrest." So in the case of *Whiting v. Cochran*, 9 Mass. 532, the court said: "The plaintiff in error has assigned for error that no issue was joined in the original action, but the record before us says otherwise, and we are bound by the record. If, however, it were true that the plaintiff below had neglected to join the issues tendered, and had gone to trial, and the defendant had appeared and defended the action before the jury, the verdict would have been good, and the judgment been supported." In the case of *Bank v. Kimberlands*, 16 W. Va. 555, this court held that, "if a plea concludes to the country as non assumpsit or payment, the plaintiff may, without the formal addition of the similiter, proceed to trial as though the issue had been formally joined; but, if the plea concludes with a verification, the plaintiff must reply thereto before the case can be tried by the jury." Bishop, in his work on Criminal Procedure, at section 1354, says: "The record must show the defendant's plea of not guilty, without which there can be no valid conviction. But, by the better opinion, the omission of the similiter or joinder by the prosecuting officer is, at most, a mere formal defect, at any time amendable, and it does not render the record

bad." And at section 801 the author says: "There can be no trial upon the merits without a plea of not guilty. This plea ought in strictness to be followed by a joinder of issue. \* \* \* Some courts hold that the omission of such joinder is fatal to the record, but by the better opinion it is not." As supporting the same doctrine, see *Henry v. State*, 33 Ala. 390; also, *Com. v. McCauley*, 105 Mass. 69. See, also, *Bish. Cr. Law*, § 1029, where the author says: "The plea commonly put in at the arraignment is an essential part of the proceedings, so that, until an indicted person has pleaded, he is not in jeopardy, though a jury has been sworn to try him, or even though there has been an actual trial. But the similitur appears not to be essential." In view of these authorities, my conclusion is that the want of a similitur is not such error as would render the record bad, or reverse the cause.

The next error relied upon is that "the indictment is insufficient, and that it was error not to quash the same; that it is uncertain, both as to the person supposed to have been libeled, and as to the nature of the libel itself, the words set out in said indictment being too remote and equivocal to be aided by any innuendo or connected therewith." Is the indictment uncertain as to the person supposed to have been libeled? The colloquium or inducement recites the facts that John Taliaferro, on the 14th day of August, 1874, was confined in the jail of Berkeley county on the criminal charge of having murdered Annie Butler; and that, on the night of said day, a mob of unknown persons, without due process of law, did take said John Taliaferro from said jail in said county, and unlawfully and feloniously hang him until he was dead; and that the unknown persons constituting said mob were then and still are unknown, and were not and have not been arrested and punished for the said felonious hanging; and that various persons unlawfully and maliciously contriving to vilify and defame one George F. Evans have falsely intimidated and charged him with abetting the aforesaid lynching of the said John Taliaferro; and on the 24th day of October, 1892, F. Vernon Aler, of the said county of Berkeley, was the proprietor and publisher of a newspaper in Martinsburg in said county called and known as "The World"; that said F. Vernon Aler, in an article and writing published by him in said newspaper, unlawfully and maliciously contriving to injure and vilify one George F. Evans, and bring said George F. Evans into public scandal, contempt, ridicule, and disgrace, did then and there, to wit, on the 24th day of October, 1892, at Martinsburg, in Berkeley county, aforesaid, publish in said newspaper aforesaid, called "The World," a false, scandalous, malicious, and defamatory libel of and concerning said George F. Evans, containing divers false, scandalous, malicious, and defamatory matters and things of and

concerning said George F. Evans, of the tenor following, to wit, setting forth the words contained in said newspaper article. It is claimed in argument that the words used neither charge an offense, nor do they expose the prosecutor to any kind of ridicule, and were not calculated in the slightest degree to prejudice or injure the prosecutor. Now, it is recited in the inducement that various persons unlawfully and maliciously intending to vilify and defame said George F. Evans, have charged him with aiding and abetting said lynching of John Taliaferro; and it is claimed that, because the intendo does not charge that the defendant had knowledge of such malicious allegations by third parties, therefore the language of the article published was not libelous, and in fact has no meaning. Now, the object of the statement made in the inducement was to show what had transpired in that immediate locality, to wit, that John Taliaferro had been hung by a mob, and various malicious persons had charged George F. Evans with aiding and abetting said mob, so as to show the relevancy of the newspaper article to these circumstances; and when it is stated by way of inducement that these circumstances had transpired, and we read the newspaper article in the light of these circumstances, there can be no hesitancy in determining what was intended. When said article is examined, it not only designates said George F. Evans as an ex-officer of Judge Lynch's court, but accuses him of conspiring with the prosecuting attorney of Berkeley county for the purpose of devising some plan or scheme to counteract the effect of one Edward Murphy's sworn statement with the general public which had been published in said newspaper, and says that it was then agreed that said Evans should swear out a warrant for Murphy's arrest at once, charging him with perjury before Squire McKee at the hearing some time prior to the term of the circuit court, and that said Murphy was immediately arrested, etc. And in the same article the question was asked: "Why did he (meaning said George F. Evans) resort to this action, and what can be his object?" "The only answer any reasonable person can make is that he fears trouble, and wants to get Murphy out of the way. But we will say here: 'Mr. Evans, you escaped an indictment at the last grand jury, but you are not yet through.'" And while it does not appear what the sworn statement of said Murphy was, and what it contained, yet the accusation is plain and clear that he (George F. Evans) conspired with the prosecuting attorney of Berkeley county to have said Murphy arrested and spirited away, in order to prevent an indictment against himself. The article, however, proceeds: "Now is your time (addressing said George F. Evans) to do your fighting, as your chances will be slim; and, furthermore, additional counsel

will assist in a legitimate and just prosecution of your case,"—plainly intimating that now was his time to do his fighting by getting rid of the witnesses, and that he would be prosecuted. What for? The answer to this question is indicated in the closing words of said article: "You (meaning George F. Evans) might carry out Judge Lynch's laws, and be protected by him in the hanging of negroes, but this time the net will be woven somewhat close, and will unravel in a court of justice, before the eyes of an injured public." The plain inference from this language is that he was to be prosecuted under section 30 of chapter 147 of the Code, for intimidating or impeding the witness Murphy from the discharge of his duty as a witness against him. But returning to the other clause, "You might carry out Judge Lynch's laws, and be protected by him in the hanging of negroes," and, whether it applies to the hanging of John Tallaferro by the mob, as detailed in the inducement, it is a plain intimation that said Evans was capable of engaging in such an unlawful proceeding. To be accused of being an ex-officer of Judge Lynch's court, without any innuendo or explanatory note, has no uncertain meaning. The reputation of Judge Lynch may be said to be national, and, while his judgments lack deliberation, his executions are sure and swift. His reputation is anything but enviable, and to be accused of being an ex-officer of his court through the medium of the public newspapers would have a direct tendency to a breach of the peace. Bishop on Criminal Law (volume 2, § 907) says a libel is any representation in writing or by pictures, effigies, or the like calculated to create disturbance of the peace, etc.; and looking to the derivation of the words "Lynch Law," we find in Anderson's Dictionary of Law the definition of the words as follows: "The action of private individuals, organized bodies of men, or disorderly mobs, who, without legal authority, punish, by hanging or otherwise, real or suspected criminals, without trial according to the forms of law." American lexicographers refer the origin of the term to the practice in the seventeenth century of a Virginia farmer named Lynch, who during the War of Independence was presiding justice of the county court of Pittsylvania, Va. The court in that state for the trial of felonies sat at Williamsburg, 200 miles distant. Horse thieves who had established posts from the north, through Virginia, into North Carolina, were frequently arrested and remanded to Williamsburg for trial. Not only was the attendance of witnesses at that distance rendered uncertain, but, when they did appear, they were sure to be confronted by false witnesses for the outlaws. Moreover, the difficulty of conveying the accused to Williamsburg was increased, and the sitting of the court made uncertain, by the presence of the British under Cornwallis. Accordingly, the justices of

the county court of Pittsylvania assembled, and Judge Lynch proposed that since for Pittsylvania the court at Williamsburg had practically ceased to exist, and, in consequence, heinous crimes went unpunished, the court over which he presided should try all felonies committed in the county; that is to say, the place of trial was to be changed by mere resolution. The plan was adopted with good results; the thieves were disbanded, many being hanged, which was the lawful penalty. The change of forum was against the words of the law, but justified, Lynch and others held, by the circumstances. Bouvier defines "Lynch Law" as "a common phrase, used to express the vengeance of a mob inflicting an injury and committing an outrage upon a person suspected of some offense"; and Webster defines "Lynch Law" thus: "The act or practice by private persons of inflicting punishment for crimes or offenses without due process of law,"—all of which definitions seem to concur in defining "Lynch Law" as something done without the warrant or sanction of law. Lynch law and Judge Lynch are so well defined and so well understood that there is nothing in the contention of counsel that the demurrer should have been sustained because there was nothing in the inducement stating who Judge Lynch was, or what was understood by his court. Words and expressions so well known must be taken in their ordinary acceptance.

It is also contended by counsel that it is nowhere averred that the public or community knew of the charge which various persons made against Evans, and without such public knowledge there was no injury and no libel. Now, the averment that various persons, unlawfully and maliciously contriving and intending to vilify and defame one George F. Evans, have falsely intimated and charged him with abetting and aiding in the aforesaid lynching of the said John Tallaferro, occurs in the colloquium or inducement, and the parties that made these charges are not proceeded against for libel, and, whether the public knew of the charges or not, those to whom the charges were made knew of them. What is intended to be stated and is stated by way of inducement is that John Tallaferro, on the night of August 14, 1874, had, without due process of law, been taken from the jail of Berkeley county, and hung until he was dead, and that various persons, unlawfully and maliciously intending to vilify and defame said George F. Evans, charged him with aiding and abetting in the aforesaid lynching; and this is inserted in the indictment as explanatory of the meaning of the publication which appeared in the World. This shows the intent and meaning of the expression, "Mr. George F. Evans, an ex-officer of Judge Lynch's court," which would have been definite enough without any "innuendo," taken, as it must be, in connection with the induc-



ment; but, when the innuendo is added that said George F. Evans had aided and abetted in the unlawful hanging of said John Tallaferro, there can be no doubt that the averment is sufficiently definite. Townshend on Slander and Libel (section 335) says: "It is an elementary rule of pleading that whatever is alleged must be alleged with certainty; and one of the means of insuring certainty in a complaint or indictment for slander or libel is an innuendo. \* \* \* The office of an innuendo is to aver the meaning of the language published." And applying this definition to other portions of the indictment where innuendoes appear, although it is true, as stated in Townshend on Slander and Libel (page 565), that an innuendo "may serve for an explanation, to point a meaning where there is precedent matter, expressed or necessarily understood, or known, but never to establish a new charge." Our conclusion is that the pleader in this instance has not violated the rule, and the court below committed no error in overruling the demurrer, and the judgment complained of is affirmed, with costs, etc.

(39 W. Va. 515)

KURNER et al. v. O'NEIL et al.

(Supreme Court of Appeals of West Virginia.  
Nov. 24, 1894.)

**FRAUDULENT CONVEYANCES—PREFERENCES—CONFLICT OF LAWS—PARTNERSHIP PROPERTY.**

1. Clause of section 2, c. 74, of the Code, which is in these words, to wit: "And every gift, sale, conveyance, assignment, transfer, or charge, made by an insolvent debtor to a trustee, assignee, or otherwise, giving or attempting to give a priority or preference to a creditor or creditors of such insolvent debtor, or which provides or attempts to provide for the payment, in whole or in part, of a creditor or creditors of such insolvent debtor, to the exclusion or prejudice of other creditors, shall be void as to such priority, preference or payment so made or attempted to be made; and all such gifts, sales, conveyances, assignments, transfers and charges, shall be deemed void as to such priority, preference or payment; and every such gift, sale, conveyance, assignment, transfer or charge shall be deemed, taken and held to be made for the benefit of all the creditors of such debtors, \* \* \*"—does not avoid such gift, sale, conveyance, transfer, or charge in toto, but only defeats the preference, and preserves such gift, sale, conveyance, assignment, transfer, or charge intact for the benefit of all the creditors of the insolvent debtor.

2. The sales of personal property, when situated at the place of the domicile of the vendor, are governed by the law *rei sitae*, and not by the laws of the state to which they may thereafter be removed.

3. A transfer of partnership property situated in this state by a member of an insolvent firm to a private creditor, with full knowledge, to satisfy an individual obligation, is fraudulent and void as to the social creditors.

(Syllabus by the Court.)

Error to circuit court, Ohio county.

Action by George E. Kurner & Co. against O'Neil, Funk & Co., and Charles Muhleman filed a claim to property attached under a

writ against defendants. From an order dismissing claimant's petition, he brings error. Reversed.

Basil T. Bowers, for plaintiff in error.  
White & Allen, for defendants in error.

DENT, J. The facts in this case are as follows, to wit: The firm O'Neil, Funk & Co., composed of W. B. O'Neil, Thomas Funk, and Charles Engeman, were in a failing and insolvent condition, and attachments had been and were being sued out against them. W. B. O'Neil was indebted to C. Muhleman & Co. in the sum of \$300.42, for merchandise used by the firm of O'Neil, Funk & Co. This account was assigned to Charles Muhleman, who also had a large individual claim against the partners of the firm of O'Neil, Funk & Co. Charles Muhleman, knowing of the failing circumstances of the last-mentioned firm, purchased from W. B. O'Neil, for the express purpose of securing himself as a creditor as aforesaid, on the 8th day of September, 1892, two car loads of slate, amounting to \$640.45, out of which he was to first pay the freight bills, amounting, respectively, to \$72.80 and \$87.90, and the balance was to be credited, first, on the mill account as above of \$300.42, and then on the note of the partners, W. B. O'Neil, Thomas Funk, and Charles Engeman. On the 9th day of September, 1892, in the state of Ohio, Charles Muhleman purchased from W. B. O'Neil one dark brown horse, valued at \$60; a road wagon, at \$25; one set double harness, including two collars, two bridles, and one pair check lines, \$20,—amounting to \$105, which was also to be credited on the note aforementioned. On the 10th day of September, 1892, George E. Kurner & Co., creditors of O'Neil, Funk & Co., sued out an attachment against said last-mentioned firm, and each of them, in the circuit court of Ohio county, on the sole grounds that they were nonresidents of the state of West Virginia, and on the 12th day of September this attachment was levied by the sheriff of Wetzel county at Baresville Station, in said county, on the slate, wagon, horse, and harness aforesaid. Charles Muhleman immediately instituted proceedings by petition under section 23, c. 106, of the Code, in said circuit court, to test the validity of such levy and the title to the property involved. The issue was made up, and, a jury being waived, the whole matter upon the pleadings and evidence was submitted to the court; and on the 4th day of October, 1892, the circuit court entered an order adverse to the claim of the petitioner, Charles Muhleman, and dismissed his petition, at his costs. From this order he has appealed to this court.

The question now presented is as to which has the superior right to the property in controversy, Charles Muhleman, the purchaser, or George E. Kurner & Co., the attaching creditor. The evidence in this case does not

substantiate the claim of counsel that the sale was made to Charles Muhleman to delay, hinder, and defraud creditors, but it seems to have been a bona fide attempt on the part of a debtor in falling circumstances to prefer a favorite creditor to others, as he would have had a perfect right to do prior to the passage of section 2, c. 74, of the Code, as amended and re-enacted in the Acts of 1891; and it is therefore the provisions of that section which must be construed in determining this controversy, especially the following clause, to wit: "And every gift, sale, conveyance, assignment, transfer or charge, made by an insolvent debtor to a trustee, assignee or otherwise, giving or attempting to give a priority or preference to a creditor or creditors of such insolvent debtor, or which provides or attempts to provide for the payment, in whole or in part, of a creditor or creditors of such insolvent debtor, to the exclusion or prejudice of other creditors, shall be void as to such priority, preference or payment so made or attempted to be made; and all such gifts, sales, conveyances, assignments, transfers and charges, shall be deemed void as to such priority, preference or payment; and every such gift, sale, conveyance, assignment, transfer or charge shall be deemed, taken and held to be made for the benefit of all the creditors of such debtor except as hereinafter provided; and all the estate, property and assets given, sold, conveyed, assigned, transferred or charged as aforesaid, shall be applied upon the debts and paid to the creditors of such insolvent debtor pro rata. \* \* \*". In the case of *Wolf v. McGugin*, 37 W. Va. 552, 16 S. E. 797, Judge Brannon, in construing this section, says: "We must note that the statute does not expressly avoid the act of transfer, but it does avoid the preference. Now, if the transfer were by deed of trust to a trustee for the preferred creditors, or if it were direct to a creditor, equity would seize upon the property, and appropriate by sale to all the creditors; but where, in this case, the sale is to an absolute purchaser, with a provision that he devote the purchase money to preferred creditors, we ought to regard the transfer valid to pass title, and hold only the purchase money liable to all creditors. The statute does say that all the property sold shall be applied upon all the debts pro rata, but a preceding clause declares the sale void as to the preference, and not wholly void, which is the vital feature of the enactment." It is very plain from the reading of this statute that it was not the intention of the lawmakers to render a bona fide sale, for valuable consideration, to a good and solvent purchaser, creditor or not, void, but only to defeat the preference, and secure the division of the proceeds pro rata among all the creditors. In the language of the statute: "Every such gift, sale, conveyance, transfer or charge shall be deemed, taken and held to be made for the benefit of all the creditors of such debtor." The statute, instead of avoiding, preserves the

sale, and equity will hold the purchaser to be, whether a creditor or not, responsible as a trustee, for the benefit of all the creditors, to the full extent of the value of the property. In case of the insolvency of the purchaser, equity will seize the property; otherwise, it will only require the payment of an adequate price therefor, as it is not the property itself, but the proceeds, that must be divided pro rata among the creditors. If there was no other legal proposition involved in this case, we would be compelled to hold that, the sale not being avoided by the statute, but preserved good and valid for the benefit of all the creditors, the property in controversy, from the time of the transfer, ceased to be the property of W. B. O'Neil, and therefore was not subject to the levy of the attachment in this case; but Charles Muhleman, being a solvent purchaser and creditor, would be entitled to hold this property in trust for the benefit of all the creditors of W. B. O'Neil. This would only apply as to the horse, wagon, and harness, the individual property of said O'Neil.

There is another reason why the horse, wagon, and harness are not subject to the levy of the attachment. The transfer of it was made in Ohio, where the property was situated; and it is a good and valid transfer, under the laws of that state. It was also the domicile of the vendor. It is not the *lex loci contractus* that governs in such cases, but the *lex rei sitae*; that is, the law of the place where the property is located at the time of the sale. Any other rule would lead to endless confusion, and all sales of property made outside of this state would be subject to review as soon as the property was brought, however remotely, within the jurisdiction of our courts. In *Story on Conflict of Laws* (pages 462 and 463) we find the doctrine stated thus: "The proper forum to decide upon all questions of the priorities and preferences of creditors is the place of the domicile of the debtor; and that the law of that place, and not the law of the place of the contract, is to govern in all cases of such priorities and preferences in respect to movables situated in his place of domicile. But as to movables situate elsewhere, as well as to immovables, the law *rei sitae* is to govern." In this case the domicile, the *rei sitae*, and the place of the contract all concur, being in the state of Ohio; and now, because the property involved is temporarily found and seized in this state, the counsel insist that, by reason of our statute, a lawful sale made in the state of Ohio at the domicile of the parties, and where the property was at the time, should be treated as null and void. The property, before it was brought into this state by a lawful and bona fide transfer, under the laws of Ohio, became the property of Charles Muhleman, and W. B. O'Neil had no leviable interest therein, and the attaching creditors have acquired no right to subject the same to the lien of their attachment. *Born v. Shaw*, 29 Pa. St. 288; *Guillander v. Howell*, 35 N. Y. 657.

As to the two cars of slate, the property of O'Neill, Funk & Co. at the time of the transfer to Charles Muhleman, a different principle must be applied. The indebtedness, or at least the greater part of the indebtedness, it was transferred to secure, although the partnership apparently received the benefit of it, was the individual indebtedness of W. B. O'Neill. Such a transfer, made by a partner, of the partnership assets, with notice to the transferee, is a fraud on the partnership, and is therefore void, and, if the partnership is insolvent at the time, is fraudulent, null, and void as to the social creditors. *Darby v. Gilligan*, 33 W. Va. 246, 10 S. E. 400; *Baer v. Wilkinson*, 35 W. Va. 422, 14 S. E. 1. In *Story on Partnership* (section 132) the law is stated as follows, to wit: "Similar principles will apply, although not always to the same extent or with the same certainty, where one partner misapplies the funds or securities or other effects of the partnership in discharge or payment of his own private debts, claims, or contracts. In such cases the creditor dealing with the partner, and knowing the circumstances, will be deemed to act mala fides and in fraud of the partnership, and the transaction by which the funds, securities, and other effects of the partnership have been so obtained will be treated as a nullity." Hence this property, notwithstanding its transfer to Charles Muhleman by W. B. O'Neill, in legal effect remained the property of O'Neill, Funk & Co., and as such was liable to attachment by any of the firm creditors, on any ground good against the firm collectively. The sole ground of the attachment is the nonresidency of the defendants. The attaching creditors are therefore entitled to priority, except as against the carrier's lien for the freight bills; and the provisions of section 2, c. 74, of the Code heretofore commented on would not be applicable, as the sale of the slate must be treated as a nullity, and absolutely void, and not held good for the benefit of all the creditors.

For the foregoing reasons, the judgment of the circuit court is reversed, and judgment entered in favor of Charles Muhleman for the horse, wagon, and harness, being the property transferred to him by W. B. O'Neill in the state of Ohio, and, as to the two car loads of slate, his claim is disallowed, and his petition to that extent dismissed. And the attaching creditors, *George E. Kurner & Co.*, must pay the petitioner his costs here and in the circuit court expended.

(39 W. Va. 561)

#### FERGUSON v. BOND et al.

(Supreme Court of Appeals of West Virginia.  
Dec. 1, 1894.)

DEED—WHEN A MORTGAGE—DELIVERY—WHAT CONSTITUTES—EFFECT OF CANCELLATION.

1. A deed absolute on its face held to be an equitable mortgage.

2. The date of a deed is prima facie the date of delivery, but only prima facie.

3. Delivery of a deed depends on intent of parties, and, though not in formal words, may be shown by circumstances.

4. Acknowledgment of a deed is not conclusive evidence of its delivery, but a circumstance tending to show delivery.

5. Where it is clear a deed has been delivered, it is still a deed, though afterwards found in the possession of the grantor.

6. Where a deed has been once completed by delivery, so as to pass title to land, its subsequent oral cancellation or destruction, though by consent of both parties, does not divest the grantee of title, but it still remains in him.

(Syllabus by the Court.)

Appeal from circuit court, Tyler county.

Suit by William T. Ferguson against Israel Bond and others. There was a decree for plaintiff, and defendants appeal. Affirmed.

M. K. Duty and J. G. McClure, for appellants. J. V. Blair, for appellee.

BRANNON, P. This is a suit in equity in Tyler county, brought by William T. Ferguson against Israel Bond and others to subject certain land to a judgment recovered by Ferguson against Israel Bond, and to set aside as fraudulent a deed from Israel Bond to Margaret Bond, conveying said land. The decree holds the land liable to the judgment, and the defendants appeal.

Is the deed from Israel Bond to his mother, Margaret Bond, fraudulent? It is dated February 8, 1881, acknowledged February 10, 1881, but not recorded till July 31, 1889. If the deed was perfected by delivery on the 8th or 10th of February, 1881, we could not hold it void, because there is no appearance whatever that it wronged, or was intended to wrong, any one whatever, as it states the consideration of its conveyance to be \$50 cash, and binds the grantee to pay a note made by Israel Bond to Ankrum's administrator of \$517.32. Israel Bond owed no other debt. Thus we cannot say he intended to defraud existing creditors. Nor can we say he intended to defraud future creditors, for it does not appear that he contracted any other debt. The judgment of Ferguson against Israel Bond was recovered August 23, 1889, for the seduction of Ferguson's daughter in 1888, and it appears that Israel Bond did not even know the girl until long after he made the deed. What, then, was the real nature and motive of this deed? It conveys from Israel to his mother, Margaret Bond, all his personal property and his land. Israel Bond was a single man, then of 42 years, living on the land with his mother, an aged lady, who drew a pension as widow of a soldier of the war of 1812. She had money. The debt Israel owed was demanded of him. If the land were conveyed to her, and she thereby made liable for it, the creditor would indulge. She had means to pay, which could be relied on, and she would be secure. She did, from time to time, pay it off. But,

with the circuit judge, I think it was, though in form an absolute conveyance, really intended as an indemnity to the mother for money she should pay for him; that is, an equitable mortgage. Why this conclusion? The relation of the parties was that of mother and son. The land, outside the personality, was worth about \$3,000, while the balance of the Ankrum debt was not more than \$500, and the cash payment was \$50; the consideration being thus greatly inadequate, repelling the idea of a sale. It is not to be supposed that a son at prime of life was conveying to a very aged mother, at one-sixth the value of the property, for her benefit, she being on the verge of life, when the sacrifice of the son would redound only to the benefit of her other children. Again, she did not record the deed for more than six years. If an absolute conveyance, is not the probability that she would have sooner recorded it? Indeed, we cannot say she ever recorded it, as it was sent by mail to the clerk, with a letter signed by her, asking its recordation, but written by the son. This did not take place until one week after service on Israel Bond of the writ of Ferguson in the suit for seduction of his daughter. We may say it never would have seen the record but for this suit. Again, Israel remained in possession of the land after the conveyance, using it as he had always done, at least without signal outward change in management, and the land and personality remained on tax books in his name until 1889. Again, she signed and acknowledged a deed in the spring or summer of 1888 reconveying the land to Israel Bond. This shows either that she had never paid the debt,—as seems probable from Israel's deposition, as he says: "We paid the most of it in December, 1892; \* \* \* that when the note was paid off was the amount she paid or I paid for her,"—or, if she paid it, that he repaid it, or she forgave it, since it is hardly probable she would reconvey, to the prejudice of other children, so valuable a property, if she did not consider that she only held it as a security. Again, she made a will March 7, 1889, giving Israel all her personality, but no realty, being silent as to realty. If she owned the realty, why was the will silent as to it? She then stated to its draughtsman, when he talked about her realty, that she had already conveyed it to Israel. She frequently had at other times referred in conversation with Hardman to the farm as Israel's, and said she was simply making her home with him. Again, after the judgment for seduction against her son, she made another will, dated October 16, 1889, and died shortly after, giving another son, Isalah M. Bond, her personal and real property, appointing Israel her executor, directing him to hold the realty "until he deems best to sell and pay to my son in installments of one, two, and three years," without bond from the executor; thus giv-

ing him a life estate, and perhaps freedom from liability, showing she regarded him really owner. He is still in possession.

These circumstances lead to the conclusion, not that the deed when made was fraudulent, but was an equitable mortgage. I shall not go over again principles already elaborately laid down by this court by which we test whether a conveyance absolute on its face is an equitable mortgage, but simply say that under those principles the circumstances surrounding this transaction will sustain the holding that in truth this conveyance was an equitable mortgage. If there were doubts, we must lean in favor of such mortgage. *Vangilder v. Hoffman*, 22 W. Va. 2; *Gilchrist v. Beswick*, 33 W. Va. 168, 10 S. E. 371. Then, if Mrs. Bond was such mortgagee, ought not her estate have been accorded preference for what she paid? No; not because her conveyance from Israel was fraudulent, but because of her reconveyance of the land to Israel. A question is made in the case whether this deed of February 8, 1881, was ever delivered until July 31, 1888, when it was recorded, and that it then, and not until then, became a deed, and was a fraudulent instrument to defeat the coming recovery in Ferguson's action. Until another date of delivery is proven, the presumption as to date is that the delivery was on the date of the deed. *Harvey v. Alexander*, 1 Rand. (Va.) 219, 241; *Harman v. Oberdorfer*, 33 Grat. 497; 2 Greenl. Ev. § 297. Still, the fact of delivery as an element of a deed must appear. Mere acknowledgment is no proof of it. *Hutchison v. Rust*, 2 Grat. 394. Recordation at the instance of grantee is prima facie evidence of delivery. Acceptance is still a distinct matter and essential. But in this case we must find that the deed was delivered, because Israel Bond swears pointedly that he delivered it at its date, Mrs. Bond sends it to the clerk for record, and she reconveyed the land to Israel Bond.

It is urged in argument that if we treat this conveyance as only an equitable mortgage, there can be no decree against the land, inasmuch as the bill charges a fraudulent conveyance, not a mortgage, and so there is no pleading to base a decree upon on the equitable mortgage theory. It is useless to discuss this matter, seeing that by reconveyance of the land by Margaret to Israel Bond it became his absolutely; and I take it as clear that the judgment lien can be enforced whether on the basis of fraudulent conveyance or that the land is Israel's, though the bill proceeds on the theory of fraudulent conveyance, for in the one case the land would be Israel's quoad his debt, and in the other absolutely his, and the bill demands payment from the land. A deed of reconveyance was surely signed and acknowledged by Mrs. Bond. She told Sheriff Hardman of it. Israel Bond says that he wrote and she acknowledged it. But then here a question arises as to the delivery of this deed

also. Mere acknowledgment is not conclusive of delivery, to be sure; yet it is a circumstance of much weight along with others. *Hutchison v. Rust*, 2 Gr. 394. We must determine, upon all the circumstances, the intention of the parties, as there surely need not be—as there surely is not in one case in a hundred—express formal delivery in words. What was the intention of the parties? Israel Bond says he wrote the deed. What for? The mother signed and acknowledged. For what purpose? Israel saw the deed after acknowledgment. He had it in his possession. For what purpose? How came it in his possession, if not because it was his deed? When asked where he put the deed, he does not remember, but says, if he put it anywhere, he put it in his mother's papers. They probably kept their papers irregularly together. That amounts to nothing. The only reason it was among her papers was that he put it there, though complete. He did not disavow the deed. In addition, the mother told Hardman she had reconveyed. The parties intended to make—did make—a complete deed. There can be no doubt but this case comes up to the standard of *Scrugham v. Wood*, 15 Wend. 545, 30 Am. Dec. 75, and note, holding that where parties meet, read, sign, and acknowledge before an officer a deed, it is sufficient evidence of delivery, though the witnesses cannot state a formal delivery, and though the deed be afterwards found in the possession of grantor. 4 Kent, Comm. 455; 2 Greenl. Ev. § 297; *Hutchison v. Rust*, 2 Gr. 394; 2 Minor, Inst. § 657; *Seibel v. Rapp*, 85 Va. 28, 6 S. E. 478. But Israel Bond says that one time, when sitting by the fire, the mother threw something in the fire, and when he asked what it was she said it was that deed; that he would never pay her for the land the way he was doing, or something to that effect. This was in May or June, 1889. This was pending Ferguson's action, and before judgment. The story does not look very plausible. What the old lady said did not import nondelivery. Before that she admitted the deed to Hardman. There was now pressing need to destroy the deed; certainly on Israel's part, and likely on her part, if she did the burning. So we may attribute the action to fraudulent destruction, taking place when it did. The deed being a perfect deed passing title, the conjoint act of both in destroying it could not divest Israel of the land, or remove it from liability to the judgment; much less her sole act, as he did not assent to it. Code, c. 71, § 1, required a deed or will to revest the title. It remained in him when the judgment lien attached to it. *Graysons v. Richards*, 10 Leigh, 61; *Seibel v. Rapp*, 85 Va. 28, 6 S. E. 478; 1 Minor, Inst. 666. Thus Margaret Bond had nothing in the land to pass by her will. So, by force of this reconveyance, the land was properly held liable, and the decree is affirmed.

(30 W. Va. 522)

**BANK OF PIEDMONT v. BOWMAN et al.**  
(Supreme Court of Appeals of West Virginia.  
Dec. 15, 1894.)

**FRAUDULENT CONVEYANCE—EVIDENCE.**

A case in which the court refuses to set aside a conveyance for fraud.

(Syllabus by the Court.)

Appeal from circuit court, Tucker county. Suit by the Bank of Piedmont against A. H. Bowman and others. There was a decree for defendants, and plaintiff appeals. Affirmed.

W. B. Maxwell, for appellant. P. J. Crogan, for appellees.

**BRANNON, P.** This was a suit in equity in the circuit court of Tucker county, brought by the Bank of Piedmont against A. H. Bowman and others, in which the plaintiff alleged that it had recovered a judgment against A. H. Bowman, E. B. Stone, and W. H. Lipscomb, and that Bowman and Stone had made various fraudulent dispositions of and incumbrances upon their property, and praying that a conveyance by Bowman to one A. M. Goff of two tracts of land containing 67 acres and 232 acres, respectively, lying in Tucker county, and a deed of trust for \$3,656.10 on other property, given by Bowman to secure Goff, and a judgment confessed by Bowman in favor of Goff for a debt, be set aside, and that Stone be required to bring to light from concealment certain notes and accounts which he was suppressing in fraud of creditors. Owing to decrees in a case of the First National Bank of Fairmont against A. H. Bowman and others in Preston county, mentioned in the record, the matters of the deed of trust and judgment have been eliminated from this case, and it is only necessary for us to pass on the conveyance of the two tracts of 67 and 232 acres of land in Tucker county, and the notes and accounts which Stone is charged with concealing from creditors. Now, then, as to the tracts of 67 and 232 acres of land conveyed by Bowman to Goff. The debt which the plaintiff would assert against these lands originated on November 8, 1887. Bowman sold these lands to one John J. Cline as far back in time as January 1, 1883, as shown by a written contract acknowledged and duly recorded January 31, 1884. Thus the fact appears, and it is one of decisive force in the case, that long before this debt arose these lands had been sold by Bowman, and I will add, as showing the good faith of this sale, that none of the debts referred to in the bill which in later years embarrassed and ruined Bowman existed at the date of this sale, and the bill states that at the date of November 8, 1887, Bowman was worth \$30,000, and was indebted only in a very small amount. So it is clear that, unless on account of something afterwards occurring, the right of Cline, and any

right which is derivative from it, must stand stable against the debt of the Bank of Piedmont. But it is claimed that something did afterwards occur to render these lands liable to this debt, and that is, as alleged in the bill, that when Bowman became involved he managed to induce Cline to surrender his said purchase, and thereupon Bowman, in order to defraud creditors, conveyed the lands to his son-in-law, Goff, by deed dated December 2, 1887. Cline, who is no relation to the parties, swears that he applied to Goff for a loan of \$500, to finish payment to Bowman for the land under his contract of purchase of January 1, 1883, and Goff demanded security for the loan, and it was agreed that Bowman, instead of conveying under that contract to Cline, should convey to Goff, and that Goff should hold the land until Cline should repay the \$500, and that Goff did lend him the money, and he paid it to Bowman in discharge of the purchase money due him, and Bowman, by order of Cline, made the deed to Goff. Goff swears the same, and that he had no conversation with Bowman about the loan to Cline, or about the conveyance of the land to Goff, but his transaction was wholly with Cline. Thus the conveyance to Goff from Bowman created in Goff, not an absolute estate in the eyes of equity, but an equitable mortgage to secure Goff his loan, with right of redemption in Cline. *Ferguson v. Bond* (decided this term) 20 S. E. 591; *Vangilder v. Hoffman*, 22 W. Va. 2. Bowman had no longer any interest in the land which creditors could subject. He had not had, since January 1, 1883. If Cline and Goff do not falsify, such is unalterably the state of the case as to these lands. There is not a bit of evidence to contradict them in this matter. Can we arbitrarily reject their evidence when there is not even a cross-examination to impugn it?

Several witnesses were examined on the plaintiff's side, but their evidence only tends to show that Goff was not peculiarly able to raise money to make this loan and the loan to Bowman of \$3,656.10 for which the deed of trust and judgment were given. Let us concede that he was not able to do both, yet he may have been able to lend this \$500. And if—as I do not think we can—we could look to the case of *Bank v. Bowman*, 36 W. Va. 655, 14 S. E. 989, we would find that debt was never claimed to be wholly a loan by Goff to Bowman, but the larger part from a gift to Goff's wife by Bowman in years gone by. Anyhow, it is clear, not only from witnesses for Goff, but even from witnesses for the bank, that Goff was worth from \$2,000 to \$3,000, was a good farmer, raised and sold cattle, engaged very considerably for years in logging and lumbering, was an active, hardworking, saving man, and of honorable character. Why is it improbable that he made the loan of \$500? We have positive evidence

by two undisputed witnesses that he did make this specific loan, and his state and condition as proven by other witnesses lend corroboration to their evidence. A circumstance cited against the fairness of the transaction is that when Cline paid this purchase-money debt to Bowman with only \$500, there was due \$621; but this is not certain, for we do not know, as a matter of fact, that several payments had not reduced it. It is said that though this deed was made December 2, 1887, it was not put on record till February 27, 1888. Sometimes withholding a deed from record may be a circumstance of fraud, but it would seem rather the reverse here, for we would suppose, if sedate fraud was intended, the party would hasten to put it on record. Failure to record is often owing to mere neglect and procrastination. Bowman's deposition is not in the record. It may be that in urging payment of this debt by Cline he intended to get it out of the way of creditors, but that does not convict Goff of fraud in lending Cline money to pay, or Cline in paying it to Bowman. The fact that the deed from Bowman to Goff was only a mortgage is confirmed by a writing found in the record, which both Cline and Goff say was executed, dated March 27, 1888, by which Goff sold this land to Cline for \$500, and was to deed the land to Cline on payment of purchase money. This simply attests in writing what had been orally agreed. The relationship of Bowman and Goff does call for explanation as argued, but the evidence of a disinterested witness (Cline), supported by Goff's, furnished fair explanation. Were it simply a conveyance by Bowman to Goff, it would wear a different hue; but it is a loan by Goff to Cline to pay Bowman purchase money under a sale from Bowman to Cline years before any trouble,—a fact not disputed, nor capable of dispute. So I conclude that the court below did not err in refusing to hold the land liable.

It is argued, but not apparently with confidence, that the court erred in the dismissal of the bill in this further respect: that the bill charges that Stone had carried on the merchantile business, and had large sums of money due him upon notes and accounts, which he was concealing from creditors, amounting to about \$6,000, and, as it was taken for confessed by Stone, the bill as to this matter should not have been dismissed. The bill was too indefinite in this matter to warrant a decree upon it, taken alone. What sort of a decree could have been pronounced upon it? I doubt whether there could have been a personal decree against Stone for the specific sum of \$6,000; but a personal money decree is not the one aimed at, or which would be warranted under the bill, as it contemplates an ascertainment of debtors of Stone, and pursuit of funds in their hands, as it prayed that Stone turn over the notes and accounts, that they might

be collected. This being so, there is no basis for such a decree. Who are the debtors of Stone, and what amounts do they owe? We know not. There is not a particle of evidence to answer these questions. It is a bill of discovery stopping short of discovery. Why did not the plaintiff compel a discovery? Why not compel an answer, and the production of notes and accounts? It does not even put Stone on the stand to disclose the debts, or furnish any evidence.

Another assignment of error is that the witnesses left the place of examination before 6 o'clock p. m., and plaintiff's counsel had no opportunity to cross-examine them. The notice fixed the hours for taking the depositions between 6 a. m. and 6 p. m. The examination by defendant began at 10 o'clock a. m., and was concluded at 11:30 a. m., and at 5:35 p. m. plaintiff's attorney appeared to cross-examine, but the witnesses had gone. A reasonable opportunity was given. The counsel showed no diligence to secure his cross-examination. No excuse for the negligence is given. The court could order a cross-examination had it been asked, if there had been any fair excuse by counsel for not having availed himself of the opportunity of cross-examination. These considerations conduct us to an affirmance of the decree.

(39 W. Va. 607)

#### HITCHCOX v. HITCHCOX et al.

(Supreme Court of Appeals of West Virginia.  
Dec. 8, 1894.)

#### QUIETING TITLE—PARTIES—REVIEW ON APPEAL.

1. In a suit in equity, brought to remove a deed held by the defendants as a cloud upon plaintiff's title to the land in question, in which the bill alleges that the defendants' immediate grantor, who claimed to have purchased the land at a judicial sale under a decree, had no title, because no sale of such land was ever decreed in any legal proceedings such as are recited in said grantor's deed, and that no sale of said land, or of any interest therein, was ever decreed in any legal proceedings set up in said pretended deed, and that no legal sale of said land, or of any interest therein, was ever made by the special commissioner who made the deed to the defendant's grantor, such grantor should be made a party defendant to the suit; and a decree pronounced in his absence, or, in case of his death, in the absence of his heirs at law, should be set aside.

2. Although the objection to the bill for want of necessary parties is not properly raised in the circuit court by demurrer, plea, or answer, this court will, on its own motion, reverse and remand the cause for want of proper parties where such defect is apparent upon the face of the bill and exhibits.

(Syllabus by the Court.)

Appeal from circuit court, Ritchie county.

Suit by Victor V. Hitchcox, by his next friend, Ellen A. Hitchcox, against Columbia V. Hitchcox and others, to remove cloud from title. From the decree defendants, John M. Morrison and another, appeal. Reversed.

Thomas E. Davis, for appellants. David D. Johnson, for appellee.

ENGLISH, J. This was a suit in equity, brought in the circuit court of Ritchie county, returnable to September rules, 1887, by Victor V. Hitchcox, a minor child, who sued by his next friend, Ellen A. Hitchcox, against Columbia V. Hitchcox, widow of M. M. Hitchcox, deceased, and others. The plaintiff, in her bill, asserts that the heirs at law of M. M. Hitchcox, deceased, are entitled to the undivided one-fourth of a tract of land situated in said county of Ritchie, containing really 282 acres, but which is described in a patent issued by the commonwealth of Virginia about the 1st of September, 1851, to William Hitchcox, the grandfather of the infant plaintiff, as containing 298 acres, situated on the Northwestern turnpike and Husher's run, in said county of Ritchie, in which patent the metes and bounds of said tract are given. Plaintiff alleges that said William Hitchcox died seised in fee simple of said land, and that by his will he gave said land to his widow for her lifetime, and after her death to his heirs, but to said widow absolutely with power to dispose of the same and convert it to her use during her lifetime if she saw fit, his said heirs having no right or interest therein while she lived, and only a reversion therein in case she did not use or dispose of the same; that said widow died about the year 1877, and at her death said land became the property of the heirs at law of the said M. M. Hitchcox; that said M. M. Hitchcox died before his mother (the widow aforesaid), and at the death of the said widow said land became the property of the following persons, to wit, William L. Hitchcox, Nelson K. Hitchcox, Waldo P. Hitchcox, all of whom were sons of said William Hitchcox, deceased, in the proportion of one-fourth each, and the other undivided fourth part became the property of Clay B. Hitchcox, Montrose M. Hitchcox, Columbia V. Hitchcox, Calvert L. Hitchcox, Earnest L. Hitchcox, Phoebe F. Hitchcox, and Ellen A. Hitchcox, the children and heirs at law of M. M. Hitchcox, deceased, who was the other child of William Hitchcox, deceased; and the plaintiff alleges that at the death of their grandmother, the widow of said William Hitchcox, deceased, he and his brothers and sisters aforesaid became jointly the owners in fee simple of said undivided fourth interest in and to said tract of 298 acres of land, and their mother, Columbia V. Hitchcox (who is still living), and is the widow of said M. M. Hitchcox, has a dower interest in their said one-fourth interest in said land, and he is the owner in fee simple of one undivided eighth of one-fourth part of said land, or one thirty-second part thereof. The plaintiff further alleges: That he and his said brothers and sisters had a right to have their one-fourth interest in said land set off to them in one parcel, and that if said one-fourth part so set off should be incapable of proper and judicious partition into eight parts, he had a right to have said

fourth part sold, and the proceeds thereof, so that his one-eighth part thereof can be paid to him. That the said Waldo P. Hitchcox had sold his interest in said land to Jacob S. Pratt. That Nelson K. Hitchcox's interest in said land had been sold under some sort of judicial proceedings, and that said interest was now owned by J. P. Strickler. That W. L. Hitchcox had sold his interest, and that the same had been transferred through several hands, and was now owned by J. B. and L. E. Pratt; but that plaintiff knew nothing as to the title or claims of said Jacob S. Pratt, J. P. Strickler, and J. B. and L. E. Pratt, or as to what interest they might own, or what the nature of their several claims was. That the said Nelson K. Hitchcox was still in possession of a part of said land, and the said Jacob S. Pratt was in possession of another part thereof, and the said J. B. and L. E. Pratt were in possession of another part thereof; but that William L. Hitchcox and Waldo P. Hitchcox no longer claim any interest in said land, and that the widow of M. M. Hitchcox is entitled to have her dower set apart to her in the one-fourth to which the heirs at law of M. M. Hitchcox were entitled, or to have the same sold, and to receive a gross sum in lieu thereof. That John M. and William L. Morrison are in possession of another portion of said land, and that they are asserting some claim to or interest therein, and plaintiff alleged that they had no right, title, or interest whatsoever in said land, or any part thereof. That on the 22d day of October, 1888, there was placed on record in the office of the clerk of the county court of Ritchie county what purports to be a deed from R. S. Blair, special commissioner, to one A. S. Core, purporting to convey an undivided interest in said land; but the plaintiff alleged that no sale of said land, or any interest therein, was ever made by said R. S. Blair, special commissioner, or otherwise, and that neither said land nor any interest therein was ever embraced or contemplated, in the legal proceedings mentioned in said pretended deed. That said A. S. Core had been long dead before said pretended deed was recorded, and plaintiff alleged that no such deed was ever made or delivered to said A. S. Core in his lifetime, and plaintiff charges that said A. S. Core never had any sort of right, title, or interest in or to said land whatsoever. That plaintiff's father, M. M. Hitchcox, never conveyed any interest therein, nor was any interest of his ever sold or conveyed by any legal proceedings, so that said Core never could have had any interest therein; and, if said John M. and William L. Morrison have any claim or color of title whatsoever for said land, it must be under said Core, and said Core never had any valid title, and never claimed to have, nor has there been any such claim or color of title, or any paper purporting to convey any title or interest in said land, on record, except the deed recorded in October, 1888. And

plaintiff further alleged that said pretended deed, or any pretended conveyance made in pursuance thereof, is wholly illegal, null, and void, and conveys no title or interest whatever in said land; and that the said pretended deed from R. S. Blair, special commissioner, to A. S. Core, and any deeds or conveyances made under the same, are simply clouds upon the title to said land, and that he has a right to come into a court of equity to have the same removed; and the plaintiff prayed that the said John M. Morrison and William L. Morrison might be required to disclose and show by what right or authority they are asserting possession to any part or interest in the said tract of land, and what character of title they claim to any interest therein. That the said pretended deed from R. S. Blair, special commissioner, to A. S. Core, and any deed of conveyance made by said Core in pursuance thereof, may be declared null and void, and of no effect to create any title in said Morrisons or otherwise in said land; and, further, that a partition of said tract of 293 acres of land might be made, setting off and assigning to Waldo P. Hitchcox or his assignees one-fourth, to Nelson K. Hitchcox or his assignees one-fourth, to William L. Hitchcox or his assignees one-fourth, and to the plaintiff and his said brothers and sisters, the children of M. M. Hitchcox, deceased, one-fourth; and that out of the fourth interest so to be assigned to the heirs of M. M. Hitchcox, deceased, dower may be assigned to the said Columbia V. Hitchcox, widow of M. M. Hitchcox, deceased; and that the same may be partitioned, if practicable, among the heirs of said M. M. Hitchcox, but, if the same be incapable of partition, that then said fourth, when so set off, may be sold, and a sum in gross be given to said widow in lieu of dower, and the residue divided among the said heirs of M. M. Hitchcox.

The defendants, J. M. Morrison and William L. Morrison, filed their joint answer to plaintiff's bill, in which they say: That they are not advised when William Hitchcox died, but they are advised that he died several years before his son M. M. Hitchcox, and that after the death of M. M. Hitchcox two suits were instituted in the circuit court of Ritchie county against the heirs of M. M. Hitchcox and others, namely, H. Rosenheim and others, plaintiffs, and T. P. Jeffrey, administrator, plaintiff, which suits were for the ostensible object of selling said M. M. Hitchcox's real estate of which he died seised, in which suits the heirs of said M. M. Hitchcox and his widow were among the defendants. That under a decree rendered in said suits all the real estate of which the said M. M. Hitchcox died seised was decreed to be sold, and that said real estate was sold, and on the 24th day of April, 1877, said sale was confirmed, and that among the real estate so sold and confirmed was the one-fourth interest of the said M. M. Hitchcox



in a tract of 282 acres of which said Hitchcox's father died seised and possessed, which one-fourth interest A. S. Core became the purchaser of, and from the date of the confirmation of the sale was entitled to a deed therefor, although he did not receive a deed therefor until the 8th day of February, 1881, of all which decrees and proceedings the said heirs of M. M. Hitchcox had notice. That by a suit in said circuit court, brought by said A. S. Core against William L. Hitchcox, Waldo P. Hitchcox, and N. K. Hitchcox, the said tract of 282 acres was partitioned, and the one-fourth interest so purchased by said Core as the interest of M. M. Hitchcox was assigned and set off by metes and bounds to him. And respondents further say that they purchased of said Core 82 acres of land, which they are informed is the said one-fourth interest so purchased by said A. S. Core, and partitioned to him; and an agreement in writing between them and said Core was entered into the 19th day of May, 1889; that for said land said Core afterwards executed to them a deed of general warranty, bearing date on the 29th day of March, 1882, which was admitted to record on the 3d day of June, 1882; that immediately upon their purchase on the 19th day of May, 1879, they entered into possession of said land, built a house, cleared and improved the land; that they paid a valuable consideration for said land, to wit, \$1,000; that they have since put valuable improvements on the same until it is now worth thrice what they paid for it,—of all of which said M. M. Hitchcox's heirs have had notice. Said defendants further say that if the object of this suit is to attempt to deprive them of their land by trying to show that the land they own and have been in possession of is part of the 293 acres they speak of in their bill as patented to William Hitchcox, and can show it is the same as the 282 acres, they say they are estopped; and they further show in suits against M. M. Hitchcox's heirs the said M. M. Hitchcox's widow asked and accepted a gross sum in lieu of her dower, and therefore she is estopped, and they do plead said two suits above mentioned against M. M. Hitchcox's heirs and others in bar and complete estoppel of this action against them; and they further plead that they had been in possession under written contract more than 10 years before the suing out of the writ in this suit; and further, that their title will date back to the confirmation of the sale to Core in April, 1877, in case the court should be of opinion that proceedings up to that time should be irregular, void, and without authority, and that the plaintiff cannot, by law, now, by next friend, maintain his suit; that by law, if not of age, after he comes of age he has six months to show cause against any decree, but not before; and that, being in possession, he cannot now, in equity, maintain this suit. Copies of the last will and testament of William Hitchcox, and also of

M. M. Hitchcox, were exhibited, as also the bills filed in the circuit court of Ritchie county by R. Rosenheim against M. M. Hitchcox, and by Thomas P. Jeffrey, surviving partner, etc. Against Columbia V. Hitchcox, the widow, and Columbia V. Clay and others, the heirs at law, of M. M. Hitchcox, deceased, as well as copies of the decree rendered in said causes, which were consolidated and heard together; also the copy of the report of sale made under a decree of sale rendered in said causes by R. S. Blair, special commissioner; also a copy of the bill and proceeding had in the suit brought by A. S. Core for partition against William L. Hitchcox, Waldo P. Hitchcox, and Nelson K. Hitchcox.

On the 19th day of October, 1891, the depositions of Ellen A. and Victor V. Hitchcox were taken by the plaintiff, and filed on the 22d day of October, 1891. On the 26th day of October, 1892, Thomas E. Davis, attorney for the defendants John and William Morrison, filed an affidavit for continuance, in which he states that when he submitted said case to the court it was not his understanding he was submitting the cause as to final hearing, but was for the purpose of passing on the right of plaintiff to maintain suit, and as to validity of deed made to Core by commissioner, in the suit of Rosenheim v. M. M. Hitchcox's children, etc. It was not submitted with understanding his clients should be deprived of proving their cause outside of the questions above mentioned. At no time would he have submitted cause so as to deprive his clients of the privilege of making out their defense without further proof. David D. Johnson, counsel for the plaintiff, filed a counter affidavit, in which he says that said Thomas E. Davis was mistaken, and that the case was argued and submitted upon its merits at a former term, and the understanding was that the court was to take the papers, and decide the case at the next term; and that he prepared an order making up the pleadings and submitting the case, which is still in the file, and is filed as part of his affidavit, which order bears an indorsement in pencil, made by the judge of the court in his own handwriting, a copy of which order and indorsement is also filed. Said W. L. Morrison and J. M. Morrison also filed their joint affidavit, in which they state that said land has been in their possession, open, notorious, continuous, hostile, and adverse to every person, since the 19th day of May, 1879, working, clearing, and raising crops and building thereon and paying the taxes thereon ever since they received the possession from A. S. Core, who purchased it at public sale at the front door of the courthouse of Ritchie county, purporting to be sold under a decree to satisfy debts of M. M. Hitchcox, father of the plaintiff. Columbia V. Hitchcox, widow of M. M. Hitchcox, deceased, and the children of said M. M. Hitchcox who are named as defendants, filed their answer admitting the truth of the allegations

contained in the bill. On the 31st day of October, 1892, the court proceeded to hear the case upon the bill, answers, replications, and proofs reciting in the decree that the cause was submitted at a former term of the court, and decreed the complainant was entitled to the relief prayed for in the bill, and that he and his brothers and sisters were entitled, as heirs at law of M. M. Hitchcox, deceased, to the undivided fourth interest in and to the tract of 293 acres of land in the bill and proceedings mentioned, and that said deed from R. S. Blair, special commissioner, to A. S. Core, dated October 22, 1888, constituted no adverse title in the grantee, A. S. Core, or in those to whom he subsequently conveyed; and removed the deeds from R. S. Blair, special commissioner, to A. S. Core, and from A. S. Core to John M. and William L. Morrison as clouds upon said title; and held that the heirs of M. M. Hitchcox, deceased, were entitled to the recovery of the possession of their said undivided fourth interest in said land, and to have the same partitioned, and their said fourth interest set off to them, and appointed commissioners to go upon said land, and make partition of the same, and report their proceedings; overruling the defendants' motion for continuance on the ground that the same came too late, the cause having been regularly submitted at a former term. On the 27th day of June, 1893, the commissioners appointed to make partition returned their report, which was confirmed, and a deed directed to be made to the widow and heirs of M. M. Hitchcox, deceased, with covenants of special warranty for the land allotted to them, and from this decree said John M. and William L. Morrison applied for and obtained this appeal.

The first error assigned by the appellants is to the action of the court in pronouncing a decree in the absence of necessary parties, suggesting that W. L. Hitchcox, N. K. Hitchcox, and A. S. Core were necessary parties, and were entitled to be heard as defendants in the cause. It is true, no demurrer appears to have been interposed suggesting the want of proper parties, yet this court has held in the case of *Morgan v. Blatchley*, 33 W. Va. 156, 10 S. E. 282, that, "although the objection to the bill for want of proper parties is not properly raised in the circuit court by demurrer, plea, or answer, this court will, on its own motion, reverse and remand the cause where such defect is apparent upon the face of the bill and exhibits"; and in the case of *Donahue v. Fackler*, 21 W. Va. 124, it was held that "when it is uncertain whether or not certain persons have an interest in land, it is error to decree a sale of such land without making such persons parties to the suit." Now, the avowed object of this bill was to partition and set off to the plaintiff and the other heirs at law of M. M. Hitchcox, deceased, the undivided one-fourth part of a tract of land which was patented to William

Hitchcox, the grandfather of the plaintiff, by the commonwealth of Virginia in September, 1851, and described therein as containing 293 acres, situated on the Northwestern turnpike and Husher's run, in Ritchie county, which patent was filed, and gives a description by metes and bounds, and is evidently the same land an undivided interest in which was sold by R. S. Blair, as special commissioner, under a decree of the circuit court of Ritchie county, in the consolidated cases of *H. Rosenheim against M. M. Hitchcox and Thomas P. Jeffrey*, surviving partner, etc., against the widow and heirs at law of M. M. Hitchcox, deceased, and, while the description of the land in the bill and exhibits described may not correspond precisely with the description of the 282 acres of land reported as sold by R. S. Blair, special commissioner, to A. S. Core, yet the case was referred to a commissioner to ascertain the real estate owned by the estate of M. M. Hitchcox, deceased, and his report was unexcepted to, and, acting on pursuance of said report, said R. S. Blair, as special commissioner, reports that he sold the one-fourth of a 282-acre tract, being the interest of the said M. M. Hitchcox, then deceased, in his father's farm, near Ellenboro, to said A. S. Core, for which he paid \$650; and said R. S. Blair appears subsequently as special commissioner acting under a decree of the circuit court of said county in two chancery cases which were consolidated to have made said A. S. Core a deed for the one-fourth interest in said 282-acre tract of land, which deed the plaintiff alleges appears to have been admitted to record in said county on the 22d day of October, 1888, and one of the alleged objects of the plaintiff's bill was to remove this deed as a cloud upon the title and a determination of the questions raised by the effort to show that said deed should be removed as a cloud upon the title under the allegation made in the plaintiff's bill that no sale of said land, or any interest therein, was ever decreed in any legal proceedings set up in said pretended deed; that no legal sale of said land or any interest therein was ever made by said R. S. Blair, special commissioner, or otherwise; and that neither said land, nor any interest therein, was ever embraced or contemplated in the legal proceedings mentioned in said pretended suit,—constitutes a direct attack upon the title of said A. S. Core to the interest in said land which he conveyed to the defendants John M. and William L. Morrison. In this state of circumstances, A. S. Core, or, in case of his death, his heirs at law, should have been made parties to the suit. The general rule is found in *Sand's Suit in Equity*, at page 191, where it is said: "It is a general rule in equity that all persons materially interested in the subject-matter of the bill ought to be made parties to the suit, however numerous they may be." The same rule is found in 1 Bart. Ch. Pr. p. 133, § 35. The de-

endants John M. and William L. Morrison, in their answer, allege that A. S. Core conveyed to them said interest in said 282 acres of land by deed with covenants of general warranty, dated the 29th day of March, 1882, and that the same was admitted to record on the 3d day of June, 1882, which was filed as "Exhibit B" with their answer, which shows that the said A. S. Core was directly interested in protecting his warranty of title. In the case of Pappenheimer v. Robberts, 24 W. Va. 702, which was a suit brought by a judgment creditor to sell the lands of the debtor, this court held that "if in such suit the plaintiff seeks to set aside as fraudulent and void certain deeds alleged to have been made by the judgment debtor with intent to hinder, delay, and defraud the plaintiff in the collection of his debt, in order to charge the land thereby conveyed with the payment of his judgment, such alleged fraudulent alienees are necessary parties to such suit, although they may have conveyed the said lands granted them respectively to other persons, who are defendants in the suit"; and that "if the want of such proper parties appears on the face of the bill, it will, for that cause, be demurrable, and the defect may be taken advantage of by demurrer or at the hearing of the cause"; and in the case of Neely v. Jones, 16 W. Va. 626, it was held that "if all the judgment creditors are not made parties to such a suit either formally or informally, and this is disclosed in any manner by the record, the appellate court will reverse any decree ordering the sale of the lands, or the distribution of the proceeds of such sale." See, also, Donahue v. Fackler, 21 W. Va. 125, and Turk v. Skiles, 38 W. Va. 404, 18 S. E. 561. In the case under consideration, the legality of the manner in which the defendant Morrisons' immediate grantor derived his title being directly assaulted, and, although purchased by said grantor at public sale under a decree of court, the regularity of the chancery proceedings under which said decree was obtained being challenged and brought in question by the plaintiff's bill, my conclusion is that A. S. Core was a necessary party to this suit, and should have been brought before the court, in order that he might protect his interest, and the questions raised might be properly determined. It cannot be said that said A. S. Core was a purchaser at a judicial sale under a decree of court, which sale was afterwards confirmed by a decree of court, and therefore he is protected under section 8 of chapter 132 of the Code, for the reason that the plaintiff, in his bill, alleges that there was no such decree and no such sale; and said Core, or those representing him, should be present, in order that they may have an opportunity of presenting the facts and placing the question at rest. And, having arrived at the conclusion that the decree complained of was entered in the absence of necessary parties, the same

must be reversed, and the cause remanded to the circuit court of Ritchie county for further proceedings to be had therein, with costs to the appellant.

(39 W. Va. 567)

BOGGESS v. RICHARDS' ADM'R et al.  
(Supreme Court of Appeals of West Virginia.  
Dec. 1, 1894.)

CONTRACT—MARRIAGE AS CONSIDERATION—LIMITATIONS—HUSBAND AND WIFE—PROFITS ON WIFE'S ESTATE.

1. Marriage in an antenuptial contract is a valuable consideration, and such contract cannot be impeached by existing creditors as fraudulent unless it be shown that both parties thereto participated therein, or had notice of fraudulent intent.

2. The statute of limitations, as provided in section 14, c. 104, Code, has no application to contracts founded on a valuable consideration, but is limited, by the wording of the statute, to contracts on consideration not deemed valuable in law.

3. A husband may engage in business with his wife's capital, in her name and on her credit, for her benefit; but if, owing to his skill and labor, large profits accrue therefrom over and above the necessary expenses and indebtedness of the business, including the support of himself, wife, and family, a court of equity will justly apportion such profits between his wife and his existing creditors.

(Syllabus by the Court.)

Appeal from circuit court, Harrison county. Suit by John R. Boggess against W. F. Richards' administrator and others. From a decree dismissing plaintiff's bill, he appeals. Reversed.

John Bassel, for appellant. Edwin Maxwell and M. M. Thompson, for appellees.

DENT, J. In the circuit court of Harrison county, at April rules, 1890, plaintiff filed his bill in chancery against the defendants, alleging, among other things, that on the 30th day of May, 1887, he obtained a judgment against the defendant Wilbur F. Richards for the sum of \$420, with interest from date, and \$22.70 costs, because of a libel published on the 12th day of July, 1884, which judgment was in full force and wholly unpaid; that said Richards, at the time of such libelous publication, was the owner of a large amount of property, but that on the 17th day of November, 1885, with intent to delay, hinder, and defraud the plaintiff, he entered into a pretended marriage contract with defendant, at that time Melissa McCleary, now Richards, by which, in consideration of marriage, he transferred and conveyed all his known property to her, she participating in his fraudulent intent; this contract was not admitted to record until May 26, 1886; that after the marriage said Richards retained possession of all said property, amounting to about \$7,000, and used and managed the same as though it were his own; that he was a practical printer, and with part of the money realized from said property, or rather with part of the property itself, he purchased the fully equipped

plant of the paper known as the "Clarksburg Telegram," and printed and edited a paper, and so used and managed the property conveyed by said marriage settlement that from about \$7,000 in 1885 it amounted to upward of \$14,000 in 1890, all due to the skill, labor, and management of said Richards; that with a part of the proceeds of said property he purchased, in his wife's name, a certain lot, and erected a valuable house thereon,—all which he alleges was in fraud of his rights as a creditor of said Richards, and was fully participated in by his said wife; and he prays for a sale of said property, and the payment of his debt, interest, and costs thereof. Numerous interrogatories are propounded for the defendants to answer. The defendants file their separate answers, under oath, to the bill and interrogatories, in which they virtually admit the facts as herein repeated from said answer, but deny all fraud or knowledge of fraud, or that any of the various transactions fully set out in said answers were made or done with any fraudulent intent. All of plaintiff's interrogatories are fully and at length answered. Plaintiff replied generally. Afterwards, by leave of the court, and over the objection of plaintiff, respondents filed a supplemental answer setting up and pleading the statute of limitations. At the September term, 1893, the court entered a final decree dismissing plaintiff's bill, from which this appeal is taken.

The first question presented is as to whether the court erred in allowing the defendants to file a supplemental answer pleading the statute of limitations. Section 14, c. 104, of the Code, on which defendants rely, is in these words: "No gift, conveyance, assignment, transfer or charge not on consideration deemed valuable in law shall be avoided either in whole or in part for that cause only, unless within five years after it is made suit be brought for that purpose," etc. This section does not apply to contracts which are upon consideration deemed valuable in law, but is expressly limited to voluntary contracts. The contract in this case was not only on consideration deemed valuable in law, but on the highest consideration known to the law, to wit, marriage. As has been said, though the common law abhors every sort of cheating, it loves matrimony. The law regarding such contracts is laid down in these words, to wit: "However much a man may be indebted, an antenuptial settlement, made by him in consideration of marriage, is good against his creditors, unless it appears that the intended wife was cognizant of the fraud. And, even though it conveys his whole estate, it is not simply, on that account, void; and, when a settlement is made in contemplation of marriage, the law presumes it was an inducement to it, and the courts cannot assume the contrary to be the fact." *Herring v. Wickham*, 29 Grat. 628; *Coutts v. Greenhow*, 2

Munf. 363. Such being the nature of this contract, it could not be avoided under section 2, c. 74, of the Code, but only under section 1 of the same chapter, because it was made with intent to delay, hinder, and defraud, and the statute of limitations is no bar to such a charge. See *Hutchinson's Ex'x v. Boltz*, 35 W. Va. 754, 14 S. E. 267. The statute of limitations was improperly pleaded, but was the plaintiff prejudiced thereby? Mrs. Richards, née McCleary, was a purchaser for valuable consideration, and, to make the property transferred to her liable, it must be alleged and shown that she had notice of or participated in the fraud, if any, of her intended husband. This the plaintiff has wholly failed to do, and, for all the purposes of this suit, the marriage contract must be held valid, binding, and unimpeached, and all the property transferred thereby as the sole and separate property, including the rents, issues, and profits thereof, of the female defendant, wholly free and acquit from any liability to her husband's indebtedness.

The plaintiff objects that this contract, not being identified by date in the certificate of acknowledgment, was improperly admitted to record. In the case of *Adams v. Medsker*, 25 W. Va. 127, this court has completely answered this objection.

The plaintiff further insists that, the property in controversy being the property of a married woman, notwithstanding the fact that the bill propounds interrogatories under oath, and the answer responds to the interrogatories under oath; that because there is a general replication,—under the holdings of this court the female respondent must prove that the property was purchased with funds not derived from her husband. Now, the bill alleges, and the respondent admits, that the funds were derived from her husband, and states the manner of the derivation directly in accord with the discovery sought. If the answer admits the facts stated in the bill, what is left for the defendant to prove? The defendant admits that she received the property through the very transactions the plaintiff alleges she had with her husband, but she denies that these transactions were fraudulent, either in fact or law. The facts being undisputed, it devolves upon the court to say whether they are such that fraudulent intent on the part of the husband, with fraudulent knowledge on the part of the wife, can be inferred, or, if not, whether constructive legal fraud can be imputed to her. Taking the whole history of the transactions of the husband as set out in this case, it clearly appears that it was the intention of the defendant husband to place his property in such condition that the plaintiff could not possibly succeed in making his judgment; and nowhere is this more apparent than in the duplicate answers which he has had prepared—one, no doubt, as agent, and the other as principal—

for himself and wife, and filed herein. It is plain from these answers that the husband, either through information from his legal advisers, or through his own study of the subject, believed that he had all the property in controversy thoroughly armor-plated against the assaults of the plaintiff, and therefore he appears to take special delight in showing how skillfully he has managed to increase the value of his wife's separate estate magnificently, and yet secured it beyond the reach of the clutches of his own creditors. The exultation at the success of his scheme and the fraudulent intent of the husband are nowhere more apparent than when he gives utterance to the following false profession: "Respondent regrets that his financial circumstances are so poor, but he hopes that with the blessing of good health, industry, and economy he will yet be able, not only to pay his legal debts, or to have property of his own out of which the same may be made or paid, for it is disagreeable and annoying to respondent to owe any debt to any person." This, coming from a man who in the same answer apparently prides himself on the fact that by his ingenuity, skill, and good management he has succeeded in getting over \$14,000 in his wife's name in less than five years, besides supporting his family, and who owes less than \$1,500, evidences a lack of sincerity on his part that amounts to almost positive proof that he considers himself under no obligation to pay the plaintiff's claim, but justified in evading it in any available manner. It is true, this debt was not one of his own contracting; but the law has made him liable for it, and therefore it is just as binding on him, as a law-abiding citizen, as any other obligation. But it is not so with the defendant wife. She is guilty of no fraud in fact, nor has she been shown to have any knowledge of his fraudulent intent; on the contrary, she appears to be wholly innocent even from the suspicion of actual fraud; and the only question is whether the law will impute to her fraud from the fact that she became the substantial beneficiary of her husband's fraudulent purpose.

Having reached the conclusion that the marriage settlement was good and valid from at least the day of its recordation, May 28, 1886, against all creditors of the husband, both existing and subsequent, it becomes unnecessary to investigate any of the transactions of the husband except such as were subsequent to that date. The property which became the sole and separate property of the defendant wife by virtue of said contract was as follows, to wit: Three notes known as the "Hustead notes," amounting to \$3,250; three notes known as the "Thompson notes," amounting to \$1,700; a judgment against E. T. Baldwin, \$600, one note on Joseph Murray, \$1,000; one note on Stewart Webster, \$1,000; also, a rental interest in a two-story brick block on Main street, Clarksburg, W.

Va. This property the husband took possession of, as he had a right to do under the law, and continued to manage for her use and benefit, and realized therefrom the sum of \$6,520. The amount that was never collected does not appear, but it was certainly something which under the marriage agreement he would be in duty bound to make good to her, as it is to be presumed that when he made the transfer in consideration of marriage he represented that all said claims were as good as gold, after the usual manner of men under similar circumstances. He made several investments in real estate and gas and electric-light stock, which were all legitimate, and from none of which she received much more in return than the principal invested. It is therefore unnecessary to consider any of these, as there is no pretense that any of them could be treated as fraudulent, with the single exception of the transaction in relation to the newspaper plant. About the 1st day of April, 1886, the husband, having caused the newspaper plant known as the "Telegram" to be sold under a deed of trust given to secure the Hustead notes of \$3,250, and the same having been bought in for the wife at the price of \$1,400, credited on said notes, began, in the name and as the agent of his wife, to carry on said newspaper business, and continued the same up until the 1st day of December, 1890, when he sold the whole plant, including the balance of the lease on the building, for the sum of \$3,500, which he turned into his wife's estate, and which probably fully compensated her for her loss on the Hustead notes. In the answer of the wife, repeated in the answer of the husband, is the following statement: "Respondent had confidence in the honor and integrity of her said husband as her agent, and committed to him, as her agent, the conduct and management of said newspaper, its presses, etc., to a very great extent, depending upon his honesty and integrity and skill in the correct and proper management of said newspaper, presses, etc., in her interests and as her property and business;" and "respondent, in answer to the ninth interrogatory of plaintiff, says that the amount of profits made from the Telegram newspaper property, including job work connected with said newspaper office, from the 1st day of April, 1886, until December 1, 1890, was at the average rate of from \$1,200 to \$1,500 per annum. Respondent is satisfied that the amount of said profits per annum during the time last aforesaid was upon an average not less than \$1,200, nor more than \$1,500; so that the aggregate amount of said profits made from the said Telegram newspaper, including the job work connected with said newspaper office, was, as respondent verily believes, during said last-mentioned time, not less than \$5,600, nor more than \$7,000." In another part of their separate answers it is stated that part of this amount was used in support of the family, leaving

a net balance, however, of not less than \$5,000. Now, it is easy to be seen that the husband's labor and skill, he being a practical and efficient printer, produced this large profit. The question presents itself, has a husband who is skilled in any particular branch of labor the right to bestow all his time, labor, and skill to the increase of his wife's separate estate, and allow his just legal obligations to go unpaid? It has been settled by numerous and repeated decisions that it matters not how much of his labor and skill a man may devote to his wife's property; and, although it may be changed from a rude to a manufactured state, it remains her property still, and cannot be levied on by execution or attached for his debts. *Miller v. Peck*, 18 W. Va. 99; *Atwood v. Dolan*, 34 W. Va. 563, 12 S. E. 638.

A court of law affording no remedy, what will a court of equity do? In *Bump on Fraudulent Conveyances* (page 250) the law is stated to be: "An arrangement by which the husband acts as his wife's agent without any compensation, or for a compensation that is insufficient, is in effect an attempt to make a voluntary conveyance of the products of his skill and labor in her favor, and is void against his creditors;" and on page 251: "A debtor may, therefore, bestow his skill and labor upon his wife's estate, so far as may be reasonably necessary, without rendering the products liable to his creditors. He may do even more than that. As his first obligation is to support his family, the products of the land will not be liable for his debts until that obligation is discharged, and even then they will not be liable unless the portion not needed for the support of the family is the result of his labor; but, if there is any such surplus that is the result of his skill, there is no reason why it may not be reached in equity, and appropriated towards the payment of his debts." *Shackleford v. Collier*, 6 Bush, 150; *Murphy v. Taylor*, 16 Ohio St. 509. In the latter case it is said: "The arrangement between the husband and wife, whereby he undertook to carry on business in her name and for her exclusive benefit, was in effect an attempt to make a voluntary settlement of the products of his skill and industry in favor of his wife." In the case of *Penn v. Whitehead*, 17 Grat. 527, Judge Moncure says: "Now, I take it to be a sound principle of law that by no agreement or arrangement between husband and wife alone, founded on no valuable consideration, can the profits of the future labor of either of them, much less of the husband alone, be secured to the use of them or either of them, or their family, in exclusion of the claims of their creditors existing at the time such agreement or arrangement is made; and any such agreement or arrangement entered into for the purpose of having that effect would be a mere contrivance to hinder, delay, and defraud creditors, and would be null and void as to such creditors, according to the true intent and mean-

ing, if not the literal terms, of the statute." "No one will contend that such profits can thus be secured to the husband alone, in exclusion of the claims of his creditors. Nor can they any more be thus secured to the use of his wife or family, at least in exclusion of the claims of existing creditors." "To be sure, the law cannot, or does not, compel a man in advance to labor for his creditors." They have no lien or mortgage on his person. "And if he chooses to be so dishonest as to idle or give away his time, rather than labor for the means of paying his debts, the law cannot and does not attempt to prevent it." "A man is not apt to give away his labor, or even idle away his time. If he is not honest enough to wish to pay his debts, self-interest prompts him to do something, and to try to secure to himself and his family the profits of his skill and labor. This motive of self-interest is generally sufficient, without being assisted by legal means, to stimulate a man into action, and prevent him from throwing or giving away his time, instead of trying to make a profitable use of it; and the law, instead of attempting to apply such stimulus, contents itself with subjecting any profit he may make for himself or family to liability to the payment of his debts as aforesaid." And in the case of *Trapnell v. Conklyn*, 37 W. Va. 242, 16 S. E. 570, this court stated the law as follows: "(4) The fact that an insolvent husband voluntarily bestows his labor and skill in the business of farming carried on by his wife upon land which is her separate property, and operated with her separate property, will not, in the absence of fraud, render the products the property of the husband, and liable for his debts. If such products, after the support of the family, leave a surplus in property attributable to his skill and labor, equity would make a just apportionment between wife and creditors."

From these and other numerous authorities examined, there can be no other conclusion reached than that if a man skilled in any employment does business in her name with the capital furnished by his wife, and large profits over and above the necessary expenses of the business, including the support of himself, wife, and family, accrue therefrom, owing to his skill and experience, and he turn such profits over to his wife or invest them in property for her, a court of equity will treat such arrangement as fraudulent, and will make an equitable distribution of such profits between the wife and existing creditors of the husband. Not that the wife is guilty of any actual fraud, but her hand, be it ever so chaste, is polluted by receiving as a gift from her husband the funds which he is endeavoring to fraudulently conceal, under the cloak of her separate property, from the searching eyes of his creditors. According to the admission of both of the defendants doing business with his wife's capital, and in her name and for her benefit, owing to his skill, labor, and management,

the husband, during a period of four years and nine months, succeeded in making a net profit of not less than \$5,000 above all necessary expenses, including the support of himself, wife, and family, partly supplemented by the revenues of the husband from other sources. The only way that the law furnishes for the ascertainment of how much of this handsome profit is due to the skill and labor of the husband is to deduct therefrom the legal interest on the amount of the capital invested. The plant, which was worth much more, was purchased for the wife at the price of \$1,400; but as she lost the balance of the Hustead notes of \$3,250, and the plant was afterwards sold for her at the price of \$3,500, it is no more than equitable that her investment should be treated as this latter sum. The legal interest on \$3,500 for four years and nine months—the time the business was carried on in her name—is \$997.20, which deducted from the \$5,000 leaves the net balance of \$4,002.80, representing the husband's skill and labor, which he voluntarily and gratuitously merged into her separate estate for the evident purpose of evading the legal liabilities incurred by him, though small in amount, for his wrongful and illegal treatment of the plaintiff and others. He justifies his course for the reason that they were not debts of his own contracting, but liabilities imposed upon him in legal proceedings in which he was not dealt with justly, and therefore he is under no moral obligation to pay them, but has the right to fight the law with the law, and evade them if possible. The maxim of the moral law is tooth for tooth, eye for eye, reputation for reputation, property for property, and life for life, or what is called "restitution in kind." Human ingenuity and wisdom could not devise a practical plan for carrying out this maxim without the infliction of the greatest cruelties, and oftentimes the greatest injustice. So, leaving the equality which this law demands to the final arbitrament of Him who can weigh the motives and intentions, and from whom no secret is hidden, and on whom no deception can be successfully practiced, the common law, in cases of injury to property, person, or reputation, provides a pecuniary reparation in the way of compensation to the injured party, and also furnishes the means of ascertaining the damage inflicted; and, when that is once fixed and determined by its judgment, it regards the duty of payment just as sacred and binding as any voluntary obligation assumed by the party, nor will it lend its aid in any manner whatever to him who is endeavoring to hinder, delay, and defeat the collection of such a judgment. Owing to its feeble administration, it may sometimes appear impotent; but inconsistency and duplicity are no part of its nature. On the contrary, it hates fraudulent pretenses and practices, and loves honesty and fair dealing, and will furnish every means to ferret out and bring

to light the hidden resources and property of him who is endeavoring to defeat the collection and escape the payment of a legal obligation, be it the result of a contract self-imposed, or a forfeiture for a wrong self-committed. Since the institution of these proceedings, death has summoned the husband defendant before a higher tribunal, where we can expect equal retributive justice mercifully meted out; but the property which resulted from his skill and labor, and with which he should have satisfied his legal obligations, is still in the hands of, and commingled with, the estate of his widow, and the plain, though painful, duty devolves on this court of requiring her to surrender a sufficient amount thereof to pay the plaintiff's judgment. Her coverture being removed, there is no legal barrier to a personal decree against her; but, if she prefers the proceedings to continue against the property in controversy, it will be proper and necessary for the plaintiff to amend his bill, and bring James M. Lyon, who appears to be a purchaser, not pendente lite, of said property, before the court, that he may defend his interest therein. The decree of the circuit court is therefore reversed, and this cause is remanded for further proceedings in accordance with this opinion and the rules of law and equity.

(39 W. Va. 578)

## VANCE v. RICHARDS' ADM'R et al.

(Supreme Court of Appeals of West Virginia.  
Dec. 1, 1894.)

CONTRACTS—CONSIDERATION—LIMITATIONS—HUSBAND AND WIFE.

Same as 1, 2, and 3 in *Bogges v. Richards' Adm'r*, 20 S. E. 599.

(Syllabus by the Court.)

Appeal from circuit court, Harrison county. Bill by Lee H. Vance against W. F. Richards' administrator and others. There was a decree for defendants, and plaintiff appeals. Reversed.

John Bassel, for appellant. Edwin Maxwell and M. M. Thompson, for appellees.

DENT, J. In this case the plaintiff filed a bill against the defendants to enforce payment of a judgment in his favor against the defendant Wilbur F. Richards, now deceased, and it is in all respects similar to the case of John R. Bogges against the same defendants, decided at this term of court, except that it is by a different plaintiff to enforce a different judgment. The same principles of law must govern both cases, and reference is made to the opinion in the former case for the reasons that govern and determine this. See case of *Bogges v. Richards' Adm'r*, 20 S. E. 599. The decree complained of is reversed, and this cause is remanded to the circuit court, to be further proceeded in and determined according to the opinion aforesaid and the rules of law and equity.

(39 W. Va. 497)

**SHINN et al. v. BOARD OF EDUCATION et al.**(Supreme Court of Appeals of West Virginia.  
Nov. 24, 1894.)**SCHOOL MONEY—ORDER BY BOARD OF EDUCATION  
—VALIDITY—PAYMENT IN SUBSEQUENT YEAR  
—EQUITY PRACTICE—NEW PARTIES.**

1. A court of equity has jurisdiction of a suit by and on behalf of the resident taxpayers of a school district brought to set aside and hold for naught a contract made by the board of education so far as the same creates and incurs a debt to be paid out of the school money of subsequent years.

2. The following order is upon its face an order for the payment of money out of the building fund levied for a year subsequent to the year in which the debt was incurred, and is not negotiable according to the law of this state. Order No. 44 reads as follows: "Ripley District, W. Va., Sept. 25, 1891. Sheriff of Jackson County: Pay to the order of Educational Aid Association, or bearer, four hundred & twenty dollars, and charge to the building fund of Ripley district. By order of the board of education. Due Dec. 1st, 1892. (Without interest.) J. F. Coast, President. I. S. Little, Secretary. \$420.00."

3. Where a person who files his petition asking to be admitted as a party defendant in a pending suit in equity, in which no allegation is made naming or referring to him in any way, and no relief is prayed against him, and he is admitted to become such party defendant, he does not become a party in the cause until he has been made a party by some allegation in the bill as amended.

4. The board of education of a school district is a corporation created by statute, with functions of a public nature expressly given, and no other; and it can exercise no power not expressly conferred, or fairly arising from necessary implication, and in no other mode than that prescribed or authorized by the statute.

5. A case in which certain points of equity practice are discussed and considered.  
(Syllabus by the Court.)

Appeal from circuit court, Jackson county.

Injunction by and on behalf of the citizens and taxpayers of Ripley school district, restraining and enjoining the payment of three certain drafts, for \$420 each, on the ground of illegality. From an order overruling a motion to dissolve the injunction, Thomas E. Davis, defendant, appeals. Affirmed.

Leonard & Archer and Warren Miller, for appellant. Wm. A. Parsons, for appellees.

**HOLT, J.** This is an injunction by and on behalf of the citizens and taxpayers of Ripley school district to restrain and enjoin the payment of three certain drafts, for \$420 each, on the ground of illegality. On the 15th day of November, 1893, defendant Thomas E. Davis moved to dissolve the injunction, which motion the court overruled, refusing to dissolve same, from which order this appeal was allowed. Code, c. 135, § 1, cl. 7. Stating the contract, etc., as if they were valid, the facts are as follows: On the 25th day of September, 1891, the board of education of Ripley district, in Jackson county, entered into a contract with one of the defendants, viz. the Educational Aid Association

of Chicago, for the purchase of 42 sets of "Public School Study Made Practical," to be delivered on board the cars, and shipped to J. F. Coast, Jackson C. H., Jackson county, W. Va., on the 15th day of October, 1891, in consideration of which the board of education agreed and bound itself to pay to the Educational Aid Association \$1,260, being \$30 per set, to be paid in the following manner: \$420 due 1st December, 1892; \$420 due December 1, 1893; and \$420 due December 1, 1894,—and the president and secretary of the board were authorized and directed to issue, sign, and deliver to the Educational Aid Association, or its agents, orders in due form on the sheriff of Jackson county payable out of the building fund of the said district, for the said \$1,260, payable as aforesaid, and this contract was entered on the record of the board. The president and secretary, on the same day issued, signed, and delivered to the agent of the Educational Aid Association orders No. 44, No. 45, and No. 46, which are as follows:

"No. 44. Ripley District, W. Va., Sept. 25, 1891. Sheriff of Jackson County: Pay to the order of Educational Aid Association, or bearer, four hundred & twenty dollars, and charge to the building fund of Ripley district. By order of the board of education. Due Dec. 1st, 1892. (Without interest.) J. F. Coast, President. I. S. Little, Secretary. \$420.00."

"No. 45. Ripley District, W. Va., Sept. 25, 1891. Sheriff of Jackson County: Pay to the order of Educational Aid Association, or bearer, four hundred & twenty dollars, and charge to the building fund of Ripley district. By order of the board of education. Due Dec. 1st, 1893. (Without interest.) J. F. Coast, President. I. S. Little, Secretary. \$420.00."

"No. 46. Ripley District, W. Va., Sept. 25, 1891. Sheriff of Jackson County: Pay to the order of Educational Aid Association, or bearer, four hundred & twenty dollars, and charge to the building fund of Ripley district. By order of the board of education. Due Dec. 1st, 1894. (Without interest.) J. F. Coast, President. I. S. Little, Secretary. \$420.00."

They are not negotiable, even apart from lacking the statutory requirement of being payable at a bank, etc. (section 7, c. 99, Code), for the intention in such case, as a general rule, is to authorize the payment, and furnish vouchers to the proper disbursing officers, and not to put negotiable instruments in circulation; and they do not cut out equities as against the corporation, or in this case as against the resident taxpayers, and on the ground that there is no implied authority in such officers to execute negotiable instruments. See 1 Daniel, Neg. Inst. (4th Ed.) § 427; Stienbeck v. Treasurer, 22 Ohio St. 144; School Directors v. Fogleman, 76 Ill. 189; State v. Huff, 63 Mo. 288; 2 Beach, Pub. Corp. § 799; Fox v. Shipman, 19 Mich. 218.



On the 14th day of November, 1891, F. M. Durbin, of the city of Parkersburg, for a valuable consideration, sold and delivered the three orders to the appellant, Thomas E. Davis. They bear no indorsement. On the 18th day of January, 1893, the plaintiffs filed their bill, and obtained from the judge in vacation, on the 19th day of January, an order of injunction, as prayed for, restraining the late sheriff, James M. Poling, and the present sheriff, I. M. Adams, from paying said sum of \$1,260, or said orders, or any part thereof. The material grounds upon which the plaintiffs base their right to the injunction in their original and amended bills are as follows: (1) The order making and setting forth the contract of purchase was illegal, because Commissioner D. L. Sayre, though present, did not concur, and he was necessary to constitute a quorum. The proceedings do not show upon their face who called the meeting and directed notice to be given. That none in fact was given. That, therefore, the meeting was illegal, and its proceedings void. (2) The board had no authority under the law to use the building fund in the purchase of such things as those designated as "Public School Study Made Practical." (3) It was a debt directed to be paid out of the school money of subsequent years, and was therefore unlawfully incurred, in violation of the school law (section 45, c. 45, Code). The defendant Thomas E. Davis was made a party defendant on his own petition, and answered that he purchased the orders in controversy for a valuable consideration; that a levy was made for the payment of the order No. 44, due December 1, 1892; that plaintiffs, before that time, had notice of defendant's purchase; that the levy was legal; that each plaintiff had notice of the levy, and had paid the assessment before the suit was brought, and they are therefore estopped as to the order No. 44, for \$420; that, having notice, they made no attempt to supersede the levy; and that their remedy at law by writ of superseas was ample. Defendant denies that the meeting was illegal or irregular, but charges that the orders were legally and regularly issued in due course of business, under sanction of law, at a special meeting of the board of commissioners, regularly and duly called, a majority being present, and all having had due notice of the time and place, when the contract was made, and the order setting forth the same was entered on the record of the board; that the articles so purchased were such as the board was authorized to purchase; that they were delivered, accepted, placed in the schools, and have since been in use; that the orders were negotiable, and not in excess of the amount authorized by law; that the board had a right to create a debt payable in one, two, and three years; and that there was at least \$1,260 in the hands of the sheriff on the 25th day of September, 1891, belonging

to the building fund, not otherwise appropriated. The plaintiffs replied generally, and the issues were made up.

Several questions of pleading and practice are raised in this record, and discussed by defendants' counsel, which call for some consideration. On the 10th day of March, defendant Thomas E. Davis filed his petition, alleging that the agent of the defendant the said Educational Aid Association had placed the three orders in the bill and proceedings mentioned, amounting to \$1,260, the payment of which had been enjoined, in the hands of F. M. Durbin, to be sold; and that he had bought the same, and paid the cash therefor, and was now the owner; and that defendant the Educational Aid Association had no longer any interest whatever in these orders. Thereupon the court ordered that Davis be admitted a party defendant to the suit, with leave to plead, demur, or answer. Davis appeared by attorney, waived process, and tendered in open court his written demurrer to the bill, which was ordered to be filed and set down for argument, and also filed his answer, and moved to dissolve the injunction. Plaintiffs excepted to this answer, and defendant J. F. Coast, president of the board of education, filed his answer. On the 13th day of March, 1893, defendants I. S. Little, secretary of the board of education of Ripley district, and defendant D. L. Sayre, a commissioner of the board, filed their answers; and, the matters arising on the demurrer of defendant Davis having been argued and submitted, the court overruled the demurrer. Therefore, plaintiffs tendered in open court an amended and supplemental bill, and moved to file the same, to which defendant Davis objected, and indorsed his objection; and the court proceeded to consider the exceptions of plaintiffs to the answer of defendant Davis, overruling them, and also overruled the objection taken to the filing of plaintiffs' amended and supplemental bill, ordered the same to be filed, and defendant Davis took time to demur, plead, or answer, and plaintiffs took time to consider the answer of defendant Davis to the original bill. On the — day of November, 1893, defendant Davis filed his answer to plaintiffs' amended and supplemental bill, filing the orders in controversy as exhibits therewith; also a copy of the order of the board of education which directed them to be issued, signed, and delivered. Thereupon plaintiffs, on the — day of November, 1893, filed their amended bill No. 2, and filed, as an exhibit therewith, one of the 42 sets of "Public School Study Made Practical," in the bill and proceedings mentioned. To this bill, also, defendant Davis, on the 13th day of November, 1893, indorsed his objections and exceptions, and also tendered his demurrer thereto in writing. On the 15th day of November, 1893, the cause came on to be heard, and the court overruled the objection to plaintiffs' amended

and supplemental bill No. 2, and permitted the same to be filed; and defendant Davis demurred thereto, and, plaintiffs having joined therein, the same was set down for argument, and, being argued and submitted, the court overruled it, and the plaintiffs tendered the affidavit of James M. Poling, and exhibits filed therewith, and the joint affidavit of William A. Parsons, J. A. Woodell, and William G. Hickie, and papers exhibited therewith as parts thereof, all of which had been tendered in open court at a former day of the term, to be read for plaintiffs at the hearing of defendant Davis' motion to dissolve the injunction, to the filing and reading of which defendant Davis had indorsed his exceptions; and the court overruled the exceptions, and permitted the affidavits to be filed. Thereupon the court proceeded to hear the motion of defendant Davis, made at a former day of the term, to dissolve the injunction theretofore awarded, and it, being argued, was submitted. On consideration thereof, the court overruled the motion and refused to dissolve the injunction, but retained and continued the cause; and this, under our present statute, gave defendant Davis the right to apply for an appeal, which was asked for and obtained.

It is not necessary to consider defendant Davis' demurrer to the original bill; for, when the prayer of his petition to be made a party defendant was allowed, the amendment of plaintiffs' bill by reason thereof became necessary, for up to that time it contained nothing to justify a decree against him, for it proceeded in its allegations on the supposition that defendant the Educational Aid Association was still the owner and holder of the three school drafts, and was seeking to collect them from the late and present sheriff of Jackson county, out of the building fund of Ripley district. Defendant Davis had made an amendment necessary to some extent before there could, in strict propriety, be entered any order on his behalf or in his favor; and for the same reason the amended and supplemental bill, being sworn to, and filed by leave of the court, did not operate as a dissolution of the injunction or require a new order.

In our practice we are not careful to observe some of the distinctions between bills in naming them,—as, for example, between a bill of amendment and supplemental bill,—but we take them to be what they are in fact, without regard to the name given them. See *Sturm v. Fleming*, 22 W. Va. 404; *Laidley v. Merrifield*, 7 Leigh, 346. In this case a change of interest and ownership of the orders disclosed by defendant Davis' petition did not make a supplemental bill proper, for it appeared that such change of interest had taken place before the institution of the suit. If I understand defendant's objection or exception to the filing of plaintiff's amended bill, it is that it could only be done in the

clerk's office in vacation at rules, and there have process issue thereon, because defendant had appeared and answered that it can only be done in that way, and without leave of the court, but subject to be dismissed if improperly filed. In this the defendant, if not misapprehended, is mistaken. Section 12, c. 125, provides that plaintiff may of right amend his bill after appearance, if substantial justice will be promoted thereby. But, if such amendment be made after appearance of defendant, the court may impose such terms upon the plaintiff, as to continuance of the cause and payment of the costs of such continuance, as it may deem just. This may, by permission, be made by change, etc., in the original bill; but, after appearance, it should be made by distinct and separate formal amendment or amended bill.

A pleading can be filed in court, process thereon may be awarded in court, and made returnable to court (see section 2, c. 124), if it does not run longer than 90 days; or it may be, and generally is, sent to rules, with award of process. The amended bill, after defendant's appearance, answer, etc., may be presented to the court, with leave asked to file the same, and it will be granted on proper cause shown, and due notice to the other party; or leave to file will be given without notice, subject to defendant's right to have the same dismissed after his objection, if it is shown to have been improperly filed. Another reason for presenting it in court is it is an amended bill of injunction, which, among other things, prays that the prayer of the original bill of injunction may be granted, etc. It is sworn to, and plaintiff did not wish to run any risk of its operating as a dissolution of the injunction, or as grounds for its dissolution, by filing it without leave at rules. See 1 Daniell, Ch. Pr. (6th Am. Ed.) top page 424.

Defendant also objected because it was tendered after his motion to dissolve. In that there might have been some force if his motion to dissolve had not been made before he was properly a party defendant to the suit, as he only became so so as to have a standing in court as a defendant, in a position to move to dissolve, after the filing of plaintiffs' amended bill making him a party defendant, and making some allegation in reference to him such as was here made. Plaintiffs further say that they have learned, since the filing of defendant Thomas E. Davis' answer in this cause, that he is the owner of the said three orders, of \$420 each. They therefore charge that said Thomas E. Davis owned the said three orders at the time this suit was commenced, and has since owned and now owns the same, etc., and pray that defendant may bring said three orders into court, etc. Therefore there was certainly nothing irregular or improper in the court's refusing to dismiss its bill, and in permitting it to be filed, the filing of which defendant had rendered necessary by the

granting of the prayer of his petition to be made a party defendant. It is a cardinal principle in equity that all persons materially interested, either legally or beneficially, in the subject-matter of the suit, must be made parties. *Rexroad v. McQuaine*, 24 W. Va. 32. And when, as in this case, the court orders him to be made a party defendant, until and unless the original bill is amended so as to contain some allegations against him, or in regard to him, the court could render no decree against him; and, if it did so, such decree would be a mere nullity. See *McCoy v. Allen*, 16 W. Va. 724. Here defendant Davis is not named in the original bill. There is no allegation anywhere in it which bears upon him, or in any manner refers to him; nor is any decree prayed for against him. It is a solecism to speak of his answering or demurring to a bill of injunction in which he is not named, or moving to dissolve an injunction in which he does not by any inference appear to have any interest or concern. See *Moseley v. Cocke*, 7 Leigh, 226; *Ford v. Doyle*, 37 Cal. 346; *Newman v. Mollohan*, 10 W. Va. 503. And this depends upon the principle that all orders and decrees must be justified by the pleadings, and that a plaintiff can no more recover without sufficient averments in his bill than he can without proof of his averments properly made. *Pusey v. Gardner*, 21 W. Va. 469; *Bierne v. Ray*, 37 W. Va. 571, 16 S. E. 804.

This brings us to the demurrers. As we have already seen, this defendant, not yet being a party to the bill, had no standing in court. His demurrer to the original bill was futile and nugatory, and, if it were not, the filing of the amended bill had ipso facto the effect of disposing of it, without the court formally passing upon it; but the demurrer to the amended bill presents the same questions, and they are discussed by defendants' counsel on the theory that the scheme of the bill is to prevent and enjoin the illegal levy and collection and paying out of taxes in satisfaction of an illegal contract of purchase. Such, in my view, is not the purpose, at least not the direct object, of the plaintiffs' bill. It is true that they complain, and say that they are citizens, residents, and taxpayers of the school district of Ripley, in the county of Jackson; that they own a large amount of real estate and personal property situate and taxable in that district; and that each of them is a taxpayer therein. But this is only intended to give them a standing in court,—a right to sue; for they go on to say that the contract of purchase and the three orders to meet this obligation are illegal, and that the board of education undertook and attempted by its illegal contract, to create, and did thereby illegally and wrongfully create, a debt against the school district of Ripley, in favor of the defendant the Educational Aid Association, to the amount of \$1,280, payable in three installments, evidenced by

three orders, for \$420 each, now the property of defendant Thomas E. Davis; that thereby, without their knowledge, their taxes for the school year of 1892 were illegally increased to pay the first installment; but that they have not all paid the levy so made for the year 1892; and the prayer is, not that the levy or collection of any tax be restrained and enjoined, but the paying of it over, on a contract alleged to have been made in violation of law; that the contract itself may be set aside, and held for naught, and the orders given a provisional payment may be brought into court and canceled. Bearing in mind the frame of the bill, and the end to which it is adopted, and the consequent relief specially prayed for, will save us the discussion of several matters which, in my view, have no direct bearing on the question raised by the demurrer. The bill shows that, as taxpayers, plaintiffs are directly and peculiarly interested in setting aside an illegal obligation, made payable out of the building fund. It need not allege that plaintiffs have yet been assessed. In fact, they say they have not been assessed as to \$840. Of course, in that view, the sheriff could have no tax tickets in his hands, etc. They do not allege that they, without the injunction, would suffer irreparable injury, for that, it is likely, would not be true in the sense required when necessary to be alleged. They say nothing about avoiding multiplicity of suits; nor are they trying to avoid them, any further than the fact of bringing this one has that effect. It asks for no taxes to be refunded that have been paid; no injunction against the collection of any that have been levied, nor against the levying of any for any future year for any purpose, even for the purpose of paying this obligation in dispute. The demurrer to the original and amended bill was properly overruled; for, in my opinion, taken as a whole, they make a case for relief if made out by the proof.

It is also assigned as ground of error that the court, on the hearing of the motion to dissolve, permitted the plaintiffs to read, in support of their bill, two *ex parte* affidavits taken without notice. As generally used and understood, that constitutes the main distinction between a deposition and an affidavit. The one is evidence given under interrogatories, oral or written, taken down and certified by some officer duly qualified at a time and place of which the opposite party has notice; so that he may attend and cross-examine. And the giving of the evidence is compulsory on the witness. The affidavit is not compulsory on the witness, and therefore it might be useless to give notice. Its distinctive characteristic is that it is voluntary and *ex parte*. Notice, however, is often required and given. The affidavit may be filed by order of the court, as was done in this case; and then the court may, and often does, for cause shown, per-

mit the other party to cross-examine, and the testimony of the witness then becomes compulsory. See 1 Daniell, Ch. Pr. (6th Am. Ed.) p. 883, note. That kind of a notice operates to some purpose, and was given here. So that it cannot be said, in that sense, that these two ex parte affidavits were read without notice; and no doubt defendant could, for good cause shown, have obtained leave to cross-examine. Still, I should think notice of the time and place of taking the affidavit the better practice, and, if before an officer who can take them, it resolves it into a deposition; but, so far as I have observed, such has not been our practice. How far and with what effect ex parte affidavits may be read in support of the bill and of the answer pro and con on a motion to dissolve it is not easy to say. See 2 Daniell, Ch. Pr. (6th Am. Ed.) 1668, and note; Id. 1671; 2 High, Inj. (3d Ed.) §§ 1481, 1603 et seq.; *Williamson v. Jones* (W. Va.) 19 S. E. 436, 447; *Noyes v. Vickers* (W. Va.) 19 S. E. 429.

I do not see that the affidavit of James M. Poling, late sheriff, tends to contradict any record. It is to the effect that, when his settlements were made with the building fund of Ripley district,—on the 15th day of October, 1891, for the year 1890; on the 15th day of July, 1892, for the year 1891; and on the 15th day of July, 1893, for the year 1892,—if all the orders outstanding against the fund and then unpaid had been in, the respective balances against him would have been small, it being used as evidence tending to show that, after the settlements made, there were other unpaid orders to reduce the fund. However, in the view taken, it is not necessary to lay any stress upon either affidavit. The other affidavit describes the desk charts and large illustrated charts, and accompanying box and easel. The second amended bill files one set of these charts, etc., called in the contract of purchase "Public School Study Made Practical," as an exhibit with the bill, and alleges that all the other sets are like the one filed; and this amended bill had no other purpose, and the affidavit was intended to describe them as a matter of convenience, and also to show that they are not a part of the series of charts and text-books prescribed by section 58 of chapter 45 of the Code. Where the character of the chart and map is a material question in controversy, and it speaks for itself on the point, I see no reason why it may not be made an exhibit, and in that way, as it then requires no proof unless called for by the answer, and also be described by those who have examined them for the purpose used, viz. on a motion to dissolve.

The main objection of counsel to these affidavits is that they were read on final hearing. In this I think they are mistaken, and have misconceived the nature and effect of the order of the court, for it says that "defendant's motion to dissolve the injunction

is overruled and disallowed, and this case is continued," and there has not yet been any other hearing than on defendant's motion, nor any final decree. It is plain to see from the language used that the circuit judge was careful to avoid the possibility of his having overruled the motion to dissolve being construed into anything savoring of making it perpetual. That question was left open. The injunction still stands (see 2 High, Inj. [3d Ed.] § 1576) until further order, awaiting the final hearing.

At length we reach the merits. (1) Were these charts such things as the board was authorized by law to buy? (2) And, whether authorized or not, were the manner and the time of payment lawful? Chapter 45, on "Education," comprising more than 100 sections, is our Code on the subject. See Code (Ed. 1891) p. 359, and chapter 26, p. 75, Acts 1893; and the same published, with notes of decisions (1894) by Virgil A. Lewis, Esq., state superintendent of free schools. Section 45 of chapter 45 reads as follows: "It shall not be lawful for the board of education of any district or independent school district to contract for or expend in any year more than the aggregate amount of its quota of the general school fund, and the amount collected from the district or independent school district levies of that year, together with any balance remaining in the hands of the sheriff or collector at the end of the preceding year and such arrearages of taxes as may be due such district or independent school district. Nor shall such board hereafter incur any debt to be paid out of the school money of any subsequent year." This has been the law since the 8th day of March, 1881. See Acts 1881, p. 168, c. 15. It commands, with a directness and brevity that has but one meaning: "You shall not incur now any debt to be paid out of the school money of any subsequent year." The policy intended to be subserved by this command is the result of widespread observation and long-continued experience. These taxes are the lifeblood of the school system, and the current taxes of each fiscal year are needed for the current expenses of each year, the taxes of the subsequent year for the current expenses of the subsequent year, and by no sort of circumlocutory shift or device shall they be treasured upon and used to pay the debt of any previous year's contracting. This is a vital part of the fiscal affairs of the school system, commanding and obligatory upon those who deal and contract with the board, as upon the board themselves; and not the one more than the other can plead ignorance of this law. Its hardship and inconvenience, in special cases, such as building new houses in the independent districts to meet the wants of enlarged and growing schools, has been for several years a subject of common observation and remark. Yet this short, sweeping command of the general statute has thus far never been qualified, or

in the slightest relaxed, and when done, if at all, it is likely to be done with caution, guardedly, and with an eye to the danger of abuse. But we have to take this law as we find it, for the lawmaking power has thus far set their faces against permitting school moneys to be used and spent in anticipation of their levy and collection. But it is said that this was not intended. It is only a method of paying by installments, out of funds now in hand or in easy reach. That may be all right enough if the orders had in some way shown that they were to reach backward, and not forward, for the means of payment. But they do just the reverse. They could not have more explicitly indicated that they were payable out of the school money of subsequent years,—No. 44, on 1st day of December, 1892, out of the building fund of that year; No. 45, on December 1, 1893; No. 46, on December 1, 1894,—all without interest, and after the levy of that year has become due and payable. And this case illustrates another reason that no doubt had some influence in closing the door so tight against the temptation to waste and extravagance. All expenses incurred in the district in connection with the schools, and not chargeable to the "teacher's fund," are made a charge on the building fund. See section 38, c. 45. Can there be a doubt that these school orders are on their face payable out of the school money of subsequent years? They are all payable after the 15th day of October, in each year; and the defendant in this case claims and sets up, and the record for our purpose shows, that order No. 44, dated September 25, 1891, and due without interest on the 1st day of December, 1892, for \$420, was considered and levied for in laying the levy for the building fund for the school year 1892; and so it was intended to do, and will be done, as to the two other subsequent years, for that is their plain meaning and intent, as appears on their face. If it had said payable out of and chargeable to the present building fund of Ripley district, and not out of the school money of any subsequent year, and the contract of purchase had said the same thing in some way, then it could be said that the board did not at least intend to incur any debt payable out of the school money of any subsequent year. "The plain and commendable purpose of the provision is to make the available funds of each year pay the demands of that year, and to protect the taxpayer from indebtedness beyond what each year's means will pay." *Davis v. Board*, 38 W. Va. 382, 385, 18 S. E. 588; *Mayor, etc., v. Gill*, 31 Md. 375. And since this board of education of the Independent school district of Ripley, in the county of Jackson, is created by statute (see section 7, c. 45), it must depend upon the statute, both for its powers and for the mode of exercising them upon the true construction of the statute creating them. *Pennsylvania Lightning Rod Co. v. Board of Education* (1882) 20 W. Va. 360. It

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has no power derived from usage, and can exercise none not expressly conferred by statute, or which fairly arises by necessary implication. *Harris v. School Dist.*, 28 N. H. 61. Their functions are wholly of a public nature (*Board Ed. v. Board of Ed.*, 30 W. Va. 424, 4 S. E. 640), and must, to be valid, be exercised in the mode prescribed; they can exercise on the point here involved no discretion. Here the orders and the contract direct the time and mode of payment in such a way as to clearly indicate the school money of subsequent years as the source of payment, and as meaning that it has been so interpreted and acted upon in providing for the payment of the first order No. 44, for \$420.

These orders, as a mode of payment of a debt which by law was not payable out of the school money of any subsequent year, were in plain violation of law; and I do not deem it material to consider whether, putting this and that together that one or more of the treasurers may owe, there can be made up enough in hand and in easy reach to pay the debt incurred. When that is the case, let provision be made that it shall be paid out of that fund and out of no other; otherwise, it will be sure to fasten itself upon the fund prohibited, as it did in this case according to defendants' own showing.

Of the power to levy under certain special charters I need not speak. This general law (chapter 45) was intended to be of and within itself a Code, covering the whole subject; somewhat like chapter 50. And as it contemplates that these important and permanent schools may now have by gift or in any wise, and may hereafter come to have by purchase, libraries and philosophical and other apparatus, section 14 provides that the trustees shall visit the schools, and among other things see that these are kept in good order. I have no doubt that some schools have already acquired in that way the beginning of quite useful libraries. This law says: "Let them be taken care of, and kept in good order." But it is contended by plaintiffs' counsel that as long as the state refrains from buying for the school children their school books, and furnishing them without cost, you cannot go broadcast under this fourteenth section in buying for each of these schools \$1,200 sets of maps and charts, with easels, etc., to hold them, and books, etc., to explain them. It will be time enough for this when the law plainly authorizes it. That the present law does not. In section 38 it requires an annual levy for the building fund to provide school-houses and grounds, furniture, fixtures, and appliances, and keep the same in good order and repair; to supply said schools with fuel and all other things necessary for their comfort and convenience. It is contended that none of these embrace and signify such maps and charts as these to any greater extent or in any other fair sense than they can be held to embrace the ordinary schoolbooks and text-

books and charts; that no one contends for such latitudinous construction; that the schoolhouses, furniture, fixtures, and appliances required to be furnished and kept in good order and repair for the comfort of the scholars of the school do not embrace these charts and maps by any fair intendment; that the word "appliance," taken with its accompanying words means something adapted and used for the comfort of the pupils, and not a chart or map, as a means of teaching and instructing them after they have been made comfortable. There must be some limit to what the term "appliance" fairly embraces in such connection. The boards of education acting on the opinions of the several attorney generals of the state, have in many instances furnished their schoolhouses out of the building fund with various maps, charts, and dictionaries for reference by the teacher and pupils. I doubt whether \$1,260 is a reasonable expenditure for such things as these charts are described to be. But that is not the question. Are they such things as can be lawfully purchased, as the law now stands? This it is not necessary for us to decide; and such decision as we could, under the circumstances, make, would be likely to create uncertainty and confusion upon an important item of public expenditure. There are some lame places in the school law, I have no doubt; but the law ought not to be stretched by construction to cover them, but the proper authority should be left to apply the remedy, if needed.

Both plaintiffs and defendant Davis allege that, after the purchase of these maps and charts had been made, the board of education made, in the school year 1892, a levy for the payment of the order No. 44, for \$420, due and payable on the 1st day of December, 1892; that the plaintiffs have paid their taxes for that year, including such levy, etc. It is fair to presume that all or the most of it was collected by the sheriff before this injunction was awarded, and some of it may have been paid to defendant Davis before that time. How these facts are this record does not disclose, and therefore their bearing cannot be discussed.

We see no error in the decree complained of. The motion of the defendant to dissolve the injunction was properly overruled, and the injunction permitted to stand until further order to be made at the final hearing.

(39 W. Va. 491)

**WOLF et al. v. SPENCE.**

(Supreme Court of Appeals of West Virginia.  
Nov. 17, 1894.)

**ASSUMPSIT — PLEADING — AVERMENT OF PROMISE.**

In an action of assumpsit to recover damages for defective machinery which plaintiff had purchased, paid for, and returned as useless, the plaintiff must charge the promise, that the machinery would perform the work for which it was intended, positively, and not by way of recital.

(Syllabus by the Court.)

**Error to circuit court, Ohio county.**

Action by Theodore Wolf and others against L. Spence. There was a judgment for plaintiffs, and defendant brings error. Reversed.

Ewing, Melvin & Ewing, for plaintiff in error. J. B. Sommerville, for defendants in error.

ENGLISH, J. This was an action of trespass on the case in assumpsit, in the circuit court of Ohio county, by Theodore Wolf, W. E. Criss, and J. B. Murray against L. Spence, in which the damages were laid at \$2,500. On the 4th day of September, 1890, the defendant appeared by his attorney, and demurred to the declaration, and to each count thereof, in which demurrer the plaintiff joined, and on the 20th day of November, 1894, said demurrer was overruled by the court, and the defendant pleaded nonassumpsit, and issue was joined thereon. On the 9th day of December, 1892, the case was submitted to a jury, which resulted in a verdict for the plaintiff, assessing his damages at \$550. A motion was made to set aside the verdict, and grant the defendant a new trial, which motion was overruled by the court, and the defendant excepted, and judgment was rendered upon said verdict; and thereupon the defendant applied for and obtained this writ of error.

The declaration in the case under consideration contained three counts. In the first count the plaintiffs alleged: That on the 6th day of August, 1886, at the county of Ohio, the defendant, who then was a dealer in steam engines, entered into an agreement with them in which it was recited and agreed that the plaintiffs had on the 6th day of August, 1886, purchased of defendant one of his 10-horse traction engines, with certain appurtenances, therein described; and that plaintiffs agreed with said defendant, in the said agreement in writing, that they would furnish a wagon for the water box belonging to said machine, and would receive the said 10-horse traction engine, with its appurtenances, at the shop, and pay the freight charges on the same; and the said plaintiffs further agreed, in said agreement in writing with the said defendant, to pay to the said defendant, on or before the arrival of the machine, the sum of \$1,000 in three installments, as follows: \$334 November 1, 1886, \$333 November 1, 1887, and \$333 on the 1st day of November, 1888, for which amounts notes were to be executed, with satisfactory security, bearing interest at 6 per cent.; and the said defendant agreed in said writing with the plaintiffs to deliver the said machine at the depot or wharf in Martin's Ferry, Ohio, for shipment, on or before the 9th day of August, 1886, and to warrant it to do good work in threshing and cleaning grain, if properly managed, and to be of good material and well made, and to move itself and water tank on the roads in any reasonable place. That in pursuance of

said agreement in writing the defendant delivered to them, and they received from him, said engine and appurtenances, and that plaintiffs executed and delivered to the said defendant three negotiable promissory notes, in accordance with the terms of said agreement, each of said notes being signed by each of said plaintiffs, which notes the said defendant accepted as a settlement of the purchase money for said engine and its appurtenances. And plaintiffs averred that on the 6th day of August, 1886, and ever since, they have been, during the threshing season of each year, engaged, as partners and joint owners of said engine and appurtenances, in the business of threshing and cleaning grain for divers persons in and near the said county of Ohio, and that after the 6th day of August, 1886, plaintiffs repeatedly attempted to use and employ the said engine and appurtenances in and about said business, and when they so attempted to use it the same was properly managed by them, but that it did not do, and would not do, good work in threshing and cleaning grain, when properly managed, and was not of good material and well made, and did not and would not move itself and water tank on the road in any reasonable place, and wholly failed to do good work in threshing grain, when properly managed, and was of inferior, defective, and insufficient material, and was defectively, improperly, and insufficiently made, and wholly failed to move itself and water tank on the road in any reasonable place, of all of which the said defendant then and there had notice; and that by reason of the premises they had been greatly injured and damaged, and had sustained damage to the amount of \$2,500. In the second count the plaintiffs make the same averments as those contained in the first count, and in addition thereto allege that before they knew of the failures, defects, and insufficiencies of the said engine they paid the full amount of the principal and interest of the one of said notes which fell due on the 1st day of November, 1888, on which note Charles Seabright, to whom it had been assigned, obtained judgment against them,—laying the damages at \$2,500. In addition to the matters alleged in the first and second counts, the plaintiffs, in the third count, averred that the defendant warranted said engine and appurtenances to be of good material and properly made, and to be perfect in all respects, and to do good work, and to move itself and the water box on the roads; and that on the 6th day of August, 1886, and ever since, during the threshing season of each year, until some time in the year 1889, they were engaged, as joint owners of said engine and appurtenances, in the business of threshing and clearing grain for divers persons in the county of Ohio, and that after the 6th day of August, 1886, they repeatedly attempted to use said engine and appurtenances about their said work and

business, and that the same were not of good material and properly made, and would not do good work, and that said engine did not and would not move itself and appurtenances on the roads; and that when they discovered said defects and imperfections in said engine and appurtenances they returned the same to the defendant, and that they are now in his possession, and that before they knew of said defects and imperfections in said machinery they paid two of said notes to the defendant, and also paid and satisfied a judgment which Charles Seabright had obtained against them on one of said notes, which had been assigned to him, and that by reason of the premises they had sustained damages in the sum of \$2,500.

The demurrer in this case was to the declaration, and to each count thereof, and the first question to be considered is whether the circuit court erred in overruling said demurrer. The action is *assumpsit*, and in none of the counts is any promise on the part of the defendant directly alleged. In this action the promise is regarded as the legal cause of action. In the case of *Sexton v. Holmes*, 3 *Mumf.* 566, the court held that "the plaintiff in *assumpsit* must charge the promise by the defendant positively, not by way of recital only; for, if the declaration be defective in this respect, it is a fatal error, and not cured by verdict." The case of *Sexton v. Holmes*, *supra*, was somewhat similar to the one under consideration. In that case there was a written agreement for the sale of a tract of land, with special warranty, in consideration of the sum of \$300, which was to be paid in installments, which installments were to be secured. The declaration contained the following averment: "And the said plaintiff, in consideration of said agreement, and also in consideration that the said defendant had undertaken and faithfully promised to perform everything in said agreement on his part to be performed, promised and undertook to perform everything on his part to be performed"; and Judge Roane, in delivering the opinion of the court, said: "The court (not deciding upon any other point made or occurring in this cause) is of opinion that the judgment is erroneous, in this: that there is no promise or *assumpsit* sufficiently averred in the declaration. The judgment is therefore reversed, with costs, and judgment entered for the appellant." So, also, in the case of *Winston's Ex'rs v. Francisco*, 2 *Wash. (Va.)* 189, the same judge, delivering the opinion of the court, says: "Although an *assumpsit* is the very gist of the action, yet I would always incline to sustain a declaration where one is laid, however irregular the expressions to that effect may be, especially after a verdict. But it must be positively charged; otherwise, the declaration does not set out a sufficient cause of action to entitle the plaintiff to recover." The authorities upon this question are collated to some extent in

4 Rob. Pr. pp. 230, 231. It is there stated that "in an action of assumpsit the promise is the legal cause of action,"—citing *Phillipson v. Earl of Egremont*, 6 Adol. & E. (N. S.) 603; and on page 231: "The undertaking and promise, or what is equivalent thereto, must be positively charged. Though the latter part of a declaration had the words 'who, notwithstanding promising to pay said money,' etc., it was held in Virginia that these words did not amount to an averment of a promise. 'The promise,' said Judge Roane, 'ought to be directly averred, and not by way of inference,'"—citing *Winston's Ex'rs v. Francisco*, 2 Wash. (Va.) 187, and *Sexton v. Holmes*, 3 Mumf. 566. A declaration by the purchaser of a slave warranted to be sound, who was diseased at the time, and remained so until her death, is found in *Robinson's Forms*, on page 527, in which it is alleged that "the defendant undertook and faithfully promised the said plaintiff that the said slaves then were sound, and that, confiding in said promise and undertaking of the defendant, he bought said slaves and paid the purchase money, and then avers that the defendant did not regard his said promises and undertaking so made, but deceived and defrauded the plaintiff in this, to wit, that the said negro slaves were not sound," etc.; and the author cites *Brown v. Shields*, 6 Leigh, 455, in which Tucker, P., says: "But a count in such action cannot be considered to be in assumpsit when it lays no assumpsit or promise, and does not correspond at all with the form of declaring in assumpsit upon a representation." As to the structure of special counts in assumpsit, Professor Minor, in his *Institutes* (volume 4, pt. 1, p. 577), says: "Reference ought always to be had in preparing them to an accredited book of forms of pleading, and none can be recommended with more confidence than the work on Pleading of Mr. Chitty. See 2 Chit. Pl. 115 et seq. But it is worth while to observe, in general, that besides the averment of the breach of contract, and the conclusion, stating the damages, etc., which constitute parts of the declaration distinct from the statement of the cause of action with which we are now engaged, a special count in assumpsit embraces in such statement four points or parts which are to be principally considered, namely: (1) The inducement; (2) the consideration; (3) the contract itself; and (4) the necessary averments of plaintiff's performance on his part,"—citing 1 Chit. Pl. 317. And on the next page the author says: "The statement of the contract itself is of course a necessary element in every declaration in assumpsit. The promise may turn out in evidence at the trial to be either express or implied; but the same identical terms of description are employed (supposing the agreement to be not in writing), whether it be the one or the other. The usual form of averment is that the defendant 'undertook and faithfully prom-

ised,' but other equivalent words will suffice, taking care, however, that a promise itself shall be averred, and not merely evidence of a promise. The contract must be stated with certainty,—that is, with 'certainty to a common intent in general,'—and also with directness, and not by way of recital." And in volume 4, pt. 2, p. 1399, he gives the form of a declaration in assumpsit upon a warranty of the soundness of a chattel which conforms to his views as expressed in the text above quoted; citing 2 Chit. Pl. 279; 1 Rob. Forms, 527. The pleader in this case having failed to state a promise or undertaking on the part of the defendant that the engine and appurtenances purchased by the plaintiffs were sound and sufficient in all respects to perform the work for which they were intended, and the breach of said promise, as prescribed by the precedents, the circuit court, in our opinion, erred in overruling the defendant's demurrer to the declaration and to each count. The judgment is therefore reversed, with costs, and the case is remanded to the circuit court of Ohio county for further proceedings to be had therein.

(39 W. Va. 579)

#### MCCLURE v. COOK et al.

(Supreme Court of Appeals of West Virginia.  
Dec. 1, 1894.)

#### DEEDS—SUPPORT OF GRANTOR AS CONSIDERATION —EFFECT—RESTRAINT ON ALIENATION.

1. The general rule is that the power to sell is an inseparable incident of the ownership of property, which makes it liable to the owner's debts.

2. Such power cannot be fettered or restrained, except in certain cases.

3. Where such restraint is in the exercise of power which is a part of the dominion of the grantor, not parted with, but retained and exercised for some purpose beneficial to the security of his own right, such as to keep the property bound by a charge created and imposed upon it, and to hold the grantee to the personal performance of the duties given him in charge, the general rule does not apply.

4. Where, in a deed of settlement from father to son, a tract of land is conveyed on the consideration that the son will support for life his father and his wife, the grantors, and the deed, taken as a whole, shows the intention to be to charge the real estate conveyed as security for the performance of such duty, it is not necessary that a lien on the land for such support be expressly reserved on the face of the conveyance.

5. A case in which these principles are applied.

(Syllabus by the Court.)

Appeal from circuit court, Wyoming county.

Action by W. B. McClure against Jacob A. Cook, Jacob Cook, and Malinda Cook, to subject land to the payment of a judgment. From a judgment in favor of plaintiff, defendants Jacob and Malinda Cook appeal. Reversed.

Jas. H. McGinnis, for appellants. Johnson, Watts & Ashby, for appellee.



HOLT, J. The decree complained of was pronounced by the circuit court of Wyoming county on the 16th day of April, 1891; holding a certain tract of land bound by the liens of certain judgments, and subjecting a life interest therein to sale for their payment. The question raised turns on the meaning and effect of the following deed: "Deed. This deed, made and entered into this 13th day of January, 1888, between Jacob Cook and Lynda Cook, his wife, of the first part, and Jacob A. Cook, of the second part, all of the county of Wyoming and state of West Virginia, witnesseth: That for and in consideration of the parental love and affection that the said parties of the first part have for their son \* \* \* Jacob A. Cook, party of the second part in this deed, and for a further consideration,—that is, that the party of the second part is to support, maintain, and care for the said parties of the first part, in a genteel and decent manner, during the lifetime of the said parties of the first part: Now, therefore, in consideration of the premises aforesaid, the parties of the first part do give, grant, and convey unto the party of the second part a certain tract or parcel of land lying and being in the county and state aforesaid, situated on the waters of the Clear fork of Guyandotte river, about two miles west of the town of Oceana, and bounded and described as follows, viz.: \* \* \* containing 123¼ acres by survey, be the same more or less; 32 acres being patented to said Jacob Cook; 15 acres being a deed from Isaac Cook to said Jacob Cook; 13¼ acres being the same land deeded to said Jacob Cook by C. F. Cook and wife; 15 acres being a part of a 284-acre survey deeded to the said Jacob Cook by W. B. McClure, commissioner of school lands; 48½ acres, a part of a 100-acre survey owned by said Jacob Cook. The following are the conditions upon which the party of the first part conveys said property unto the party of the second part; that is to say, the parties of the first — are to retain the possession of and occupy the property where they now reside so long as they live; and it is expressly understood in this conveyance that the property hereby conveyed by the parties of the first part unto the party of the second part is only conveyed unto the party of the second part to have and to hold the same during his lifetime, and at his death the same is to descend to and the title thereof vest in his children of the said party of the second part; and it is further understood in conveyance that the said party of the second part is not to sell or dispose of any part or interest in or to said property without the consent and approval of the said parties of the first — thereto. The parties of the first part covenant with the party of the second part that they will warrant generally the property hereby conveyed. In witness whereof, they have hereunto set their hands and fixed their seals the day and year first in this deed

written. Jacob Cook. [Seal.] Linda Cook. [Seal.]"

The plaintiff, in his bill, charged that defendant Jacob A. Cook, his judgment debtor, was the owner in fee of this tract or parcel of land containing 123¼ acres; that his judgment, which had been docketed, was a lien thereon,—and prayed that the liens, with their amounts and priorities, might be first ascertained, and then the land sold or rented in satisfaction thereof. Jacob Cook, the father, answering the bill, says that he is 77 years old, and his wife, Malinda, 73 years old; that they are feeble, unable to work and make a living, and have no means of support other than the land; that he and his wife, by the deed in question, granted and conveyed the tract of land of 123¼ acres to their son, Jacob A. Cook, for life, with remainder in fee to his children, but upon the consideration and express condition and trust that their son, Jacob, should support, maintain, and care for him and his wife in a genteel and decent manner during their lifetime, and to make sure that the land should not be taken from them, and these conditions left unperformed, it was further expressly provided in that instrument that he and his wife were to retain possession of and occupy the property where they resided so long as they lived, and that their son was not to sell or dispose of any part or interest in the property without their consent and approval; that their son has failed and refused to support them, and is now insolvent, and unable to do so,—and therefore he prays that the deed may be set aside, or that the land be held liable and set apart for their support so long as they, or either of them, shall live, and for general relief. Treating this as a cross bill, the defendant Jacob A. Cook, the son, answered it and the bill of plaintiff, and his children, the infant defendants, answered by their guardian ad litem, and plaintiff entered a general replication. At a hearing had on these papers on the 17th day of October, 1890, the court referred it to a commissioner, with directions to ascertain the liens, their nature, dignities, and amounts; whether the rents and profits would pay off the liens within five years; and what land, if any, defendants Jacob Cook and Linda, his wife, were entitled to retain possession of during their lives. The commissioner took the accounts directed, and various depositions, but submitted to the court the question what interest, if any, Jacob Cook and wife had in or against the land conveyed by them to their son. On the 16th day of April, 1891, the cause again came on to be heard, when the court confirmed the commissioner's report as to the liens; held that the judgment debtor, Jacob A. Cook, took, under the deed, a life estate in the tract of land of 123¼ acres (except 1¼ acres, a part thereof, theretofore conveyed by Jacob Cook and wife to John F. Fisher, released from the

lien by consent of parties), but that defendants Jacob Cook and wife had a life estate in the dwelling house and curtilage, including the dwelling house, yard, garden, orchard, barn, barn lot, and outhouses belonging thereto, and the lot on which they are situated; gave a decree against defendant Jacob A. Cook, in favor of his creditors, for the amounts of their respective judgments; and directed that, if they were not paid within 30 days, then the commissioner, J. H. Robertson, appointed for the purpose, should sell the life estate of Jacob A. Cook in the entire tract of land of  $123\frac{3}{4}$  acres, except  $1\frac{1}{2}$  acres conveyed to John F. Fisher, but the residue, viz.  $123\frac{3}{4}$  acres, less the  $1\frac{1}{2}$  acres, to be subject to the life estate of Jacob Cook and wife and of the survivor in the dwelling house, curtilage, etc., the possession whereof for life had been retained by them. The commissioner made the sale, reported it as made to G. D. Cook for the sum of \$325, who paid \$70 down, and gave his bond, with security, for the balance, and by decree of 13th day of October, 1891, the sale was confirmed without exception.

The court seems to have decided the case on the theory that it was governed by section 1 of chapter 75 of the Code, which is as follows: "If any person convey any real estate and the purchase money or any part thereof remain unpaid at the time of the conveyance, he shall not thereby have a lien for such unpaid purchase money, unless such lien is expressly reserved on the face of the conveyance,"—and by the principle that alienability is an inseparable incident of the ownership of property. Before this statute, which went into effect on the 1st day of July, 1850, the vendor's enforcement of his equitable lien for purchase money against a purchaser for value was a perplexing and fruitful source of litigation. The question was, the land having been conveyed, did the purchaser have notice of the unpaid purchase money? In *Redford v. Gibson*, 12 Leigh, 349, Judge Allen says, "Prudence dictates the propriety, in all cases, of retaining an express lien where the legal title is parted with"; and the legislature made the reservation in such cases obligatory, on pain of the lien being lost. Hence the statute. So that we may say with confidence—based on the evils it was intended to remedy, as well as upon the difference in character of the two transactions—that it was not the purpose of this statute to require a lien for the performance of such conditions, connected with such consideration as we find in this deed to be expressly reserved upon the face of the conveyance. This deed must be construed and applied as all other instruments of like kind, according to the meaning of the parties, as supposed to be fully expressed therein. This requires us to read the deed as a whole, each part with the rest, as its context, and give it, each and every part, its proper meaning and effect, as constituting one consistent and efficient instrument. So

reading it, we find the consideration a constant and continuous one; not to be rendered in money, or paid by installments, but to be discharged by the performance of duties of a nature which can only be described in a general way, and by the result produced, and to be performed, not at fixed periods, but continuously, so long as the grantors, or either of them, shall live, and by the person named, as one in whom personal confidence was reposed, and on the premises conveyed. See *Korne v. Korne*, 30 W. Va. 1-12, 3 S. E. 17. It was the father's to give, charged with such duties to himself and wife as he saw fit to impose. It was the son's to accept or refuse, but by accepting he obliged himself (Co. Litt. § 217m) to their faithful performance, and took the land conveyed to him subject to the support of the creator or founder of the trust, and the support of his wife, as a charge thereon. Like a legacy which a devisee is directed to pay, if he accepts the devise he takes it subject to the payment of the legacy, as a charge thereon. See *Brown v. Knapps* (1879) 79 N. Y. 136; 3 Pom. Eq. Jur. (2d Ed.) § 1244. In addition to that, the donor expressly qualified the donee's right of possession, limited his ownership to a life estate with remainder in fee to his children, and restrained his power to sell without the donor's consent; and these, together with the nature of the duties to be performed, the nature of the consideration given for their performance, and that the instrument was a deed of settlement between father and son, in which the wife of the founder of the trust was also named as a beneficiary, fixed them as a charge upon the real estate thereby conveyed, and to that extent made it trust property, and the taker a trustee. It is true a lien might have been, in so many words, reserved in the face of the conveyance on the land conveyed for the support for life of the grantors, but was that indispensable? A trust and charge like this are not within the letter of the statute, for it speaks only of purchase money. It is not within the reason of the statute, in the sense of being within the mischief the statute was designed to cure, for the deed gives notice of the duty as a charge, in giving the nature of the transaction and the restricted conditions imposed, and because it is a trust executed fully on the part of the founder, with the continuing, active duties of support and maintenance of the beneficiaries to be performed by one in whom personal confidence was reposed, with exclusive jurisdiction in a court of equity to compel their specific performance in due administration of such trust; and the wife was a cestui que trust, in the proper sense, for, as she only relinquished a contingent right of dower, she was not one of the creators of the trust, and the value of her interest relinquished does not furnish any measure of the benefit she is entitled to receive. If they were entitled to the house

and curtilage to live in, for the same reason, and as the result of the same terms used in the one instrument, they were entitled to charge the rest of the tract with their maintenance and support, for, when we come to the next provision, it applies to the whole tract,—to the whole property conveyed to Jacob A. Cook for life, with remainder in fee to his children; and this restraint upon the grantee's right to sell or dispose of any part or interest in the property without the consent and approval of the grantors was intended to keep the property subject to the charge of their support, for which it was conveyed, and to keep the duty a personal one, not to be turned over to others without their approval. The court, in rendering the decree complained of, must have proceeded on the theory that the grantor, by this conveyance with this provision in restraint of the grantee's power of alienation was attempting to give the beneficial interest, and annex to it the inconsistent condition that it should not be liable for the grantee's debts. But the grantor put nothing out of the reach of his own creditors, for there were none. He put nothing out of reach of his son's creditors, except to the extent and in the manner he saw fit to hold the trustee to his personal duty, and the land itself bound with the paramount charge for the support of himself and wife. In all that there was nothing unlawful or void,—nothing inconsistent with or repugnant to the right of ownership, to the extent such ownership was granted. The rest of the property, if any, was liable to be taken by his creditors; and, in any event, there does not seem to be any illegal restraint on the power of alienation in this case, for nothing is more common than long leases, without the power to sell or assign, except with the lessor's approval and consent. And here, for the like reason, it is something retained by the grantors for their own benefit, and not an attempt to impress what is given to and owned by another with inalienability. For a full review of the authorities, including *Nichols v. Eaton* (1875) 91 U. S. 716; *Bank v. Adams* (1882) 133 Mass. 170,—see *Gray, Restr. Allen*. § 241 et seq., where the Virginia cases are all reviewed, and the doctrine discussed. See, also, *Nickell v. Handly* (1853) 10 Grat. 836; *Morriss v. Morriss* (1880) 33 Grat. 51, 74; *Camp v. Cleary* (1882) 76 Va. 140, 143; *Hyde v. Woods*, 94 U. S. 523; *Smith v. Towers* (1888) 69 Md. 77, 14 Atl. 407, 15 Atl. 92, 9 Am. St. 398, note.

I take the general rule to be that the power to sell is an inseparable incident of ownership, and that the law does not allow such power to be fettered and restrained, and, as a result, makes the property liable for the owner's debts; but this case is not within the reason of the rule, because the restraint here applied is a part of the dominion of ownership not parted with, but retained by the grantor for purposes and benefits to

himself: (1) To keep the property bound by the charge created and imposed upon it; and (2) to hold the grantee to the personal performance of the duty given in charge to him in confidence and trust. This exception in this case, and in like cases within the reason of it, is as well settled as the rule itself. Therefore, there is nothing in this deed of settlement, as I read it, to give any color of right to mere strangers to break up this family arrangement, and divert the property from the uses to which it is thereby devoted, to some wholly foreign purpose of their own, and thereby disarrange or set at naught the plan provided for the support of these old people, who, to that extent and in that manner, had a perfect right to say what should be done with their own property. We are of opinion, therefore, that the duty of maintaining and supporting the grantors in this deed is made an express charge upon the land thereby conveyed for the purpose of enabling the grantee to discharge it as a trustee in whom personal confidence was reposed, and that this plaintiff, who is a judgment creditor of the son, and the other judgment creditors, have shown no right to break in upon this settlement, and pervert the trust property to the payment of their judgment against the trustee, to the serious detriment of the beneficiaries for whose support it was set apart.

The decree of the 16th day of April, 1891, which directs the sale to be made of a certain interest in the land in controversy, is the only one of which complaint is made. The sale made in pursuance thereof is not objected to, but by decree of the 18th day of October, 1891, the sale was confirmed without exception. Therefore, by section 8 of chapter 132 of the Code, the sale must stand, and the proceeds of sale are to be dealt with according to the rights of the parties, as taking the place of the interest in the lands thus sold. Therefore, the decree complained of is set aside, and the cause is remanded for further proceedings to be had in accordance with the principles herein announced.

(39 W. Va. 588)

CUNNINGHAM et al. v. BROWN.

(Supreme Court of Appeals of West Virginia.  
Dec. 1, 1894.)

TAX SALE OF LAND—VALIDITY—ILLEGAL ASSESSMENT—EFFEKT.

1. A tract of land was properly entered and assessed for taxation in the name of the owner on the land books of the county for the year 1882, and the taxes paid. In the year 1883 it was omitted, without the fault or knowledge of the owner, and placed back as an undistinguished part of a larger tract in the name of the former owner. It was restored to the land books in the year 1884 in the name of the true legal owner, and all taxes since charged were duly paid, including specifically and by name the years 1884, 1885, and 1886. The larger tract, assessed in the name of the former owner, was returned delinquent for nonpayment of the taxes for the year 1883,

was sold by the sheriff on the 24th day of November, 1885, under chapter 31 of the Code, and, not having been redeemed, was conveyed by the clerk of the county court, by deed dated the 11th day of March, 1887, to the purchaser. *Held*, the deed conveyed to the purchaser no title to the small included tract, but, as to it, constitutes a cloud upon his title, which the owner has a right to have removed.

2. The smaller tract not being returned delinquent in the name of the owner for the year 1883, and there being nothing to rebut the presumption, it is to be presumed, under the facts of this case, that the taxes for that year have been paid by the owner.

3. Where the assessment of a tract of land for taxation is illegal, a sale of such tract of land, made by the sheriff for nonpayment of the tax so assessed, is void.

4. For there can be no valid sale made by a sheriff of a tract of land as delinquent for the nonpayment of taxes where there has been no legal assessment of such taxes.

(Syllabus by the Court.)

Appeal from circuit court, Preston county.

Action by Thomas Cunningham and others against James A. Brown to set aside a tax deed. A demurrer to the bill was sustained, and plaintiffs appeal. Reversed.

Fortney & Monroe, for appellants. P. J. Crogan, for appellee.

**HOLT, J.** This is a suit in equity, brought in the circuit court of Preston county in June, 1891, by Thomas Cunningham and others against James A. Brown, contesting the validity of Brown's purchase of a certain tract of land sold by the sheriff as delinquent for taxes on November 24, 1885, and praying that the tax deed made to him by the clerk of the county court on the 11th day of March, 1887, might be set aside as null and void. Evidently the purpose was to have the case finally decided on demurrer without expense. One demurrer being sustained, an amended bill was filed, and, this being also demurred to, a final decree was pronounced on the 1st day of April, 1892, sustaining the demurrer and dismissing the bill. The plaintiff not desiring to further amend, this appeal was taken.

The facts as they appear are as follows: John A. Dille and wife, by deed dated the 16th day of November, 1870, sold and conveyed to John Cunningham, by designated corners and lines, a certain tract of land lying one mile west of the town of Kingwood, not giving the quantity by naming any number of acres, excepting therefrom, however, a certain privilege to mine coal. This deed was admitted to record on the 28th day of November, 1870, but when the land was entered upon the land books for taxation in the name of John Cunningham does not otherwise appear than by the allegation of the bill that it was prior to 1881, and as containing 65 acres. In the year 1884 the tract in controversy called in these proceedings "20 acres," but on the land books a tract of 34 acres, was again entered on the land books in the name of Elizabeth Cunningham, and the taxes for the years 1884 and 1886 paid by

her, as appears by tax tickets filed here as exhibits. John Cunningham, by deed dated July 30, 1881, and admitted to record on the same day, sold and conveyed to Elizabeth Cunningham, then the wife of the plaintiff Thomas Cunningham, and the mother of the infant plaintiffs Thomas Cunningham, Jr., and Annie Elizabeth Cunningham, but now deceased, intestate, a portion off the west side of his farm, on which he then resided, to be bounded on the north, west, and south by the lines of the entire tract (of which this is a part), on the east by a line to run parallel with the line on the west side of the said entire tract, and to extend far enough east thereof to include 20 acres. It was entered on the land books in the name of the grantee, Elizabeth Cunningham, for taxation for the year 1882, as containing 34 acres, and as of the value of \$172, and she paid the tax for that year, amounting to \$3.46, and lifted her tax ticket, which is here filed as an exhibit. On the 28th day of February, 1882, an act was passed to provide for the reassessment of the value of all the real estate within this state. See Acts 1882, c. 32, p. 44. When, in 1882, the commissioner of the first district of Preston county reassessed the lands of his district, he, by mistake or oversight, reported the tract for taxation as it originally was, in the name of John Cunningham. At that time, and before that, the tract of 65 acres had been further subdivided, and John Cunningham had, by deed dated April 14, 1882, conveyed 32½ acres thereof to William Cunningham, in which deed he recites having sold theretofore 6¾ acres of the said Cunningham farm, in the northeast corner, to Dr. James H. Manown. After this mistake made by the commissioner of reassessment, the 34-acre tract was omitted, and not charged on the land books for the year 1883 in the name of Elizabeth Cunningham, but on the books for that year the whole tract was charged with taxes in the name of John Cunningham, and, not being paid by him, was returned as delinquent for the nonpayment of taxes, in his name, as a tract containing 65 acres, for the year 1883. Elizabeth Cunningham had made no conveyance or sale of her land to any one. Never by herself, or any one acting for her, did she authorize said tract of land to be omitted from the land books in her name. She and the plaintiffs were entirely ignorant of what had been done, and of those changes made in the land books, but were ready and willing at all times to pay the taxes thereon, whenever the sheriff should present the bill therefor. During all the years 1883 and 1884 there was on the 20-acre tract sufficient property of the said Elizabeth Cunningham, subject to be distrained, to pay the taxes of 1883, for which the tract of 65 acres was sold; and also during the year 1883, Thomas Cunningham, the plaintiff, and John Cunningham each had on the 20-acre tract abundance of personal property out of which the taxes

could have been made; but the sheriff never demanded them, or exhibited any tax bill therefor, and made no effort to collect them by distress or otherwise; and for these reasons the land ought not to have been returned by the sheriff as delinquent, as plaintiffs aver. The lands thus returned delinquent in the name of John Cunningham were in fact not his land, for the same had all been sold and conveyed by him to other persons prior to the year 1883, viz. 6¼ acres to Dr. Mannon, 32½ acres to William Cunningham, and the tract of 20 acres or 34 acres (the true quantity does not appear) to the decedent, Elizabeth Cunningham, and had been respectively transferred to and charged on the land books in the names of these three parties before the year 1883. At the time of his purchase at the tax sale, defendant, Brown, was by purchase the owner of all the land sold for taxes except the 20 acres in controversy. The plaintiffs aver that the original tract contained 74½ acres; that the 20 acres in controversy were not sold, and were not intended to be sold at the delinquent sale; that defendant had knowledge of all the facts, and was not a bona fide purchaser.

The case must be decided according to the statutes as they were when the proceedings were had and the tax sale made, to be found in the Acts of 1882, p. 387, being chapter 130, to amend and re-enact chapter 31 of the Code, and is now found in chapter 31 of the Code (Ed. 1891), with an amendment of section 1, authorizing a suit in equity in the name of the state to enforce the lien against the land for the taxes assessed. So, also, chapter 105 of the Code, (Ed. 1891) has been amended and re-enacted by chapter 24, p. 57, of Acts of 1893, for the sale of lands for the benefit of the school fund. Both are here noted, but neither one has any bearing on this case, as this was a sale made by the sheriff for delinquent taxes on the 24th day of November, 1885, under the act of 1882; and the point here involved arises in the main under the twenty-fifth section of that act, which section is the same as section 25 found in the present edition (1891) of the Code. In the case of *Hays v. Heatherly*, 36 W. Va. 613, 15 S. E. 223, very many of the cases bearing on the general subject of such sales by the sheriff are brought together as a matter of convenience. Since that the case of *Baxter v. Wade* (W. Va.) 19 S. E. 404, has been decided, bearing on the subject of such sales and the construction of the statute, but not on the point here involved. See *Poling v. Parsons*, 38 W. Va. 80, 18 S. E. 379; *De Forest v. Thompson*, decided by Judge Jackson of the United States district court, to be found in a supplement to 32 W. Va. 1, 40 Fed. 375. Counsel for the appellee claims that under section 25, c. 31, Code, the title of Elizabeth Cunningham to the 34 acres (20 acres) was vested in James A. Brown in pursuance and by virtue of the sale made of the tract of land of 65 acres charged on the land

books with taxes for the year 1883, returned delinquent for such taxes, and sold therefor by the sheriff on the 24th day of November, 1885, at which sale Brown became the purchaser at the price of \$11.82; that he had the land surveyed and reported according to law; that it was found to contain 74½ acres by actual survey, and the clerk of the county court made him a deed therefor, which need not be set out, for it is in the form prescribed by the statute (see section 19, c. 31); that the 34 acres of Elizabeth Cunningham was a part thereof; that it was not charged on the land books in her name for the year 1883, and she had paid no taxes thereon for that year. On the other hand, it is claimed that there can be no valid sale where there has been an illegal assessment; that the assessment for taxation is a part of the proceedings of record on which the deed is founded, and therefore is an irregularity which may appear on the face of the proceedings of record in the office of the clerk of the county court, and was of such a character as would mislead a man of ordinary business capacity, and was of such a character as would be calculated to prevent the owner from redeeming his land; that such gross irregularity thus appears in this case, and that the court should therefore conclusively presume that the owner was thereby prejudiced, and his rights materially affected (see *McCallister v. Cottrille*, 24 W. Va. 173; *Williamson v. Russell*, 18 W. Va. 612); and in any event that she had no notice—was not warned in any way—of this quasi judicial proceeding against her.

On the questions here involved of illegal, invalid assessment of the 34 acres under the form and by the description of 65 acres in the name of John Cunningham, a former owner, and the want of notice or warning of any kind, actually or inferentially brought home or fairly to be imputed in any way, of the proceedings against her or her land for delinquency in not paying the taxes for the year 1883, we need not stop to consider the distinguishing mark of land as property and the inherent differences between it as a thing owned and personal property, nor of the peculiar relation which the state holds to it on account of its indestructibility, and the necessity of its political control absolute as a prerequisite standing ground essential to the very existence of the state, nor of the doctrine of tenure, whether the state has retained or only resumes some ultimate right of ownership. See 2 Bl. Com. (Hammond's Ed.) notes to chapter 2, p. 40. It is enough to say on this head that every state must, for its own existence as such state, have a territory of land, and be in that sense, as far as necessary, the lord paramount. Here the state takes to herself all the lands of which any person shall die seised of an inheritance, intestate, and without any known heir; but she does it by an inquest of the necessary facts, careful of the rights of all, and in its forms and methods of procedure strictly ju-

dicial. See Code, c. 69. She exercises the right of eminent domain, but does it only for a special purpose, and for a public use, and by a judicial proceeding, of which she makes sure the owner shall have notice, and that it shall not be taken or damaged for any other use, or in any other way, or without just compensation. See Const. art. 3, § 9, and Code, c. 42, etc. Taxation in some form is the lifeblood of the state, and as necessary to political existence as is a place to stand on. The land is always present, and cannot escape this constant burden. The assessment of land for taxation is judicial in effect, if not in form, and is subject to the general rule that the proceedings shall not be *ex parte*, nor without due warning to all concerned; and under our constitution the legislature can no more make an assessment under which property may be taken and sold without notice than it could render a decree that might be attended with the same result. No man's property shall be taken without due process of law of some kind, which includes notice in some way. This principle has been embodied in our written constitutions for wellnigh 700 years (see Great Charter 1215; Bill of Rights, Const. 1776, § 8; Const. U. S. Amend. art. 5; Const. W. Va. art. 3, § 10); and so it has been construed by the courts. There must be such a notice, so given as that the owner may have an opportunity to be heard before his land is taken. Here there was no notice of any kind, or in any form, direct or indirect, general or special, actual or constructive. If the 63 acres had been bought in by the state, and had gone on to the proceeding by the commissioner of school lands, then it would have become a regular, formal, judicial proceeding, an inquest of office against the land itself, in the name of the state, making the former owner, or the one in whose name it was charged on the land books, and all persons claiming title to or an interest in any such lands, parties to the suit. Chapter 105 of the Code, as amended and re-enacted by chapter 24, Acts 1893, p. 57. The legislature may declare that land or chattels shall be taxed, and according to what rate within the constitutional limits, and no power short of the popular will can reverse the decree; but, if they go further, and charge individuals or classes without providing some proper means of ascertaining whether they are in fact liable, the attempt will contravene the principle that no man, etc., and may be frustrated by the judiciary. 1 Hare, Am. Const. Law, p. 312. But here also the constitution keeps up the distinction between property real and personal by requiring taxation on all property of any kind in proportion to its value, and that such taxation shall be equal and uniform throughout the state. The legislature must, in compliance with the constitution, levy or impose the tax declaring that property, both real and personal, shall be taxed; but the property subject to the tax, and the

value thereof, must be ascertained by some quasi judicial or administrative proceeding directed by law; and the proceeding to enforce payment must also be at least so far judicial as not to deprive the owner of his property without due process of law,—a guaranty of our constitution that runs back continuously to the Great Charter. The assessment of land for taxation is judicial in effect and quasi judicial in form, and is subject to the general rule which requires notice, some warning adapted to the nature of the proceeding. Where the land has been sold for taxes, bought in by the state, and has become irredeemable, the constitution itself requires that any proceeding against it, based on that supposition, shall be judicial in the proper sense (see article 13 of the constitution); and the present statute, made to enforce and carry it into effect, requires an inquest to be made in a regular suit in equity in the name of the state, not only against the land itself, but also *inter partes* against all persons claiming title or interest in the lands, who are to be made defendants, and designated and proceeded against by name as far as known. See chapter 105 of Code as amended and re-enacted by chapter 24, Acts 1893, p. 57. So, also, chapter 31 of the Code, under which the proceeding here complained of was had, says, inferentially at least, in the first section, that the sale to be made by the sheriff is to enforce a lien for taxes assessed; and, as far as his proceeding is concerned, he is not authorized to proceed against or sell any other land, no matter what the clerk's deed may be supposed to pass. (To be considered further on.) In these proceedings to ascertain delinquency and enforce payment by sale to be made by the sheriff the appropriate notice is required. Notice is of the essence of things required to be done. *Rex v. Loxdale*, 1 Burroughs, 447; *Doughty v. Hope*, 3 Denio, 597; 1 Blackw. Tax Titles (5th Ed. by Parsons) § 397. And it is a fundamental rule that in all judicial or quasi judicial proceedings affecting the rights of the citizen he shall have notice, and an opportunity of a hearing, before the rendition of any judgment, decree, or order against him. In other words, he must be warned, and have his day in court. So strict is the rule that, where a proceeding of a judicial nature is authorized, and the statute is silent as to notice, the adjudication will be void unless notice is given to the party in interest. The common law, "the just spirit of all laws," and the plainest principles of reason and justice, forbid the taking of judicial steps against a person without notice to him, and the opportunity to be present and be heard. Therefore a statute will not be interpreted, unless its words be specific, requiring it to authorize judicial proceedings without notice to the party to be affected by them. See *Bish. Writ. Laws*, § 141, and *Lasere v. Rochereau*, 17 Wall. 437, 438, and other cases cited. Hence the statute in ques-

tion must be so construed, as far as it will admit of it, so as not to bring it into conflict with this principle of natural justice, embodied in our fundamental law; and so far as it will not admit of such construction it must be held to be qualified and inoperative so far as overridden by such higher law.

In this state our system of granting lands and enforcing the payment of taxes has called into being in unusual numbers adverse claims and conflicting rights to the same land. This fact is recognized in our scheme of taxation, and each bona fide claimant is permitted to enter the land for taxation in his own name for the purpose of paying the same; and the payment by his adversary will not inure to his benefit, and save his land from the effect of delinquency or forfeiture. So each freehold owner or claimant has his claim entered for taxation, whether good or bad, that is as yet undetermined; and it is the lien on such real estate, to the extent of his title, in the sense of his right, and nothing more, that the state proceeds against and sells through the sheriff for delinquency under chapter 31, and all the steps in such proceeding are based on the enforcement of the lien to that extent; and, thus regarded and by this method, she does not proceed against the land itself, regardless of who the true owner may be. Upon this distinction the decision of this case turns, for, with an eye to it, section 25 of chapter 31 must be interpreted, construed, and applied to the facts as they appear, in the exercise of all the inherent functions of judicial power, which no statute can dispense with or take away. With this plain meaning of the law as a whole in view, we are not so likely to go astray, for the one question is, were the 34 acres of Elizabeth Cunningham legally assessed as her land on the land books in the year 1883 as an undistinguished part of the 65 acres charged in the name of her vendor, John Cunningham, and were the taxes for that year on the 34 acres never properly paid, and had she notice in any fair way that the proceedings had been proceedings against her as owner of the 34 acres? For unless the 34-acre tract was thus legally assessed against her, the conceded freehold owner, there could be, under this proceeding, no lien against her land for the taxes of that year, and, there being none, the sheriff could enforce none by his sale, for it was not the object of this proceeding, as we have seen, to enforce any forfeiture, incipient or complete, resulting from omission, or to give the sheriff power to sell any other title derived from any other source than the one listed and assessed. We may be sure this is so, because the legislature has no power by this proceeding to transfer her title to the purchaser in any other way. It cannot, without some notice or proceeding in the nature of an inquest, declare her land forfeited for omission, nonpayment, or for any other cause; and, if it could, it cannot

in this mode pass her title to another, for the constitution stands in the way. Article 13, if not section 10 of article 3. See *Blackw. Tax Titles* (2d Ed.) § 105 et seq., and notes; *Id.* §§ 162, 89, 90; *Jones v. Dils*, 18 W. Va. 759, 764; *Bradley v. Ewart*, *Id.* 598; 1 *Blackw. Tax Titles* (5th Ed.) § 397.

Then the question arises, was her land legally assessed as against her for the year 1883, as a part of the 65 acres charged in the name of John Cunningham? We cannot say that the assessment against John Cunningham was to all intents and for all purposes illegal, for he may in some way and for some cause—even a good and valid one—have claimed it adversely to his vendee, and, if so, and the other requirements were complied with, it was proper, and he had the right, to put it on in his own name. But if this is the way it came on the books, then, for the reasons already given, the legislature did not intend that her adverse title to the 34 acres should pass by the sheriff's sale and clerk's tax deed under any circumstances, for the plain reason in her case the state did not have it to confer upon another, and, if it had it by forfeiture, it could not be passed to another in that way as against any private right. Nor is such the meaning of the statute, properly interpreted and construed. If put on as in privity with or in any way representing the ownership of Elizabeth Cunningham, the vendee, then it was illegally and improperly entered and assessed as to her in that name and in that form, without her knowledge or fault in any way, as affirmatively appears by the records of the clerk's office, including the proceedings here complained of; an illegality worse than a mere irregularity,—something that would mislead her to her prejudice, and mislead any man of ordinary business capacity, not only as to what portion of her real estate was sold, or for what year or years, or the name of the purchaser, but in a transaction thus obscured, conceal from her effectually the fact that her 34 acres had been sold at all, for any year, or to any person, and of course calculated to prevent her from redeeming her land. See *McCallister v. Cottrille*, 24 W. Va. 173. Therefore I do not regard this as the irregularity mentioned in the statute, but as an illegal assessment, made without her knowledge or consent, in another name, and with a different description; for the quantity in this case was the best and only distinctive item of description. Therefore no lien, and no valid sale, but an invalid one, made without assessment, without notice, or any other step to give the administrative officers of the law jurisdiction in a proceeding with nothing to stand on but the naked statute to that extent everywhere strictly construed, and every material requirement held to be indispensable to the validity of the sale. The statute, properly read in connection with all other laws on the same subject, does not require—would not tolerate—a judgment

so unnecessarily harsh. But when we come to look at the facts the state had this tract of 34 acres on her land books charged in the name of the owner; was dealing with it all the time as a subject of taxation with which Elizabeth Cunningham was in her own name assessed; and the taxes were paid,—all paid, as far as we can tell; presumptively paid,—for it was never returned delinquent in her name. *Lewis v. Disher*, 25 Wis. 441. It was the duty of the law officers, both assessor and clerk, to make out the proper assessment against her for the omitted year, 1883, with its interest, as well as the years 1882, 1884, 1885, and 1886, and she paid all that was charged against her. See *Gould v. Sullivan* (Wis.) 54 N. W. 1013, 20 L. R. A. 487, and notes; *Lumber Co. v. Wells*, 157 Pa. St. 5, 27 Atl. 408. And whether she paid it or not, the state was in 1884 dealing with her, and with her land as a tract which had been improperly dropped from the land books in her name in the year 1883, restored it at the earliest opportunity, viz. 1884, and the tax for 1883, if in fact not paid by being charged in the lost tax ticket of 1885, or accounted for by the sheriff as extended on his book but not made out by him in the ticket for 1884, is still dealing with her or her estate in regard to it, whether successfully or unsuccessfully it does not concern us to inquire. As to the duty of clerk and assessor in regard to the taxes for the year 1883, see Code, c. 29, §§ 9, 10; and *Id.* c. 31, § 51. There was nothing to put her on inquiry, to make it her duty to inquire into the fact of assessment against a tract of 65 acres charged in the name of John Cunningham, or to pay such taxes, or to inquire into or take notice of any quasi judicial proceeding against the 65-acre tract for the nonpayment of such taxes and the enforcement of collection by the sheriff's sale. The officers of the law have duties to perform as well as the owner. It was their fault that the tract of 34 acres was omitted from the land books in the year 1883, and this the owner had corrected at the first opportunity thereafter. It was the duty of both the clerk and assessor to charge the land with the tax for the omitted year 1883, with its interest. Such was the officers' duty, and the owner had a right to suppose that it had been done. She paid all that was demanded of her, all that stood charged against her land. Two such mistakes on the part of the officers of the law, with which the purchaser had nothing to do, but made without her fault, would of themselves be sufficient to set aside the sale for the taxes of 1883; for, if not corrected so as to prevent the loss of her land, they would be carrying with them all the numerous consequences of a fraudulent misrepresentation, which a court of equity would not permit. See *Slater v. Maxwell*, 6 Wall. 263, 277, citing *Dudley v. Little*, 2 Ham. 504; *Yancey v. Hopkins*, 1 Mumf. 419; *Rowland v. Doty*,

*Har.* (Mich.) 3; *Bacon v. Conn*, 1 Smedes & M. Ch. 348; *Lefferts v. Board*, 21 Wis. 688; *Gould v. Sullivan*, 84 Wis. 659, 54 N. W. 1013; *Blackw. Tax Titles*, § 162; *Cooley, Tax'n*, p. 367; *Lumber Co. v. Wells*, 157 Pa. St. 5, 27 Atl. 408. Again, if this mistake was made by the commissioner of reassessment, acting under chapter 32 of Acts of 1882 (see Acts, p. 44), then no doubt he made it because the language of these deeds from John Cunningham led him to believe that the respective grantees did not thereby take and hold their parts in severalty, within the meaning of the law, which then authorized several assessments; so he, for that reason, put it back on the land book as an undivided tract of 65 acres, in the name of John Cunningham, the common grantor. If that view be taken, then, to avoid injustice, Elizabeth Cunningham and appellant must be regarded for that occasion and thought about in that manner as co-owners, with the duty of each to pay if such was the duty of either; and if, under the circumstances, it was not her duty to pay on her 34 acres in that name, then the sale could in no wise affect her; if it was her duty, then we may also regard it as the duty of her quasi co-owner, and he could not buy to her injury. See *Battin v. Woods*, 27 W. Va. 58; *Cooley, Tax'n*, 345; 2 *Desty, Tax'n*, 936; *Blackw. Tax Titles*, 206, 282; 25 *Am. & Eng. Enc.* 706; *Blake v. Howe*, 1 Alkens, 306; *Brundred v. Eghart*, 158 Pa. St. 552, 28 Atl. 142. If the tract of 65 acres was entered on the land book in the name of John Cunningham as an adverse claim,—but I do not regard that as a correct view,—then the 34-acre tract was not proceeded against and not sold, and the pending quasi judicial proceeding did not affect her, the adverse claimant. If her 34 acres was thus entered as a part of the 65 acres because not sufficiently severed to be separately assessed,—nor do I think this the correct view,—then her co-owner could not buy to the prejudice of her rights. If, however, it was done by the fault of the commissioner of reassessment, without the knowledge or fault of Elizabeth Cunningham, and this is the case as made by the bill, and accepted as true by the demurrer, then there was against her no legal assessment of her tract of 34 acres for the year 1883, and therefore no lien; nor was there any notice or warning to her, such as the statute requires, of the sale and proceedings on which the sale was based, and it is not the purpose of the statute, properly construed, to dispense with such elemental requirements, or to impart to the deed of the clerk the efficacy to pass her title to the purchaser without them; for the state had nothing to give, and, if she had had anything as the result of omission from land books, she could not transfer it in that way to the prejudice of any private right.

For the reasons already given, it is seen that we do not regard it as a case necessarily



involving the right to redeem, and therefore do not regard it as necessary to discuss the sufficiency in amount and legality of the mode of the tender of \$15 alleged in the bill. We are of opinion that the title of Mrs. Elizabeth Cunningham to the tract of 34 acres or 20 acres, whatever the true quantity may be, did not pass to the purchaser by virtue of the tax sale and tax deed complained of, but that the tax deed constitutes a cloud upon the title of the plaintiffs, as her heirs, which they have a right to have removed. The decree complained of is reversed, the demurrer overruled, and the cause remanded for a rule to answer, and further proceedings.

(115 N. C. 553)

**LINDSEY et al. v. FIRST NAT. BANK OF ASHEVILLE.**

(Supreme Court of North Carolina. Dec. 27, 1894.)

**RIGHTS OF TENANT—OBSTRUCTION OF LIGHT—REVIEW ON APPEAL.**

1. One who leases rooms in a building is not entitled to damages from an adjoining landowner because the latter builds so as to shut off the lessee's light on the side of the leased premises.

2. Where in no aspect of the case plaintiff is entitled to recover, errors on the trial will not be reviewed on appeal.

Appeal from superior court, Buncombe county; Armfield, Judge.

Action by Lindsey & Brown against the First National Bank of Asheville. There was a judgment for defendant, and plaintiffs appeal. Affirmed.

Chas. A. Moore, for appellants. M. E. Carter, for appellee.

AVERY, J. The plaintiffs, who were the lessees for a term of years of the second story of a certain brick building in the city of Asheville, contended that the boundary of the lot on which said building was situated ran parallel with its southern wall, and 18 inches from it; while the defendant, claiming that the line ran with that wall, had erected another structure upon the disputed ground, so as to shut off the light from the apartments occupied by plaintiffs, and render them unfit for further use in taking photographs. The court instructed the jury that in no view of the evidence were the plaintiffs entitled to recover. The easement of light and air cannot be acquired, according to the general current and weight of authority in this country, even by prescription (6 Am. & Eng. Enc. Law, 152), and of course no right to object to the obstruction of one's windows by a wall erected on the land of an adjacent owner can be said to exist independently of the English doctrine. Whether the plaintiffs leased the second story room

for the purpose of taking photographs therein, or with some other object in view, they contracted in terms only for the use of the apartments occupied by them, and not for unobstructed light, passing through a certain window or windows, in addition. They might maintain an action for any trespass upon the premises rented by them. But conceding that their lessors were the owners of the 18 inches of land just outside the wall,—which was in dispute,—it was not contended that they had entered into any stipulations, so far as we can ascertain from the testimony, that the lease of the plaintiffs should extend beyond the wall. Consequently, the lessors could have purchased the land of the coterminous proprietor, and have erected a structure, one wall of which would have shut out the light from the windows of the demised premises, without subjecting themselves to liability on an action of trespass brought by their tenants. They could have conveyed to another this narrow strip of land, and have vested their grantee with the same power; their lessee having acquired, in the absence of special stipulations, no right, title, or interest in it. Whether the lessors allowed the adjacent owner to build a wall upon it under a verbal license, or left him unmolested, when he built without either license or title, the lessees had no remedy against the latter in any event, and could maintain an action against the former only by showing a breach of some special contract in reference to the lights. So that it was not material, in so far as it concerned or affected their rights, whether the defendants were building under a parol license, or held the disputed land under a sufficient deed from their lessors. Had the lessors been adversary parties in the litigation involving the title, it would nevertheless have been left at their option to determine whether they would avail themselves, in one of the modes pointed out by the law, of the benefit of the statute of frauds. No right, title, or interest in the locus in quo having passed by the demise to the plaintiffs, they were in no sense in privity with their lessors as to it.

We concur with the judge below in the opinion that in no aspect of the testimony did the plaintiffs show any prima facie right to recover in the action. It was therefore immaterial, when the plaintiffs failed to show a cause of action, in the most favorable view of the evidence, whether the defendant was allowed to bring out incompetent testimony. We do not deem it necessary, therefore, to notice seriatim the objections and exceptions as to testimony admitted or refused, unless the testimony offered would have established the plaintiffs' prima facie right to recover, or that admitted would have destroyed such prima facie right. The judgment must be affirmed.

(115 N. C. 307)

STATE v. McDANIEL et al.

(Supreme Court of North Carolina. Dec. 27, 1894.)

**HOMICIDE—CHARGE TO THE JURY — INTOXICATION AS A DEFENSE.**

1. On a trial for murder, a charge that defendants' "lives and deaths are in your hands" is without error.

2. It appeared that, on the night of the homicide, defendant declared that, if deceased went home with H., he would kill him; that, in company with another, he went to the house where deceased was, drew his pistol, and informed H. he would kill deceased as soon as he opened the door; and that on another's opening the door, defendant shot deceased twice. *Held*, that a charge that defendant was guilty of murder either in the first or second degree, or innocent, was not erroneous.

3. The fact that defendant was intoxicated at the time the crime was committed is no justification therefor, if his mind was still sufficiently clear to plan a formed design to kill, in consequence of which he deliberated and premeditated upon the killing.

Appeal from criminal court, Buncombe county; Jones, Judge.

Billy McDaniel and one Webb were convicted of murder, in the first degree, and defendant McDaniel appeals. Affirmed.

This was a criminal action for murder, tried before his honor, Thomas A. Jones, Judge, at the October term, 1894, of the criminal court of Buncombe county, and a jury; and the following are the defendant Billy McDaniel's exceptions to his honor's charge to the jury: "(1) His honor charged the jury, among other things, as follows: 'The question of their lives and deaths are in your hands. You must act honestly, conscientiously, and fearlessly.' To which Billy McDaniel excepted. (2) His honor charged the jury, among other things, as follows: 'As, in my opinion, there are no facts in this case from which you can infer that the killing was excusable, justifiable, accidental, or manslaughter, I shall not define the law in regard to said offenses, or give you the definitions. So, according as you shall find the facts to be, the prisoners are either guilty of murder in the first degree, murder in the second degree, or not guilty.' To which the defendant Billy McDaniel excepted. (3) His honor charged the jury as follows: 'A man may be intoxicated, and still have mind enough to plan, deliberate, and premeditate. If the intention to kill is deliberately formed,—is premeditated,—then the mere fact that the defendant was drunk will not make the crime murder in the second degree.' To which the defendant Billy McDaniel excepted. (4) His honor charged the jury as follows: 'The court charges you that if any of the evidence is sufficient to raise in your minds a reasonable doubt as to whether the defendant Billy McDaniel formed a deliberate, premeditated design to kill the deceased, then it is your duty to give him the benefit of such reasonable doubt, and he cannot be convicted of murder in the first degree, but only in the second degree, and your verdict

should so be.' To which the defendant Billy McDaniel excepted. (5) His honor charged the jury as follows: 'If, notwithstanding the fact that you may believe that the defendant was intoxicated, you are satisfied beyond a reasonable doubt that he had mind sufficient to plan a formed design to kill the deceased; that he deliberated and premeditated upon the killing in consequence of his formed design, deliberation, and premeditation,—then the fact of the intoxication of the defendant would not even then justify him, but your verdict should be, "Murder in the first degree."' To which the defendant Billy McDaniel excepted."

The Attorney General, for the State.

SHEPHERD, C. J. Both of the prisoners were convicted of murder in the first degree, but as no exceptions were taken or errors assigned by the prisoner Webb, and no error appearing on the face of the record, the judgment below must, as a matter of course, be affirmed as to him. We need, therefore, only consider the exceptions of the prisoner McDaniel.

1. His honor, among other things, charged the jury that: "The question of their [the prisoners'] lives and deaths are in your hands. You must act honestly, conscientiously, and fearlessly." We are at a loss to understand how these remarks could have prejudiced the prisoners, as they declare a standard of duty which every person on trial is interested in having impressed upon the jury.

2. Equally untenable is the objection to the instruction that there was no evidence warranting a verdict "that the killing was excusable, justifiable, accidental, or manslaughter," and that the prisoners were either not guilty, or were guilty of murder in the first or second degree. It appears that on the night of the homicide, and a short while before it occurred, the prisoner McDaniel declared that, if the deceased went home with Hannah Winters, he would kill him; that, accompanied by the prisoner Webb, he went to the house where the deceased was; and that he drew his pistol, and informed "her" (we suppose, the said Hannah) that he intended to kill the deceased as soon as he opened the door. It further appears that he then told Webb to "do what he told him to do," whereupon Webb opened the door, and McDaniel shot the deceased twice, inflicting the wounds of which he died. It is too plain for argument that under this testimony the prisoner McDaniel was guilty of murder in the first or second degrees, as charged by the court.

3, 4, and 5. The remaining three exceptions are addressed to the instruction relating to the element of intoxication as affecting the degree of murder, under our recent statute. There surely can be no objection to the instruction that if the jury had a reasonable

doubt as to whether McDaniel formed a deliberate, premeditated design to kill the deceased, it was their duty to give the prisoner the benefit of such doubt, and to convict only in the second degree. Neither can there be any question as to the correctness of the following instruction: "A man may be intoxicated, and still have mind enough to plan, deliberate, and premeditate. If the intention to kill is deliberately formed,—is premeditated,—then the mere fact that defendant was drunk will not make the crime murder in the second degree." His honor was therefore correct in charging that, notwithstanding intoxication, "if you are satisfied beyond a reasonable doubt that he had mind sufficient to plan a formed design to kill the deceased,—that he deliberated and premeditated upon the killing in consequence of his formed design, deliberation, and premeditation,—then the fact of the intoxication of the defendant would not even then justify him, but your verdict should be murder in the first degree." We regard the principles embodied in the instruction as so well settled as to dispense with the necessity of discussion. We will refer, however, to Whart. *Hom.* 369-371, in which the charge of the court is fully sustained. We have scrutinized the record with the care which the gravity of the offense demands, and we are of the opinion that the judgment must be affirmed.

(115 N. C. 712)

## STATE v. HAWKINS.

(Supreme Court of North Carolina. Dec. 27, 1894.)

## PERJURY — BY DEFENDANT ON CRIMINAL TRIAL — EVIDENCE.

1. A defendant in a criminal prosecution who testifies in his own behalf and of his own accord is guilty of perjury if he testifies falsely.

2. Testimony of one witness that defendant, in a fight, struck a certain person with an ax, which was not "sharp," and that of the physician who dressed the wound of the person so struck, that the wound was inflicted with a "sharp-edged instrument," is sufficient to convict defendant of perjury for testifying that he did not use an ax or any sharp-edged instrument in the fight.

Appeal from superior court, Wake county; Bynum, Judge.

James Hawkins was convicted of perjury, and appeals. Affirmed.

The indictment charged the defendant with committing perjury upon the trial of an action in the mayor's court of the city of Raleigh, in which the state was plaintiff and said defendant and one Benjamin Curtis were defendants, "by falsely asserting on oath that he (James Hawkins) did not have or use an ax or any kind of sharp instrument in a fight" which he, said Hawkins, was charged with having engaged in with said Curtis in the trial aforesaid, knowing said statement to be false, etc. Thomas Badger, a witness for the state, testified that

he is mayor of the city of Raleigh, and tried the case charged in the following warrant, in substance: "Whereas," etc., "he is informed and believes that James Hawkins did, in the city of Raleigh, on September 17, 1894, unlawfully," etc., "commit willful perjury by testifying under oath in the trial of a warrant of The State vs. James Hawkins and Benjamin Curtis, before the mayor of the city, that he did not use or have an ax or any kind of sharp instrument in the fight with Benjamin Curtis, whereas in said fight he did have and use an ax; contrary," etc. The mayor adjudged that the defendant, Hawkins, give a justified bond for his appearance at the superior court of Wake. The defendant was sworn, and he and the other defendant were both represented by counsel. "I gave the defendant no caution; did not advise him of any of his rights nor ask him any question. His counsel appeared for him, and, when I asked counsel if he desired to introduce any witnesses, he replied yes; he desired to introduce the defendant. The defendant was then introduced, and sworn by me on the Bible, as required by law, his right hand on the Bible, and he was sworn to tell the truth, the whole truth, and nothing but the truth, in regard to the matter then on trial as charged in the warrant. He was examined by his counsel, and cross-examined by counsel for the other defendant. The examination was made publicly and in the presence of the other witnesses." The defendant objected to any testimony as to what the witness swore in the examination, upon the ground that the mayor did not caution him and examined him in the presence of the other witnesses, and defendant could not take any binding oath under an oath administered as the mayor testified he had administered it to defendant, under sections 1146 to 1149, inclusive, of the Code. Objections overruled, and defendant excepted. The witness then testified: "I can give the substance of his evidence. The attorney for Curtis asked him (Hawkins), on cross-examination: 'Did you at any time have or use an ax or any kind of sharp instrument during the fight with Curtis?' His answer was: 'No; I did not.' Upon his cross-examination the same counsel said: 'You are under oath, and I put you on your guard.'" Curtis, a witness for the state, testified that the fight between defendant and himself occurred at Lee's stables; that Hawkins first hit him two licks with a stick, and then got an ax and cut him with it in the back of the head. Upon cross-examination this witness testified: "I saw the ax. It was one that was used for cutting the wires off of bales of hay. It was not sharp." Dr. Scruggs, a witness for the state, testified, without objection, that he was a practicing physician, and was called to attend Curtis shortly after the difficulty. "He was cut in the back part of the head. The cut was two inches long, through both plates of

the skull, and to the membrane that covers the brain. I could see the brain. It was an incised wound,—that is, a smooth cut wound,—not a lacerated or contused wound. The wound was made with a sharp-edged instrument. It was a severe blow, as it cut through both plates of the skull." This was all the evidence. Upon the conclusion of the evidence the defendant's counsel asked the court to instruct the jury that they could not convict the defendant upon the evidence. This was refused, and defendant excepted. The court left the case to the jury, with proper instructions, to which there were no exceptions, except the refusal to charge as above requested. There was a verdict of guilty, and the defendant appealed from the judgment pronounced.

Thos. M. Argo, for appellant. The Attorney General, for the State.

BURWELL, J. The testimony shows that, when the defendant made in the mayor's court the statement which is alleged to have been false, he was not being examined under the provisions of section 1145 of the Code, but was testifying in his own behalf and of his own accord, and at the suggestion of his own counsel, then present. He had a right so to testify. Code, § 1353. If he saw fit to exercise that right, as it seems he did, he is to be treated just as any other witness.

2. There was the testimony of one witness (Curtis) that the oath of the defendant was false. To prove its falsity, it was necessary to supplement this either by the evidence of another like witness, or else by proof of corroborative circumstances sufficient to turn the scale against the defendant's oath. *State v. Gates*, 107 N. C. 832, 12 S. E. 809. We think the evidence of Dr. Scruggs as to the nature of the wound furnished such corroboration. He said that it "was made with a sharp-edged instrument." An ax, though such a one as the witness Curtis described, is "a sharp-edged instrument," within the meaning of those words as used by the witness. No error.

(115 N. C. 466)

JONES et al. v. PULLEN.

(Supreme Court of North Carolina. Nov. 13, 1894.)

MORTGAGES—POWER OF SALE—PURCHASE BY MORTGAGEE—VALIDITY.

1. In the absence of an affirmation, the right of the mortgagor to avoid a foreclosure sale under a power, whereby the mortgagee indirectly buys the property, is not barred by laches for a shorter period than the statutory limitation of 10 years. Code, § 158.

2. Where the mortgagee in a mortgage providing that he may purchase at the foreclosure sale indirectly purchases at the sale, and goes into possession, and retains it for five years with the acquiescence of the mortgagor, the latter cannot avoid the sale, provided it be fair and the price reasonable.

3. Though a mortgage containing a power

of sale authorizes the mortgagee to purchase, the burden is on him to show that such a purchase by him is not fraudulent.

Appeal from superior court, Wake county; Hoke, Judge.

Action by Alfred Jones and others against R. S. Pullen to set aside a sale under a trust deed. Judgment was rendered for defendant, and plaintiffs appeal. Affirmed.

T. M. Argo and T. R. Purnell, for appellants. Haywood & Haywood and J. W. Hinsdale, for appellee.

SHEPHERD, C. J. On a previous investigation of this case we were of the opinion that the decision in *Joyner v. Farmer*, 78 N. C. 196, would amply sustain the action of his honor in denying the plaintiffs the relief prayed for. The delay of the plaintiffs of over five years after the sale, and their surrender of possession (there being no fraud and the price being reasonable), were sufficient, under the principle of the above-mentioned case, to bar the plaintiffs of their alleged right of election to set aside the sale. Our attention, however, has been called to the more recent case of *Bruner v. Threadgill*, 88 N. C. 361, in which it is said that, in the absence of affirmation, the right of a mortgagor to avoid a sale under a power, where the mortgagee has indirectly become the purchaser, is not barred by his laches for a shorter period than the statutory limitation of 10 years. Code, § 158. As the mortgagee had a right to enter under his legal title, the entry in this case would not alone be sufficient evidence of affirmation, and, nothing further appearing, the principle of *Bruner's Case* would seem to apply. This renders it necessary to further investigate this case in the light of the other facts found by the referee, and in this we have had the aid of a second argument by counsel on each side. There is no question, according to our authorities, that if a mortgagee, with power to sell, indirectly purchases at his own sale, the mortgagor may elect to avoid the sale, and this without reference to its having been fairly made and for a reasonable price. This is an inflexible rule, and it is "not because there is, but because there may be, fraud." *Gibson v. Barbour*, 100 N. C. 192, 6 S. E. 766; *Froneberger v. Lewis*, 79 N. C. 426; *Cole v. Stokes*, 113 N. C. 270, 18 S. E. 821; *Dawkins v. Patterson*, 87 N. C. 384. If, however, the mortgagee with power of sale deals directly with the mortgagor, and purchases of him the equity of redemption, quite another principle applies. In such a case there is, by reason of the trust relation, a presumption of fraud; but the mortgagee so purchasing may rebut this presumption by showing that the transaction was free from fraud or oppression, and that the price was fair and reasonable. The doctrine is fully discussed in *McLeod v. Bullard*, 86 N. C. 210, and need not be elaborated in this opinion. If the presumption of fraud is rebutted,

the plaintiff has no election to set aside the sale, and a court of equity will grant him no relief.

Now, if this be the rule applicable to a direct purchase of the equity of redemption, why should it not also apply to a case like the one before us, where the mortgagor has by his deed expressly authorized the mortgagee to become the purchaser? If the mortgagee can directly purchase if the transaction is fair, why can he not, when the transaction is fair, purchase as the highest bidder at the sale when expressly authorized to do so? In 1 Jones, Mortg. 1883, provisions of this kind are said to be in general use where there is no statute authorizing the mortgagee to purchase at his own sale, and cases are cited which deny that the privilege should be strictly construed; and the author remarks that it is generally held that, "under such a provision, the court will not interfere with a purchase by the mortgagee unless there be some other objection which would invalidate a purchase by any one else under the same circumstances." On the other hand, while the right to purchase is fully recognized, there are numerous authorities to the effect that the mortgagee so purchasing "will be held by a court of equity to the strictest good faith and the utmost diligence in the execution of the power for the protection of the rights of the mortgagor, and his failure in either particular will give occasion to allow the mortgagor to redeem." In Fox v. Mackreth, 1 White & T. Lead. Cas. Eq. 244, note, it is said: "The mortgagor may indeed dispense with the restraint by authorizing the mortgagee to sell to himself, if he is the highest bidder. This results from the right of every man to waive a rule intended for his benefit. But such transactions will notwithstanding be closely scrutinized, and may be set aside if the sale is not conducted with entire frankness and in a way to obtain the market value." In Gibson v. Barbour, 100 N. C. 192, 6 S. E. 766, after denying the right of a trustee like a mortgagee to purchase at his own sale, and remarking that a court of equity will not tolerate the attempt and give efficacy to what is done when opposed by competent parties in interest, the court proceeds as follows: "The cases to which the brief of counsel calls our attention are in no degree hostile to this universally accepted rule. That of Dexter v. Shepard, reported in 117 Mass. 480, simply decides that a trustee, expressly authorized under the deed to purchase at his own sale, may exercise the right by employing some one to bid for him at the sale; and so might the court, directing a commissioner, interested in the trusts, to make a sale, give him authority to bid as a means of securing himself against loss, as was done in McKay v. Gilliam, 65 N. C. 180, although the fact does not appear in the report; and so, we think, may this be allowable with the general consent of all who

could otherwise make objection to the sale." These remarks seem to recognize the right of the mortgagee to purchase under the circumstances of this case, and the numerous authorities cited by Mr. Jones from courts of the highest respectability, such as New York, Massachusetts, and Alabama, as well as the "reason of the thing," in our opinion, fully establish the proposition. In passing we will observe that Howell v. Pool, 92 N. C. 450, cited by counsel, does not distinctly pass upon this question. Although we adopt this view, it is nevertheless true that the mortgagee is still the agent or trustee of the mortgagor, and, while he may purchase under such a provision, we are of the opinion that the exercise of such authority should be watched with a most jealous eye by the courts. Indeed, we think it more consistent with the principles of equity, as enunciated by this court, to place such a purchaser within the rule declared in McLeod's Case, supra; that is to say, that being still a trustee, although with power to purchase, there is a presumption of fraud, and that it lies upon him to rebut such presumption. If he does this, we see no reason why he should not hold the land as if he had purchased the equity of redemption directly from the mortgagor. The mortgagor, in effect, says: "You may sell my land to the highest bidder, and, if you act fairly and purchase at a reasonable price, you may yourself become the purchaser." If this agreement is honestly carried out, why should the mortgagor have the right to repudiate it, and especially in the present case, when he has surrendered the possession after such sale, and the defendant has occupied the land for over five years? The referee finds that: "The sale was fairly and honestly conducted, in conformity to the terms of the mortgage and trust deeds, and there was no effort to suppress the bidding. The land brought a fair price. There were no circumstances of fraud or undue advantage taken." The right to purchase having been conferred upon the mortgagee, we think our case is not within the principle that the mortgagor may avoid the sale, even though it be fair and the price reasonable. Under this view, the defendant had a right to acquire the equity of redemption by virtue of the sale under the mortgage, and, this being so, the principle of Taylor v. Heggie, 83 N. C. 244, does not apply. The equity of redemption was conveyed subsequently by the mortgagors to Mr. Haywood, in trust, it seems, to secure the payment of the mortgage debt, though the trust provided that it shall be subject to the mortgage; and, as the mortgagees had the right to purchase at his own sale under the mortgage, the fact that the trustee joined him in the sale by virtue of the trust, and also joined in the execution of the deed to Wynne (who afterwards conveyed to the defendant), cannot affect the result. Inasmuch as the legal title passed to Wynne, we have not deemed

it necessary to pass upon the supposed difficulty of the mortgagee (when a direct purchaser) executing a deed to himself. This may be done upon the well-settled principle that the donee of a power may execute a deed in that capacity to himself. Whether the mortgage should contain an express power of this kind is not before us, but it has been held to be necessary by several courts, and this view seems to be entirely sound. All that it is necessary, however, to decide in the present case, is that, where the legal title has passed through a third person to the mortgagee with power to purchase, the power will be so far recognized as to place such purchaser within the principle of *McLeod v. Bullard*, *supra*. Affirmed.

(115 N. C. 489)

**CONGREGATION OF UNITED BROTHERS OF SALEM AND VICINITY v. BOARD OF COM'RS OF FORSYTH COUNTY.**

(Supreme Court of North Carolina. Dec. 28, 1894.)

**EXEMPTIONS FROM TAXATION—CHURCH PROPERTY.**

1. Act 1893, c. 296, § 20, exempts from taxation property used exclusively for religious, charitable, or educational purposes, and provides that all property not used exclusively for such purposes, or which is held for the purpose of speculation, investment, or for rent, shall not be exempt. *Held*, that credits and notes belonging to a religious society, the income from which is applied to educational, religious, and charitable purposes, are exempt.

2. Land owned by a religious society which is not occupied by its church or school buildings, or necessary for the purposes of such buildings, is not exempt from taxation.

3. Act 1893, c. 296, § 20, providing that, where the rental from property is applied exclusively to the support of the gospel, the property shall not be taxed, does not apply to a house owned by a religious society, the rental whereof is applied to educational, religious, and charitable purposes.

Appeal from superior court, Forsyth county; Battle, Judge.

Suit by the Congregation of United Brethren of Salem and Vicinity against the board of commissioners of Forsyth county to restrain the collection of a tax. There was a judgment for defendant, and plaintiff appeals. Modified and affirmed.

Watson & Buxton, for appellant. Glenn & Manly, for appellee.

CLARK, J. The constitution (article 5, § 5) empowers the legislature to exempt from taxation "property held for educational, scientific, literary, charitable or religious purposes." This is the limit. The legislature can exercise this power to the full extent, or in part, or decline to exempt at all. It can exempt one kind of property held for such purposes, either realty or personalty, and tax other kinds. It can exempt partially, as, for instance, up to a certain value, and tax all above it. It can exempt the property held for one

or more of those purposes, and tax that held for others, as, for instance, it may exempt churches or other property held for religious purposes, and tax buildings or other property held for scientific or literary purposes; for the constitutional provision is in the disjunctive, and authorizes the legislature to exempt property held "for educational, scientific, literary, charitable or religious purposes." The property which is left subject to tax will be taxed uniformly, as laid down in *Redmond v. Commissioners*, 106 N. C. 122, 10 S. E. 845. It is the power of exemption, within the limit, which is discretionary. Whether the legislature can discriminate in the same class, by exempting to a large value the property of a college or university, and to a smaller amount the property of an academy or high school, is a large question, which is not before us; for there is here no attempt to discriminate between corporations holding property for the same purposes, and any expression of opinion on that point would be obiter dictum. The legislature has used its discretion of discriminating between the classes by exempting property held for religious purposes when rented out, "if the rentals are applied exclusively to the support of the gospel," while refusing to exempt any property held for the other classes if rented out. But it has not discriminated between institutions in the same class. The act of the legislature being, therefore, well within the constitutional discretion reposed in them, it only remains to apply it to the case in hand.

Acts 1887, c. 137, § 21, subsec. 2, exempts from taxation "property belonging to and set apart and exclusively used for the university, colleges, institutions of learning, academies, the Masonic fraternity, Order of Odd Fellows, Knights of Pythias, Independent Order of Mechanics, Good Templars and Friends of Temperance, Knights of Honor, Good Samaritans, and Brothers and Sisters of Love and Charity, Royal Arcanum, Hibernian Benevolent Society of Wilmington, the Israel and Pricilla Tent of Wilmington, schools for the education of the youth or the support of the poor and afflicted, orphan asylums, such property as may be set apart for and appropriated to the exercise of divine worship or the propagation of the gospel or used as parsonages, the same being the property of any religious denomination or society: Provided that any such property is used exclusively for religious, charitable or educational purposes." Thus, the legislature did not go to its full constitutional power of exempting all property held for the purposes named, but restricted the exemption to the property "belonging to and set apart and exclusively used" for such purposes. It emphasizes this by again repeating in the proviso, if "such property is used exclusively for religious, charitable or educational purposes." This statute is copied in Acts 1889, c. 218, § 23, and Acts 1891, c. 326, § 21. By the words "set apart and exclusively used" is contemplated such property as is used directly, immediate-

ly, and solely for the purposes named. Property rented out is not "so apart and used," even though the rents may be so applied. That would exempt the rents, but not the real estate itself. This was thought to work a hardship as to church property, so the act of 1893 (chapter 296, § 20), extends the exemption as to property held for religious purposes, even though rented out. The proviso under that act reads: "Provided that all property not used exclusively for religious, charitable, or educational purposes or which is held for the purpose of speculating in the sale thereof, investment or for rent, shall not be exempt, provided further that when the rental from such property is applied exclusively to the support of the gospel, the property shall not be taxed." It was and is competent for the legislature to also exempt property whose rental is applied to educational or charitable purposes, but it has not so enacted. That matter rests in the legislative discretion. The property sought by the plaintiff to be exempted in addition to its large property admittedly exempt consisted of (1) solvent credits and notes secured by mortgage amounting to \$87,043.48. It is found as a fact that the interest on these is applied exclusively and faithfully to educational, religious, and charitable purposes. It seems to us that the corpus of the fund is "set apart and used exclusively" for such purposes. It is the only mode in which it can be so set apart and used, and it is therefore exempt until the legislature shall declare its will to tax it. This fund is not held for "investment," in the meaning of the proviso, for that contemplates the holding of the property for the benefit of the corporation, to await enhancement or future use, but here the whole use, the interest, is applied as received for the purposes named. Any part of such fund on which the interest is not so applied, but is allowed to accumulate, would not be exempt. (2) The second piece of property is a parcel of land of about 20 acres in the town of Winston, known as the "Reservation." On the north side is a church, covering about one-third of an acre, situated on a lot, fenced in, of about two acres. Excluding these two acres, the reservation is found to be worth \$18,000. A number of lots have heretofore been sold off, leaving the tract of the present dimensions, and public notice has been given that lots were for sale. A part of it is now under lease. This property (leaving out the church inclosure) is certainly not in use for educational, charitable, or religious purposes, and was properly held liable to taxation. (3) A tract of 80 acres in West Salem, chiefly in forest, and worth \$5,000. A school-house stands on the eastern side. It is found as a fact that only about two acres were necessary for the use of the school. It was properly held that the remainder of the tract was liable to taxation. It would be advantageous, no doubt, to the corporation to hold the unused 78 acres as an investment, and reap the benefit of the increased value which will come to real estate adjacent to a growing and prosper-

ous town, like Winston; but in the meantime such property must bear its share of the public burdens. The exemption is for property now used for religious, charitable, or educational purposes, and not for property abstracted from all use, or used to create a large fund in future, which fund, when so created, may be used for such purposes. When so used, it will be exempt, subject to legislative change, but not till then. (4) A house and lot in the town of Salem, known as the "Bishop's house," worth \$3,000, which is rented out as a residence, the corporation receiving the rents therefor, which are applied to religious, charitable, and educational purposes. The house not being needed for religious, charitable, or educational purposes,—not used for a church, parsonage, school, or hospital,—the corporation is showing business judgment in renting it out. But the act of assembly only exempts from taxation property which is used for the specified purposes, which in this case is the rent. The legislature can exempt property whose rental is so applied, but so far it has only granted exemption to property rented out when the rental is "applied exclusively to the support of the gospel." "Expressio unius exclusio alterius." The house and lot would be equally subject to taxation if not rented out and unused. It is only property used for the specific purposes which is exempt. The general rule is liability to taxation, and that all property shall contribute its share to the support of the government which protects it. Exemption from taxation is exceptional. It needs no citation from reiterated precedents that such exemptions should be strictly construed, and that, if we had any doubts, which we have not, they should be resolved in favor of liability to taxation. *Railroad Co. v. Alsbrook*, 110 N. C. 137, 14 S. E. 652. As above modified, the judgment is affirmed.

(115 N. C. 542)

GILLESPIE et al. v. ALLISON et al.  
(Supreme Court of North Carolina. Dec. 27, 1894.)

**PARTITION OF LAND—LIFE TENANT AND REMAINDER-MAN—VESTED REMAINDER—IMPAIRMENT OF VESTED RIGHTS.**

1. One to whom land is devised to hold as long as she may remain a widow is a "life tenant," within Act 1887, c. 214, § 3, providing that in proceedings for partition the life tenant may join in the petition, and that on a sale the interest on the value of the share of the life tenant shall be paid to him annually. *Burwell, J.*, dissenting.

2. A remainder after an estate devised to one to have so long as she may remain a widow is a vested remainder.

3. Act 1887, c. 214, providing that the existence of a life estate in land shall not bar a sale for partition, does not impair the rights of a remainder-man whose interest in the land was acquired before the passage of the act.

Appeal from superior court, Mecklenburg county; Winston, Judge.

Suit by Saddler Gillespie and others against

R. W. Allison and others for partition of land. There was a judgment for plaintiffs, and defendants appeal. Affirmed.

W. J. Montgomery and Walker & Cansler, for appellants. Clarkson & Dula, for appellees.

MacRAE, J. There being no contention as to the interests of the parties in the lands sought to be partitioned, or sold for partition, it appears that the petitioner is, by virtue of the wills of Henry Owens and Jane Owens, tenant of said lands so long as she remains the widow of W. A. Owens, that she has sold her interest in one of the tracts to one of the other petitioners, and that the other parties are tenants in remainder of said lands, according to their respective rights, as set out in the petition and answer. Before the act of 1887 (chapter 214), cotenants in remainder or reversion had no right to enforce a compulsory partition of land in which they had such estate. *Wood v. Sugg*, 91 N. C. 93; *Aydlett v. Pendleton*, 111 N. C. 28, 16 S. E. 8. The provisions of the above-named act are substantially:

Section 1. That actual partition may be made of a part of the land sought to be partitioned, and a sale and partition of the remainder, or a part only of any land held by tenants in common may be partitioned, and the remainder held in common.

Sec. 2. That the existence of a life estate in any land shall not be a bar to a sale for partition of the remainder or reversion thereof, and for the purposes of partition the tenants in common shall be deemed seised and possessed as if no life estate existed. But this shall not interfere with the possession of the life tenant during the existence of his estate.

Sec. 3. That, in all proceedings for partition of land whereon there is a life estate, the life tenant may join in the petition or proceeding, and on a "note [this word is an evident mistake, and should be "sale"] the interest on the value of the share of the life tenant shall be received and paid to such life tenant annually; or in lieu of such annual interest, the value of such share during the probable life of such life tenant shall be ascertained and paid out of the proceeds to such life tenant absolutely."

The life tenant and her assignee, with others, who are tenants in remainder, ask for a sale for partition; and, as the life tenant has sold her interest in one of the tracts, they ask that the value of an annuity of 6 per cent. of the proceeds of the sale of that tract be paid over to him, and that the other tract be sold for partition, and the proceeds divided according to the interest, etc. The other remainder-men are defendants. They contend:

1. That the estate of the petitioner Alice B. Owens is not a life estate, in the contemplation of the act of 1887, because the said estate may be terminated by her marriage at

any time before her natural life expires. Estates of this nature are called "estates durante viduitate," and such are defined to be "estates for life, determinable on her ceasing to be such widow, during their continuance freeholds." Co. Litt. 42a; Cruise, Dig. 115; 4 Kent, Comm. 28; 2 Bl. Comm. 121. Such estates, being so long known to the law as "life estates," are within the meaning of the words used in the act of 1887, as such words are to be taken in their ordinary and legal acceptance.

2. It is contended that the remainders are contingent, and as such the petitioners are not entitled to have partition of the same. But they cannot be contingent remainders, either according to the definition of Blackstone or the arrangement of Fearne, for one criterion of all such remainders is that the particular estate may chance to be determined, and the remainder never take effect. Now, the particular estate is that durante viduitate. It may last for the life of the tenant, and it may be determined by her marriage; but in either event the remainder immediately takes effect, for it is invariably fixed to remain to determinate persons after the particular estate is spent. See 4 Kent, Comm. 202 et seq., where the definitions both of Blackstone and of Fearne are given of vested and contingent remainders. The remainder-men in our case have a present, fixed right of future enjoyment. Their estates are vested. But, if they were contingent, it does not follow that there could not be partition, unless it be that there is no one before the court to represent all of the contingent interests. *Aydlett v. Pendleton*, supra; *Overman v. Tate*, 114 N. C. 571, 19 S. E. 706.

3. It is further objected that it is impracticable in this case to give to the life tenant the choice offered by the act of 1887, either to have the interest on the value of the life tenant's share, or in lieu thereof the value of such share during the probable life of such life tenant, because the life estate may determine by the marriage of the tenant, and therefore there can be no rule for computing the present value of such estate. The third section of the statute seems to have been framed to meet such an emergency, and we are of the opinion that the statute will be satisfied by the payment of the interest upon the proceeds of sale of the land sold to the life tenant or her assignee until the determination of the particular estate. And the second section provides for the actual partition of the other tract, not to interfere with the possession of the life tenant or her assignee during the existence of her estate.

4. The defendants claim that they have vested rights which cannot be impaired or affected by the act of 1887, passed after such rights had accrued; in other words, that they were remainder-men before 1887, when by the law of this state they were not permitted to have partition during the continuance of the particular estate. What vested rights



did they have? They were tenants of an estate in remainder, and upon the death or marriage of the life tenant, and not until then, they would be entitled to partition, or sale for partition. This new law permits them to anticipate the time for partition, and have the same made subject to the interest of the life tenant, which is not to be disturbed, or when the life tenant joins in the petition, as in this case to have a sale for partition, saving her interest. It seems to us that, instead of depriving the remaindermen of a right, the effect of this statute is in furtherance of the public policy, which, as was said in *Overman v. Tate*, supra, discourages the tying up of property and the prevention of its alienation, and gives effect to the general principle that every one has the right to enjoy his own in severalty. No vested right of property has been disturbed, and in our view this is a remedial statute, enlarging rights instead of impairing them. "Statutes are remedial and retrospective, in the absence of directions to the contrary, when they create new remedies for existing rights, remove penalties or forfeitures, extenuate or mitigate offenses, supply evidence, make that evidence which was not so before, abolish imprisonment for debt, enlarge exemption laws, enlarge the rights of persons under disability, and the like, unless in doing this we violate some contract obligation or divest some vested right." *Larkin v. Saffarans*, 15 Fed. 147. These principles as to vested rights and retrospective laws are fully discussed in the great and leading case of *Calder v. Bull*, 3 Dall. 386. See, also, many cases collected in *Myer, Vested Rights*, c. 1; *Hinton v. Hinton*, Phil. (N. C.) 410; *Tabor v. Ward*, 83 N. C. 294. We hope we shall not be understood as making any reference to *ex post facto* laws, which cannot be made to have a retrospective effect in criminal cases. This statute differs greatly from that under consideration in *Greer v. City of Asheville*, 114 N. C. 681, 19 S. E. 635, where it was sought to give a retrospective effect to an act amending the charter of Asheville so as to continue in office during good behavior a city marshal who had been elected under the law, as it then was, for a term. Such an act, as was justly said, was to act prospectively only, unless the legislative intent to the contrary was made manifest in express terms. The right to actual partition only exists where such partition can be made without injury to the parties interested, but the right of sale, in case such actual partition cannot be had, has long existed in this state (Code, § 1904), and has been extended by the act of 1887 to remaindermen and reversioners. In our opinion the judgment appealed from protects the rights of all the parties, and in it there is no error.

BURWELL, J. (dissenting). I do not think the act (Laws 1887, c. 214) was intended to apply to cases such as this. There being no

way to ascertain the cash value of the estate of Mrs. Alice Owens, the effect of the decree is merely to convert real estate into money, and not to make any partition whatever of the city lots described in the pleadings, or of the funds arising from their sale. I do not think it was the intention of the legislature to compel these defendants, and others in like circumstances, to run the risks necessarily attendant upon the investment of the fund, or else settle with the particular tenant. I know of no rule by which the fund can be divided, and I do not believe the act applies, unless there can be a division of it according to some rule of calculation recognized by the law. It does not seem to me reasonable to suppose that an act passed evidently to promote the partition of property shall be called into service to effect the conversion of real estate into money, when no division of the money can be made by the law.

(95 Ga. 481)

## BROADEN v. STATE.

### POE v. SAME.

(Supreme Court of Georgia. Dec. 21, 1894.)

#### CRIMINAL PRACTICE—GROUNDS FOR NEW TRIAL—EVIDENCE—SUFFICIENCY.

1. It is well-settled law in this state that the denial of a motion to quash a criminal accusation is no ground for a new trial. In these cases there should have been motions in arrest of judgment, or direct exception to the refusal to quash.

2. The evidence in each case warranted the verdict, and there was no error in refusing to grant a new trial.

(Syllabus by the Court.)

Error from criminal court of Atlanta; T. P. Westmoreland, Judge.

One Broaden and one Poe were convicted of shooting into a car of a passenger train, and bring error on orders denying them new trials. Affirmed.

The following is the official report:

Broaden was tried in the criminal court of Atlanta upon an accusation charging him with shooting into a car of a passenger train. The affidavit upon which the accusation was based was sworn to and subscribed by one Wooster before "L. McConnell, N. P. Fulton Co., Ga." Defendant was found guilty, and, his motion for new trial being overruled, excepted. The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also because the court erred in overruling the motion of defendant's counsel to dismiss the accusation, because it appeared on the "accusation" that the affidavit of Wooster, the prosecutor, was made before L. McConnell as a commercial notary public, "and was not authorized by law to take such an affidavit as the commencement or foundation for criminal proceeding, and that an affidavit made before a commercial notary public cannot legally be the foundation or commencement of a criminal prosecution in the

said criminal court of Atlanta." Because McConnell, before whom the affidavit was made, "is the clerk of the solicitor of said court, or, as the solicitor said of him, 'his right bower,' and, as expressed by the judge on the occasion, the special bailiff of the court. As a clerk or as a 'right bower' of the solicitor of the court, the said L. McConnell has no authority of law or power of position to accept or take affidavits in a criminal matter or prosecution, and the court erred in sustaining the accusation based on any such affidavit before said L. McConnell." The facts and assignments of error in the Poe Case are similar to the foregoing.

Robt. L. Rodgers, for plaintiffs in error.  
L. W. Thomas, for defendant in error.

**PER CURIAM.** Judgment in each case affirmed.

(95 Ga. 563)

**BRASWELL v. ALBERT et al.**

(Supreme Court of Georgia. Dec. 21, 1894.)

**TRIAL BY COURT—EXCEPTIONS ON APPEAL—EVIDENCE—SUFFICIENCY.**

The questions, both of law and fact, by consent of counsel, having been submitted to the presiding judge, without the intervention of a jury, and there being in the bill of exceptions no such specific assignment of error upon the judgment complained of as enables this court to determine whether the plaintiff in error excepts thereto as being contrary to law or contrary to the evidence, and the judgment of the court, upon examination of the record, appearing to be supported by the evidence and based generally upon correct legal principles, it will not be disturbed.

(Syllabus by the Court.)

Error from city court of De Kalb; H. C. Jones, Judge.

Action by J. W. Braswell against Albert & Callaway, a copartnership, on an instrument which acknowledged the receipt by defendants from plaintiff of a certain duebill on Smith & Reagin, copartners, certain evidences of liens on quarried and unquarried stone, and orders for royalties thereon. On a judgment for defendants, plaintiff brings error. Affirmed.

The following is the official report:

Braswell sued Albert & Callaway on the following receipt: "Received from J. W. Braswell one duebill on Smith & Reagin for \$17.35; also one lien on stone for \$50, to be collected out of stone on Ga. R. R. at cemetery; also 1% c. per foot on stone quarried on the Goddard Quarry. Said amounts to be paid before stone shall be released to any one else. October 25, 1889." Signed by Albert & Callaway. The cause was submitted to the judge below, who gave judgment in favor of defendants, on the grounds that the consideration of the instrument sued on wholly failed; that, under the evidence, plaintiff was not entitled to recover in his individual capacity; and, generally, that plaintiff had failed to make out a case en-

titling him to recover. To this judgment plaintiff excepted, upon the ground that said judgment was error. Upon the trial, plaintiff put in evidence the receipt, and testified: "Albert Albert, of the defendant firm, gave me the receipt. Defendants had bought the stone from Smith & Reagin, who owed me the duebill for \$17.35, and I also had a lien on the stone for \$50, which I had loaned Smith & Reagin, and had two orders to defendants for the royalty on the stone from Smith & Reagin and N. Reagin & Co., one for \$18, the other for \$22.43. I turned them all over to Albert, who offered to pay me some of the money on them the day I got the receipt, but said they were in a little tight, but if I would wait till they got the check Smith & Reagin turned over to them for a part of the stone they would pay it all. I sold them the duebill, lien, and orders, and they were to pay me for them. The \$40.43 in orders for the royalty was for royalty on stone due me as administrator of Goddard's estate, on the Goddard Quarry; the \$50 lien was due me as administrator of that estate, the money loaned belonging to the estate; and the \$17.35 was for some tools I sold Smith & Reagin. I never took the duebill, lien, and orders out of the store when defendants offered them to me, but shoved them back on the counter." There was further evidence for plaintiff, to the following effect: Smith & Reagin had shipped stone to Birmingham, and had the balance of the stone on two cars and on the ground at cemetery. They had borrowed \$50 from plaintiff, and gave him a lien on the stone, and owed plaintiff the duebill and the orders for royalty. Defendants wanted Smith & Reagin to turn over to them a check for \$387 for the stone that was shipped, but Smith & Reagin refused to do it until Albert, for defendants, agreed to buy all the stone on the cars at the cemetery and on the ground, and take the check, and pay Braswell what Smith & Reagin owed Braswell, and give Smith & Reagin 27 cents a foot for the stone. Reagin and Albert measured the stone, and Smith & Reagin turned over the check and the stone to Albert on this agreement. Defendants got the check and the money on it. Callaway, one of defendants, sued out a lien for hauling. Defendants had bought the stone before any lien was sued out. For the defendants there was evidence to the following effect: Plaintiff turned over to Albert, one of defendants, the papers stipulated in the receipt. Albert never bought them from him, and never agreed to pay him for them out of the check defendants got from Smith & Reagin. Defendants never got any of the stone that was at the cemetery. It was levied on by some laborers' liens against Reagin & Reagin and Smith & Reagin, and sold, and none of the proceeds went to defendants except to pay for some hauling. Albert never told Smith & Reagin that, if they would turn

over to him the check for the stone they had shipped, defendants would pay the claims of plaintiff. Upon measuring up the stone at the cemetery there was only about 600 feet of it, which was less than 40 per cent. of the indebtedness against it. The understanding of Callaway was that defendants were not to be liable to plaintiff unless there was enough stone to pay off. Defendants were not to receive or be paid anything for their trouble, were under no obligations to plaintiff, and there was no consideration for the undertaking on the part of defendants to collect plaintiff's claim. The check in question was not sufficient to pay defendants what Reagin, Smith, and N. Reagin owed defendants. Albert turned the duebill, lien, and orders over to plaintiff, who went back from the desk in defendants' store and wrote something on them, and left them on the desk, where they were found in the evening, and defendants took the papers and kept them for plaintiff. They had written on them, "Rejected."

G. W. Gleaton and W. W. Braswell, for plaintiff in error. John S. Candler, for defendants in error.

**PER CURIAM.** Judgment affirmed.

(95 Ga. 539)

#### KENNEDY v. BRAND.

(Supreme Court of Georgia. Dec. 21, 1894.)

##### EXCEPTIONS TO AUDITOR'S REPORT—REQUIREMENTS OF STATUTE.

Under the plain and unequivocal mandate of section 4203 of the Code, when exceptions to the report of an auditor are submitted to a jury, they must return a verdict on each exception seriatim. Accordingly, where divers exceptions to an auditor's report were thus submitted, a verdict in these words: "We, the jury, find to sustain the auditor's report," was contrary to law, and must be set aside.

(Syllabus by the Court.)

Error from superior court, Rockdale county; R. H. Clark, Judge.

Action between Joseph A. Kennedy and E. M. Brand. From a judgment on an auditor's report, Kennedy brings error. Reversed.

J. N. Glenn, for plaintiff in error. J. R. Irwin, for defendant in error.

**PER CURIAM.** Judgment reversed.

(93 Ga. 747)

#### BRUNSWICK CO. v. DART.

(Supreme Court of Georgia. June 11, 1894.)

##### SPECIFIC PERFORMANCE — CONTRACT TO CONVEY LAND—BREACH—WAIVER OF ATTORNEY'S FEES AS DAMAGES.

1. Where a general agent of a corporation, acting under parol authority, sold land belonging to the company, and yielded possession, without any condition or restriction as to its use, and the price was paid to the company in full by the purchaser, and improvements made

by him, he is entitled to a specific performance of the contract as made, and to an unconditional deed from the company, although the agent who made the sale had no authority to make any deed or other conveyance.

2. When one having the right either to sue for damages for a breach of contract or to proceed for specific performance elects the latter remedy, and such performance is decreed, he waives his right, if any he had, to collect attorney's fees as damages for bad faith in committing the breach.

(Syllabus by the Court.)

Error from superior court, Glynn county; J. L. Sweat, Judge.

Action by W. R. Dart against the Brunswick Company for specific performance of a contract to convey land. There was a decree for plaintiff, and defendant brings error. Affirmed, with direction.

Crovatt & Whitfield, for plaintiff in error. J. L. Harris and F. H. Harris, for defendant in error.

LUMPKIN, J. The motion for a new trial contains numerous grounds, but the questions upon which the case really turns are succinctly stated in the headnotes.

1. There can be no doubt that Kay was a general agent of the Brunswick Company, and as such had a right to make sales of its lots, though not invested with authority to make and execute deeds or other conveyances. It is also true beyond question that he did sell a lot to Dart without any condition or restriction whatever as to its use, that possession of the lot was delivered to the purchaser, the price paid in full, and that the purchaser made valuable improvements upon the lot. Afterwards the company tendered him a deed containing numerous restrictions and limitations, which Dart declined to accept, but, on the contrary, filed an equitable petition praying for a specific performance of the contract as made. It seems that the company so far recognized the validity of the sale made by Kay as to accept the purchase money, and permit Dart to remain in possession and improve the property; but it desired to incorporate in its deed of conveyance terms entirely unknown to the transaction between its agent and Dart. It had no right to do this, but was bound to convey in accordance with the terms of the sale as made; and therefore, under the evidence, the verdict and decree for a specific performance in Dart's favor were right.

2. The evidence to sustain the finding of the jury that the Brunswick Company acted in bad faith was not very strong, and it is at best doubtful whether Dart really had a right to damages on this ground. But, be this as it may, he did not bring his action for damages for a breach of the contract. He had a right to do this or to proceed for a specific performance. Having elected this latter remedy, he waived his right to collect attorney's fees as damages for bad faith in breaking the contract, the performance of which was decreed in his favor. Section 2942 of the Code, which

allows, in specified cases, expenses of litigation as a part of the damages, is applicable to actions for damages sustained in the breach of a contract, but is not applicable where the party stands upon the contract, seeks to have the same enforced specifically, and succeeds in so doing. Consequently, in affirming the judgment, we have ordered the recovery of \$50 for counsel fees to be written off by the plaintiff below. Judgment affirmed, with direction.

(34 Ga. 412)

**BUICE v. McORARY.**

(Supreme Court of Georgia. March 26, 1894.)

**TRIAL—AMBIGUOUS VERDICT—NEW TRIAL—CONSENT TO CORRECTION OF JUDGMENT.**

The action being upon an account for lumber sold and delivered, and the verdict being for the plaintiff, in these terms: "We the jury find for plaintiff forty-one dollars and four cents principal and interest," the verdict is ambiguous, inasmuch as it does not clearly disclose whether the interest referred to was interest to be computed on the amount specified, or was interest already computed, and included in that amount. For this ambiguity the court was warranted in granting a new trial, and the judgment granting it is affirmed. But inasmuch as the only prejudicial result to the defendant below would be that he might be charged with interest on interest, as well as interest on the principal of the debt, and as this result can, at the option of his adversary, be avoided, direction is given that if the plaintiff will, during the term at which the remittitur from this court shall be entered, vacate the judgment he has heretofore entered upon the verdict, and in lieu thereof will enter judgment for the specific amount named in the verdict, with costs in the court below, with an express renunciation of any interest thereon, and an express declaration in the face of the judgment that it shall bear no interest whatever, then no new trial shall be had, but the verdict, thus limited in its effect, shall stand.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by E. E. Buice against O. F. McOrary on an account for lumber sold and delivered by plaintiff to defendant. There was a judgment for plaintiff, and a new trial granted. Plaintiff brings error. Affirmed, with direction.

McHenry, Nunnally & Neel, for plaintiff in error. Dean & Smith, for defendant in error.

**PER OURIAM.** Judgment affirmed, with direction.

(35 Ga. 503)

**WASHINGTON v. STATE.**

(Supreme Court of Georgia. Dec. 21, 1894.)

**HIGHWAY ROBBERY—ALIBI AS DEFENSE—EVIDENCE—SUFFICIENCY.**

No error of law having been committed, and the verdict being supported by the evidence, this court will not interfere with the discretion of the trial judge in refusing a new trial.

(Syllabus by the Court.)

Error from superior court, Carroll county; S. W. Harris, Judge.

Harry Washington was convicted of robbery, and brings error. Affirmed.

The following is the official report:

Harry Washington was indicted for the offense of robbery, and was found guilty. His motion for new trial was upon the general grounds alone, to wit, that the verdict was contrary to law, evidence, etc. It was overruled, and he excepted.

Upon the trial the prosecutor, Maxwell, testified in brief: "On the night of December 4, 1893, was on my way home from my store at Villa Rica. The store is about a quarter of a mile from my house. Met two negroes, with pistols in their hands, who presented their pistols. Told them not to shoot, I was unarmed. One of them put his right arm around me, caught my right arm, and with his other hand took my pocketbook from me, and searched my pockets. In the pocketbook I had some \$300 in money and various checks. Recognized defendant's voice. Couldn't recognize faces, because it was too dark. It was an unusually dark night, and we were in a low place. The person I recognized as defendant looked about his size. Think the other was smaller, but might be mistaken. Couldn't tell much about sizes in the dark. Have known defendant two or three years. He had worked for me. Was very familiar with him, and am well acquainted with his size and voice. The men had their hats pulled down over their faces, but were disguised in no other way that I could see. Couldn't see their eyes, but could see their hands and mouth. Was right at them. The one I think was defendant stood in front of me while the other was searching my pockets. Had his pistol at my breast. The one who took the pocketbook said, 'Don't say nothing, or we will blow your damned brains out;' and the one in front of me said, 'Run, and if you make any alarm about it in this town to-night, God damn you, we will kill you.' At that time I recognized it as defendant's voice. Think they called my name when they first approached me; and when they took the money won't be positive whether he called my name or not. Was about twenty or twenty-five yards from my gate when they robbed me. Green Roberts lived a little southeast of my store,—three or four hundred yards from my store, and about three-eighths of a mile from my house. The one who stood in front of me was a negro. I could see enough to tell he had a negro's flat nose. Won't swear positively it was defendant's face. The only thing that caused me to think it was defendant, I thought I recognized his voice. When I met them they both talked, and both said about the same thing: 'Hold up! Your money or your life, God damn you!' Didn't recognize defendant at that time. Couldn't tell; both talked at once. Didn't recognize his voice until they had gotten my money, when he spoke by himself. Was so excited when they were getting my money don't remember all that was said. I started

to put my hand in my pocket, and he said don't do that. I recognized that voice at that time as the voice of defendant. I had my eye on the one that stood in front of me, for I thought he was going to kill me. Can't say positively that was defendant's voice. Know it sounded like his voice. It was so dark you couldn't recognize a man forty or fifty yards. There is a bridge near where I live, and I heard them coming, very near the house, before I got on the bridge. I was robbed about fifteen or twenty feet after I passed the bridge. The man who caught me and took my money talked like he was trying to change his voice, while he was robbing me. I didn't take time to measure the man who stood in front of me, but suppose he was five feet eight inches high,—about medium height. Had defendant arrested that night between eight and twelve o'clock. Had him turned loose without bond a few minutes next morning, and then had him arrested again. The first passenger train was due there at five twenty-five, and the next (accommodation) at six forty-two. About fifteen or twenty minutes after the first train came, I went and got my mail. Then as quick as I could come from the post office I closed up, having nothing to do but close the door and blow out the light. I walk home from the store in five minutes or less time. After I was robbed, went in my house, and consulted my wife a few minutes; then went to some neighbors; then to the depot, and got there just before the accommodation came in. The persons who robbed me ran up the sidewalk towards town, until they got to a gate near the first house, when they ran through the field. They ran across a rye patch into a pasture, and then through a swamp, where there was a cow mire. They seemed to be running close together. The swamp was thirty or forty feet wide, and so miry I couldn't walk in it without stepping on tufts of grass. They went through that swamp without picking their way, but stepped in the slush. The land is gray down there, and I think the color of the mud is a kind of pipe clay. No red mud there. Don't remember that I saw any mud on defendant after he was arrested."

Other testimony was introduced by the state, to the following effect: After the first train had passed, and before the accommodation had come, one Thompson went to Maxwell's store, and went out the back door. He saw two men at the back of the store, who seemed to be stretching up, looking in one window. One of these corresponded pretty well with defendant, but Thompson could not see his face. He did not recognize this man as defendant, and did not speak to him. Took it to be defendant; thought it was defendant. Has known defendant several years, and was pretty well acquainted with him. When he could see defendant in the daytime knew his walk, and thinks the walk of the man corresponded pretty well with defendant's walk. He sized up to be

defendant. The other man seemed to be lower. The man Thompson took to be defendant had on an overcoat, and did not stagger. The overcoat, Thompson thought, was the overcoat which defendant usually wore. He would know defendant's overcoat; had seen him with that overcoat. He did not know whether the overcoat in court was the one defendant had on that night or not. A little before the accommodation train came, defendant came into Green Roberts' house. There was mud on his knees, and his pants were wet and frozen. Roberts did not notice his shoes. Defendant said he had been up to Jim Morgan's, to see if Jim had come home, and Jim Benson asked defendant, "If you had been up there, how come your breeches leg muddy, and cockleburrs on you?" and defendant said Warren Cary's dogs got after him, and ran him up there, and he fell in a mud hole. A short while afterwards one came in, and said Mr. Maxwell was robbed, and Benson said, "You can all tell where I was, I was right here." Defendant said, "You can tell where I was, too, can't you?" and Roberts' wife replied: "No, you was gone. We can't tell where you was gone to." Defendant stayed a few minutes, and left, saying he was going on up to the church, and, after he left, his wife came, and inquired for him. Defendant was at Roberts' when the accommodation train passed Villa Rica. The mud on his pants was sorter red mud and looked like he had been down on his knees. When he came into Roberts' house he didn't appear to be excited nor tired, and had his guitar box in his hand. Roberts' house is about 10 steps from Charity Lambert's. There is a bridge 10 steps from Roberts' house, and to cross the street and come right up from the bridge 100 yards up that street would put defendant at Warren Carey's house. Defendant was drinking that night. If defendant came to Warren Carey's house that night, Warren did not see him, and if Warren's dogs ran anybody, Warren did not know it. The dogs could not run any more than the length of the chain, for they were tied under the house and in the house. Smith's field is between Carey's and Charity Lambert's, and there is red mud in the gullies of that field. Defendant was seen with his guitar in his hand, between sundown and dark, before the first train passed, coming out of the store next door to Maxwell's. One witness thought that on the night Maxwell was robbed witness could have recognized almost any person at a short distance, he was well acquainted with; and that if a negro was standing in front of him, he was well acquainted with, with hat pulled down on his forehead, and it was light enough for witness to tell he was a negro by the flatness of his nose, witness could recognize him at once. It is about as easy to tell a person at night by his voice as it is to see him if you are familiar with him. Another witness testified that he could recog-

nise one's voice if well acquainted with him, and, if scared no worse than to know that a person in front of him had a flat nose, one ought to be able to recognize the face of a person with whom he was well acquainted. The tracks that were found and supposed to be the tracks of the robbers finally turned in the direction of the depot and Green Roberts' house; and at the gait the persons seemed to have been traveling when the tracks were made, to have gone the way they went from where Maxwell was robbed to Roberts' would have taken 10 or 15 minutes, may be less. Defendant, when asked to go and put his foot in the track, said he would go, and went voluntarily. His foot fit the track. There was nothing peculiar about his shoe or the track. He wore a 9 or 10 shoe, not an unusual number; and a 9 or 10 shoe on the foot of another would have fit the track. One Velvin, who took defendant out the next morning to try his foot in the track, noticed the clothes defendant had on, but did not pay any attention to them; did not notice any sign of muddy slush on defendant's pants. One witness testified that the mud in the swampy place where he saw the tracks was black, and that the tracks where he last saw them were not going in the direction of Villa Rica or of Roberts' or of Orrie Scott's or of defendant's house; and that he did not see any yellow mud, "like that there on pants," at the slush these parties went through, and did not think one could, at that place, have gotten such mud, but would have gotten black mud, and could not have gone through that place without getting more mud on pants "than that"; but there were plenty of gullies in the pasture through which the robbers ran, some not far from where witness saw the tracks last, and the mud in these gullies was yellow,—same color as the mud on the pants, witness thought. From where this witness last saw the tracks, if the person making them had continued to move in a circle, they would have come into a street north of Maxwell's house; and a person could have gone from there by a street to one Embry's, then by a school building, and direct to Roberts'. When defendant was arrested he told the arresting party that he had been up at Charity Lambert's and Warren Carey's; that he met Charity between her house and Carey's, above the road, in the field, in a low flat place, but did not say how long they were there; that he went to Carey's, and Carey's dogs got after him, and ran him down through the branch and swamp. One of the arresting party went to Carey's house, and the dogs were tied. It was about a hundred yards from where defendant said they were to Carey's house. This person did not notice any mud on defendant's pants, nor that they were frozen; but they were tolerably wet from his knees down, and defendant said it happened by his running from the dogs through the swamp. Defendant was sitting at home,

playing the guitar, when arrested. To another person defendant stated that he was out with Charity, down close to Carey's, having taken her out to get a smack. This person told defendant that Maxwell said two negroes robbed him, and defendant said if he could get out, if the money could be got he would get it. This person noticed mud on defendant's shoes and pants, and to him, also, defendant accounted for it by saying Carey's dogs got after him. Charity Lambert testified, among other things: Defendant came to her house about sundown, and stayed there until after the first train went by, and left. Defendant then had his guitar with him, picking it. Defendant left Jim Benson at Charity's. After the accommodation passed, defendant came back, and asked for Benson, and Charity told him Benson was hunting for him. This was the first time Charity saw him after he had left her house as above mentioned. She was not out with defendant at all that night. She went to town after both trains had passed, and he was then standing on the bridge, and was standing there when she came back. She did not come between her house and Orrie Scott's, and did not go back down the street towards Carey's, that night, at all. Defendant left her house after the first train came, and came back just a little before the accommodation, having been away 25 or 30 minutes. Defendant was drinking, and said, when at her house the first time, he was not going home to his wife that way, in reply to one who asked him to go home. Defendant sent his wife after Charity, and told her he was in a serious thing, and wanted her to help him all she could; that he would give her \$15 to say he and she were out together; and she refused to say it. Defendant did not tell her to swear the truth about the matter; that they were out about Warren Carey's; and she did not acknowledge to being there, and did not say to him it would get her in a worse fix than him, and he did not promise her to help pay her fine.

The main defense was an alibi. The pants and overcoat, which a witness testified defendant had on the night in question, were exhibited in court, and the witness testified that the pants had been in her possession ever since defendant pulled them off, but not the coat; and that the pants had not been washed, but were like they were when defendant pulled them off. There was evidence that about the time of the commission of the robbery two men were seen about at the place where the robbery was committed, one tolerably tall and the other low; the tall one taller than defendant and the low one lower; and a witness who testified as to this did not think either of them was defendant. This witness did not know defendant until the day before the trial, and did not know whether the men above mentioned were white or black. Another witness saw the two men, and also testified that the tall one was taller

than defendant and the low one lower, and that the tall man was not defendant. This witness did not know who the men were, and did not know defendant until the day before the trial. There was evidence tending to show that defendant was at Charity Lambert's or its immediate vicinity, from before the first train went by until after the accommodation passed; that during that time he was out with Charity Lambert; and that defendant was "staggering" drunk. One of defendant's witnesses testified that defendant was at Rich Townsend's when the first train came by; that witness left there about five minutes after the first train passed, and defendant was there when witness left; that four or five minutes after the accommodation train passed, defendant came into Green Roberts' house with mud and stuff on his knees and cockleburra, and said he was tired; that Carey's dogs got after him; that there are cockleburs down in the flat in the field between Charity Lambert's and Carey's; and that the mud on defendant's pants was red. One witness testified, among other things, that Charity Lambert and defendant went down the street together; that Charity turned the corner at Orrie Scott's, and went down the street, and defendant followed her, and was gone until two or three minutes before the accommodation came, and came back a minute after Charity did. Another witness about the same time saw Charity go between her house and Orrie Scott's, down in the direction of Carey's, and saw a man staggering along behind her, who walked like defendant, but witness did not know who it was; was not close enough to tell who it was, being about 25 steps away. A few minutes before that, this witness had seen Charity and defendant whispering together at Charity's and Rich Townsend's, and heard defendant say, "All right." Another witness testified positively that it was defendant who followed Charity down the street that night; that witness did not know whether the moon was shining or not, but reckons you could see anybody by moonlight, up the street, a hundred yards or further; that she was looking, and recognized defendant, and the last time she saw defendant and Charity that night they were about a hundred feet from her. Another witness testified that at the time of the robbery there were strange colored folks about Villa Rica; that he saw two the day Maxwell was robbed,—one a tall, yellow fellow, and the other lower; and it was nothing unusual to see strange men there. Witness saw them there nearly every day about that time of the year, etc. Defendant made a long statement, denying any connection with the robbery, and accounting for his whereabouts in the manner indicated above. He stated further that while he was off with Charity that night, in crossing a little ditch, he fell on his knees, and that got the legs of his pants wet; that he did say, when he got back to Roberts' house, that Warren Carey's

dogs barked, got after him, and he ran; and that while he and Charity were down there the dogs did bark, and she said, "Let's go away," and they left; that Charity did admit that she was with him that night, and afterwards denied it; that Charity said she did not want to say it in court, as they would put her in the chain gang, and he told her that if they put her in the chain gang for telling the truth he would help pay her out; and that what he said as to finding the money was that, if his bond was made, if negroes got that money in that town, he would find out where it was, and let it be known. Rich Townsend, one of defendant's material witnesses, was impeached by evidence of a witness as to Townsend's bad character, etc.; and so was Mollie Plant, another; and by the same witness Charity Lambert was impeached.

W. D. Hamrick and S. H. Holderness, for plaintiff in error. T. A. Atkinson, Sol. Gen., and W. F. Brown, for the State.

PER CURIAM. Judgment affirmed.

(98 Ga. 342)

WARE et al. v. LAIRD.

(Supreme Court of Georgia. Oct. 30, 1893.)

GARNISHMENT PROCEEDINGS—BOND TO DISSOLVE—SUFFICIENCY—PLEADINGS—ISSUES.

1. The bond given by the defendant below, though not in strict compliance with the terms of the act of October 15, 1885, was sufficient to operate as a dissolution of the garnishment under that act, and therefore a traverse of the answer of the garnishee was unnecessary. The court, having erroneously dismissed the case for the want of such traverse, erred in overruling the motion to reinstate.

2. The issue as to whether the fund garnished was subject to the garnishment was sufficiently raised by the affidavit or so-called "claim" of the defendant that the fund was not subject, and the plaintiffs should have been allowed to proceed to trial upon this issue.

(Syllabus by the Court.)

Error from superior court, Fulton county; Marshall J. Clarke, Judge.

Action in justice's court by Ware & Owens, copartners, against T. O. Laird, in which the East Tennessee, Virginia & Georgia Railroad Company was served as garnishee. From judgment for plaintiffs, defendant appealed to the superior court, where his motion to dismiss was sustained. From an order overruling their motion to reinstate the cause, plaintiffs bring error. Reversed.

The following is the official report:

Ware & Owens sued Laird in a justice's court, and caused process of garnishment to issue and be served on the East Tennessee, Virginia & Georgia Railroad Company. Laird interposed an affidavit and bond, the affidavit alleging: "That he is a laborer for wages, employed by the E. T., V. & Ga. R. R. That he has been so employed by said road as a day laborer for wages at the sum

of \$2.25 per day since the 1st day of August, 1890. That said plaintiffs, Ware & Owens, have heretofore, to wit, on the 13th day of January, 1891, caused process of garnishment to issue and be served on said railroad to hold up the wages earned as aforesaid by deponent, and subject the same to the payment of a certain judgment for the sum of \$65, which said plaintiffs claim to have against him. This defendant claims that all the money earned by him in the service of said road as aforesaid since the date aforesaid of first employment up to this date has been earned as a day laborer for the wages above stated, and that the same, and every part thereof, is exempt from process of garnishment under the law; and he hereby so claims the same as daily wages, and exempt from any liability of garnishment in said case." The bond recites: "That we, Thos. O. Laird, principal, and —, as security, hereby acknowledge ourselves jointly and severally bound unto Ware & Owens in the sum of \$130.00, subject to the following conditions: That said Ware & Owens, at the alleged date, Sept. 3, '91, of the justice court of the 1234th district G. M. of said county, obtained a judgment against said Thos. O. Laird, principal, upon which judgment the said Ware & Owens, plaintiffs, claim there is due them the sum of \$65; and that said Ware & Owens have sued out summons of garnishment, which summons has been served upon the E. T., V. & Ga. R. R. Co.; and that said Thos. O. Laird has filed his claim to the amount due him by said E. T., V. & Ga. R. R. Co. as exempt from the process and liability of garnishment, for the reason that the sum so due is owing for daily labor performed, and therefore not subject to the payment of said alleged judgment. Now, if said defendant, Thos. O. Laird, shall pay to said plaintiffs, Ware & Owens, the sum that may be found due to said defendant upon the trial of any issue that may be formed upon the answer of the garnishee, or that may be admitted to be due in said answer if untraversed, or that may be found subject to said garnishment process under the claim hereinbefore stated, then this bond to be void. Witness our hands and seals this January 28, '91. [Signed] T. O. Laird. S. L. Limberry." Four days after the date of the affidavit and bond the garnishee answered, admitting an indebtedness of \$95.10, and alleging that it was due Laird for daily labor, and was not subject to garnishment. The justice rendered judgment in favor of the plaintiffs, and Laird appealed to the superior court. There he moved to dismiss the case because the garnishee's answer had not been traversed. The court ruled that a traverse of the answer was necessary, and that it should have been filed at the first term, and dismissed the garnishment proceeding, with leave to move to reinstate. The motion to reinstate was made, and was overruled.

Mayson & Hill, for plaintiffs in error.  
Simmons & Corrigan and John Clay Smith, for defendant in error.

BLECKLEY, C. J. 1. Laird, the debtor, whose money was garnished in the hands of the East Tennessee, Virginia & Georgia Railroad Company, his debtor, made an affidavit claiming the fund as exempt because consisting of his wages as a day laborer, and at the same time gave bond to dissolve the garnishment. These two documents are set forth in the reporter's statement. On a comparison of the bond with the terms of the act of October 15, 1885, it will be seen that there is some want of strict compliance with the provision of that act. We think, however, that the bond was sufficient to operate as a dissolution of the garnishment, and for this reason that a traverse of the answer of the garnishee was unnecessary. The superior court dismissed the case because the answer was not traversed. It was error to deny the motion to reinstate.

2. The affidavit of Laird, asserting his claim, sufficiently raised the issue as to whether the fund was subject to garnishment or not. There was no need for raising that issue upon the answer of the garnishee after the debtor himself had come in and raised it by his own affidavit asserting claim to the fund as exempt. The plaintiff, his creditors, who sued out the garnishment, should have been allowed in the superior court to proceed to trial, and condemn the fund if they could. Judgment reversed.

LUMPKIN, J., disqualified, not presiding.

(96 Ga. 571)

TAYLOR et al. v. NEW ENGLAND MORTGAGE SECURITY CO. et al.

(Supreme Court of Georgia. Dec. 8, 1894.)

APPEAL—SECURITY FOR COSTS—DISMISSAL.

1. There being several plaintiffs in error in the bill of exceptions sued out in this case, an affidavit by one only of them of inability, from poverty, to pay the costs, is not sufficient to bring the case to this court in forma pauperis.

2. No such affidavit having been duly filed by the other plaintiffs in error, and counsel for the plaintiffs in error having, up to the time of the calling of the case for trial in this court, neglected or refused to pay the costs, the writ of error is dismissed.

(Syllabus by the Court.)

Error from superior court, Washington county; R. L. Gamble, Judge.

Action by the New England Mortgage Security Company and others against John Taylor and others. From the judgment, defendants bring error. Dismissed.

J. N. Gilmore and Jordan & Tyson, for plaintiffs in error. Evans & Evans, for defendants in error.

PER CURIAM. Writ of error dismissed.



(35 Ga. 361)

**PEASE v. WAGNON.**

(Supreme Court of Georgia. Jan. 8, 1894.)

**JURISDICTION—PRESUMPTIONS — JUDGE IN CHAMBERS—MORTGAGE EXECUTED BY TRUSTEE—FORECLOSURE.**

1. Under sections 4221-4223 of the Code, a judge of the superior court, though acting in vacation and at chambers in passing lawful orders touching trust estates, acts as a court of equity, that court being always open. Hence the presumptions which attach in favor of judgments and decrees by a court of general jurisdiction apply to orders thus granted.

2. As against a general demurrer to a petition to foreclose a mortgage made by a trustee to secure a debt contracted as trustee, the petition is good in substance as to the authority of the trustee to execute the mortgage if it alleges that the mortgage was created by virtue of an order of the judge of the superior court of a named circuit authorizing and empowering the trustee to create the same. As against a special demurrer pointing out that the order should be set forth in terms or attached as an exhibit, the petition would not be good, but it would be amendable, and ought to be amended. The court erred in dismissing the petition on general demurrer.

(Syllabus by the Court.)

Error from superior court, Houston county;  
C. L. Bartlett, Judge.

Action by William A. Pease against Mary V. Wagon, trustee, to foreclose a mortgage. From a judgment dismissing the petition, plaintiff brings error. Reversed.

Gustin, Guerry & Hall, for plaintiff in error. R. W. Patterson, A. O. Riley, and Dossau & Hodges, for defendant in error.

**BLECKLEY, C. J.** Although the petition and the rule nisi conformed to the general provisions of the Code contained in section 3962, prescribing the mode of foreclosing mortgages on real estate, yet, as section 2335 declares that trustees are not authorized to create any lien upon the trust estate, except such as are given by law, and as the law, without some preliminary order granted by the proper judge of the superior court in the exercise of his equitable jurisdiction, does not enable any trustee to create a lien by mortgage, some amendment to the petition as it originally stood was necessary in order to show that the mortgage sought to be foreclosed was valid and binding upon the trust estate, that mortgage as described in the petition having been executed in 1885, long after the Code went into operation. The amendment made to the petition alleged that the mortgage was "created by the said Mary V., trustee, by virtue of an order of the Honorable Thos. J. Simmons, judge of the superior courts of the Macon circuit, authorizing and empowering said trustee to create said mortgage." Certainly this is a very general, vague, and meager averment of the judgment or decree referred to. But the petition, as amended, was met by a general demurrer only, and of course this admitted that the averment was true in substance. As Houston county

is in the Macon circuit, the judge of that circuit was the proper one to exercise jurisdiction over such a matter, and the appropriate decree, made in vacation, conferring upon a trustee authority to mortgage the trust property, is usually called an order. The admission made by the demurrer therefore conceded that the mortgage was executed in pursuance of a decree rendered by the judge of the Macon circuit out of term. The superior court, as a court of equity, is one of general jurisdiction; and the Code, in section 4222, declares that "a court of equity is always open, and hence the judge in vacation and at chambers may receive and act upon such petitions," meaning such as are referred to in the preceding section, which says that "all proceedings ex parte or in the execution of the protective powers of chancery over trust estates or the estates of wards of chancery may be presented to the court by petition only, and such other proceedings be had therein as the necessity of each cause shall demand." It follows, we think, that the presumptions which attach in favor of judgments and decrees by a court of general jurisdiction apply to orders like the one alleged by this amendment to have been granted by the judge of the Macon circuit. That such an order could lawfully be granted out of term, see *Weems v. Coker*, 70 Ga. 746. We are not to be understood as indorsing the amendment as good pleading in point of form. If the petition, as amended, had been demurred to specially, pointing out that the order granted by the judge should be set forth in terms or attached as an exhibit, such a demurrer ought to have been sustained, but the petition would have been still further amendable, and doubtless the requisite amendment would have been made, had this particular defect been pointed out. The court erred in dismissing the petition on the demurrer adjudicated upon, which, as applied to the amended petition, was a general demurrer only. Judgment reversed.

(34 Ga. 58)

**LAMB v. DUNWODY.**

(Supreme Court of Georgia. June 18, 1894.)

**MUNICIPAL CORPORATIONS—MAYOR OF BRUNSWICK—TERM OF OFFICE—AMENDMENT OF CHARTER.**

Under the act amending the charter of the city of Brunswick, approved December 23, 1892, which declares "that the term of the mayor to be elected at the election for mayor and aldermen of said city on the second Saturday in December, 1892, shall be two years," the mayor elected on the day last mentioned was entitled to hold the office for the term of two years, although, before the approval of the amending act, that day had already passed, and an election for a mayor for a term of one year only, as provided in the existing charter of the city, had taken place; it appearing from the legislative journals that the amending act had been introduced in the senate and passed by that body, and had been read the first time in the house of representatives, before the sec-

ond Saturday in December, 1892, and the charter of the city, before the amending act was passed, expressly declaring that the mayor should hold his office until his successor was elected and qualified.

(Syllabus by the Court.)

Error from superior court, Glynn county; J. L. Sweat, Judge.

Action by Thomas W. Lamb against Harry F. Dunwody to test defendant's right to the office of mayor of the city of Brunswick, claimed by relator. There was a judgment for defendant, and plaintiff brings error. Reversed.

Symmes & Bennet and Harrison & Peeples, for plaintiff in error. Harry F. Dunwody and Spencer R. Atkinson, for defendant in error.

**LUMPKIN, J.** The act of August 27, 1872, amending the charter of the city of Brunswick (Acts 1872, p. 151), provided for the election of a mayor on the second Saturday in December of that year, and that there should be an election for a mayor on the second Saturday in December in each and every year thereafter, the mayor's term of office being one year, and until his successor was duly elected and qualified. While this law was still of force, Lamb, on the second Saturday in December, 1892, was elected mayor of Brunswick for the term of one year, which, under the law, was to begin on the first Monday in the January following. The second Saturday in December, 1892, was the 10th day of that month. On the 30th day of the preceding November, a bill to amend the charter of Brunswick was introduced and read the first time in the senate. It was read the second time in that body December 2d, and was read the third time and passed December 5th. This bill was read in the house of representatives, the first time, December 9th; the second time, December 13th; was passed by that body December 15th; and approved by the governor December 23d. This act is to be found in the official publication of the Acts of 1892 (page 213). The tenth section thereof amends the fourth section of the act of 1872, above cited, so as to provide "that the term of the mayor to be elected at the election \* \* \* on the second Saturday in December, 1892, shall be two years, and from thereafter elections for mayor shall be held biennially." It will thus be seen that the bill which became the act of 1892 had been introduced and passed in the senate, and had been read the first time in the house of representatives, before the second Saturday in December, at which time Lamb, as already stated, was, under the then existing charter, elected mayor for the term of one year. At the time of its passage by the senate and of its first reading in the house of representatives, the words "to be elected" were appropriately used with reference to "the second Saturday in December, 1892," which had not then yet arrived; and it is obvious that, when the bill was introduced,

it must have been the intention of its author, and also of the senate in passing it, that it should apply to the election which would occur on the day last mentioned. As, however, that day had come and gone before the passage of the bill by the house of representatives and its approval by the governor, the words "to be elected" were no longer literally appropriate. The difficulty, doubtless, arose from inattention and a consequent failure to have the bill amended so as to be accurate in its terms with reference to the election to which, beyond all question, it was originally intended to apply. In view of the facts stated, we cannot reasonably doubt that the real intention of the general assembly was that the mayor elected on the second Saturday in December, 1892, should hold his office for the term of two years from the first Monday in January, thereafter, upon which day that term was by law to begin. The cardinal rule for the construction of all statutes being that effect should be given to the real legislative will, when ascertainable, we feel bound to hold that Lamb was entitled to the office of mayor for the term of two years just mentioned, the more especially as the law actually in force when his election took place distinctly provided that he should hold the office until his successor was duly elected and qualified.

At an election held on the second Saturday in December, 1893, Dunwody was elected mayor of Brunswick, and took his seat as such on the first Monday in January, 1894. Lamb, claiming the office, instituted proceedings to test Dunwody's right to hold it, which resulted in a judgment in favor of the latter. There was no authority of law whatever for holding an election in 1893. After very anxious and careful consideration, we can find no sound or even plausible reason for imputing to the legislature a design to say "1893" instead of "1892" in the phrase "on the second Saturday in December, 1892." At the time the bill was drafted, its author could certainly have had no intention to use the figures "1893"; and there is no reason whatever for supposing that at any time while the bill was pending in either branch of the general assembly there was any purpose or intention to substitute "1893" for "1892." The act appoints the even, and not the odd, years for the whole series of biennial elections. To begin the count with 1893 is unquestionably the very reverse of what was contemplated. The case is really not one for construction, but for honest acceptance of the exact truth.

There being no authority of law for holding the election at which Dunwody was elected, that election was absolutely null and void, and conferred upon him no right whatever to hold the office. This being so, Lamb had the right to hold over by virtue of his election under the act of 1872, even if the act of 1892 did not confer upon him a term of two years. But we think, for the reasons already stated, the

act last mentioned did this. That act was not retroactive. The term of Lamb had not begun when it was passed. It therefore did not prolong the existing term, but simply added an additional year to a term which was to begin in the future. The act, therefore, was prospective entirely as to the term of office it affected. Judgment reversed.

(93 Ga. 352)

# WESTERN UNION TEL. CO. v. BATES.

(Supreme Court of Georgia. Nov. 6, 1893.)

TELEGRAPH COMPANIES — DELAY IN DELIVERY —  
EVIDENCE—ADMISSIBILITY—MEASURE  
OF DAMAGES.

1. As to the penalty for not delivering in Georgia with due diligence the message after its transmission from Tennessee, and as to the constitutionality of the statute on the subject with reference to interstate commerce, the case is ruled by *Telegraph Co. v. James*, 16 S. E. 88, 90 Ga. 254.

2. The message delivered by the company after the delay was over was admissible in evidence, and it was unnecessary to call for or put in evidence the original message delivered to the company for transmission.

3. Where an agent of the defendant corporation is examined by the plaintiff as his own witness, it is discretionary with the court to admit evidence, otherwise competent, drawn out by a leading interrogatory, although the interrogatory was excepted to in due time and manner by the defendant.

4. If a plaintiff seeks to take the benefit of a written demand upon a telegraph company for damages, where such demand is necessary to his right of action, the mere fact that the agent on whom the demand was made answered it verbally by a refusal on the part of the company to settle, saying that the plaintiff would have to bring suit, will not dispense with the highest evidence of the demand, which is the writing itself, or proof of its contents after failure to produce it has been accounted for.

5. Where the plaintiff has made a journey which he would not have made so early had the telegraph company delivered to him with due diligence a message which ought to have been delivered before the journey was commenced, he is, *prima facie*, not entitled to recover of the company the whole expense of the journey, but only the difference, if any, between what it cost to make it then and what it would have cost to make it at the later time designated in the delayed message. Evidence to show that he incurred expense for a horse and buggy to convey him beyond the point from which the dispatch was sent, the sender being his own wife, is not admissible without further evidence tending to show that he had not then discovered that he had made his journey prematurely, and why he had not made the discovery.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action by Lewis I. Bates against the Western Union Telegraph Company to recover for defendant's negligence in the matter of delivering a certain telegram. On judgment for plaintiff, defendant brings error. Reversed.

Bigby, Reed & Berry, for plaintiff in error.  
Frank A. Arnold, for defendant in error.

BLACKLEY, C. J. 1, 2. The first and second points have been ruled heretofore. As

to the first, see *Telegraph Co. v. James*, 90 Ga. 254, 16 S. E. 83. As to the second, see *Telegraph Co. v. Fatman*, 73 Ga. 285; Same v. *Blance*, 93 Ga. —, 19 S. E. 255.

3. The trial court has a discretion in allowing leading questions when a witness is under examination in open court. We see not why this discretion should not extend to the taking of evidence by interrogatories. Here the witness interrogated was an agent of the adverse party, and, doubtless, this was the reason why the court deemed it no impropriety to lead him. We can see nothing to indicate any abuse of discretion.

4. The demand upon the company for damages was in writing; and, while the question admits of two opinions, we think the writing itself was the highest and best evidence of the demand, and should have been produced or accounted for, notwithstanding the company's agent answered it verbally, by a refusal on the part of the company, and said the plaintiff would have to bring suit. The evidence of Arnold touching demand, and the response made thereto, should have been ruled out.

5. Inasmuch as the plaintiff made his journey earlier than he would have made it if the company had delivered to him with due diligence the delayed message, he might recover, as a part of his damages, any excess of expense which was occasioned by making the journey at a time when it would not otherwise have been made. But this excess would be the limit of his recovery on this score. If he made it as cheaply as he would have made it had he waited until the time designated in the message, there was nothing upon which to base any recovery on account of expenses. Of course, if he had to repeat the journey, and thus pay for two journeys, instead of one, the whole expense of the first might be recoverable; but nothing of this kind appears in the evidence. The sender of the message was the plaintiff's wife, and it was sent from Shelbyville, Tenn., to Atlanta, Ga. She seems to have been in Shelbyville both when she sent the message and when he arrived there, in consequence of a previous message or appointment; and there is nothing tending to show that she did not inform him that the delayed message had been sent, and that his journey had been prematurely made. This being so, we can see no ground for charging the company with what he paid to hire a horse and buggy in Shelbyville, to carry him to another point, where the party was with whom he had business. The court erred in admitting evidence as to this item of expense.

The judgment refusing a new trial is reversed, with direction that, if the plaintiff will write off all his recovery except for the amount of the statutory penalty and the costs, then the judgment, thus modified, shall stand affirmed. Judgment reversed, with direction.

(94 Ga. 457)

**WESTERN & A. R. CO. v. MOORE.**

(Supreme Court of Georgia. March 26, 1894.)

**ACTION FOR WRONGFUL DEATH — RAILROAD COMPANY — INJURY TO BRAKEMAN — CONTRIBUTORY NEGLIGENCE — VIOLATION OF RULES — INSTRUCTIONS — DAMAGES.**

1. There was no error in allowing the plaintiff to testify that her husband, after paying his "cab board," which amounted to \$5, brought her \$59 at the end of every month he was at work, and that he had no other means or resources except his wages; the evidence being offered to show what were the earnings of the deceased, and the objection being that the amount turned over to the plaintiff by her husband at the end of the month was no standard by which to measure his earnings.

2. There was no error, while explaining to the jury the law that an employé, in order to be entitled to a recovery, must be free from fault, in using the expression that "he must not have contributed to the injury." This was no intimation that there could be a partial recovery by such employé in case he contributed to bringing about or causing the injury.

3. Under a rule of a railroad company in these words: "Conductors and trainmen are required to be at terminal stations 30 minutes before the leaving time of their trains. Brakemen must examine the coupling apparatus and brakes before train starts, and report to the conductor such as are not in good order,"—it would prima facie be incumbent upon brakemen to examine brakes only at terminal points, before the starting of a train. It was improper to leave to the jury the determination of the meaning of the rule, and evidence was not admissible to show that employes of the company interpreted and acted upon the rule as meaning that it was a brakeman's duty to examine the brakes upon a car taken at a station before the train left that station, without showing that the plaintiff so understood or so acted on the rule, or knew that the other employes did so. An ambiguous rule promulgated by a corporation for the government of its employes in a dangerous service should generally be taken in its stronger sense against the corporation, and in favor of the employé.

4. Where the court clearly instructed the jury that the railroad company could defend by showing that the employé injured was in fault, or that the company was without fault, and that, if it established either of these defenses, it was not liable, the expression "it would be upon them [the company] to show either of these things, and, if they [the company] fail to show either one of these things, the plaintiff would have a right to recover," could not have misled the jury, and is no cause for a new trial. Taking the entire charge together, the jury must have understood that the establishment of either defense by the company would be sufficient, and that it was not necessary to establish both.

5. It was not error to refuse to give in charge to the jury the following request: "If the plaintiff's husband knew, or ought to have known, of the existence of the alleged defect in the brake before he attempted to use it, or he could have known it by the exercise of ordinary care and diligence on his part,—that is to say, such care as every prudent man would have used under the same or similar circumstances,—if, by using such care, he could have discovered the defect, plaintiff cannot recover, because the law is that a servant cannot recover of the master for an injury received in using defective appliances either where he knew of the defect before using it, or could and ought to have discovered it before using it." This is sound law in the abstract, but there was no evidence from which the jury could infer that the plaintiff knew of the de-

fect; hence the request, in some of its terms, was not applicable to the facts.

6. In its charge upon the measure of damages, the court erred in omitting to call the attention of the jury to the fact that in his declining years the capacity of the deceased to labor in his calling, and his ability to earn money, might have decreased, and that they should take this into consideration in fixing the amount of the damages. In view of the facts of this case and the amount of the verdict rendered, there ought to be a new trial because of this error.

(Syllabus by the Court.)

Error from superior court, Cobb county; George F. Gober, Judge.

Action by Mary E. Moore against the Western & Atlantic Railroad Company for death by wrongful act. There was a judgment for plaintiff, and defendant brings error. Reversed.

Payne & Tye and Sessions & Sessions, for plaintiff in error. Clay & Blair, for defendant in error.

PER CURIAM. Judgment reversed.

(98 Ga. 752)

**HUBBARD et al. v. TURNER et al.**

(Supreme Court of Georgia. June 18, 1894.)

**LIFE INSURANCE — PAYABLE TO "HEIRS"—CONSTRUCTION OF TERM—RIGHTS OF CREDITORS OF DECEASED TENENT.**

The word "heirs," in a policy of life insurance payable to the "heirs or assigns" of the assured after his death, he never having had a wife or child, is to be construed as meaning his next of kin according to the statute of distributions, which in Georgia, when the decedent leaves no widow, is the same as the statute of descent or inheritance. Although the heirs, as beneficiaries of the policy, are to be ascertained by reference to the statute, they become beneficiaries, and take their interest, by virtue alone of the contract in their behalf embraced in the policy, and not in any respect by virtue of the statute; wherefore, on the death of the assured intestate without having assigned the policy, they take its proceeds as purchasers, and not as heirs or distributees. This being so, these proceeds are no part of the estate of the assured, and are not subject to the claims of his creditors, unless, by reason of some fraud, actual or constructive, committed by the assured upon their rights in taking out or keeping up the policy, the creditors are equitably entitled to follow and reclaim money invested in the policy which ought to have been used or reserved for use in satisfying their demands.

(Syllabus by the Court.)

Error from superior court, Chatham county; Robert Falligant, Judge.

Action by Hubbard, Price & Co., as creditors of Charles O. Hardwick, against one Turner and others, to recover the proceeds of a policy of life insurance taken out by deceased, and claimed by them to be subject to his debts. There was judgment for the heirs, and plaintiffs bring error. Affirmed.

A. Minis, W. W. Osborne, and Pope Barrow, for plaintiffs in error. Cabaniss & Wilingham, Saussy & Saussy, and Harrison & Peeples, for defendants in error.

LUMPKIN, J. Charles C. Hardwick, in his lifetime, took out a policy of insurance, payable to his "heirs or assigns." The contest in the present case was between his creditors and his heirs at law, who were his sister, two nieces, and a nephew (he never having had a wife or child), over the fund derived from this policy, which had been paid over by the company to Hardwick's administrator. The policy was issued in 1869. The debts due the contesting creditors were made in 1890. Hardwick had never assigned the policy, and died insolvent. There was no evidence that he was insolvent when the policy was taken out, nor that any of the premiums upon it were paid when he was insolvent, nor that any of the present claims against his estate were in existence at any time when any premium was paid. The judge, upon the above state of facts, rightly decreed that the heirs were entitled to the proceeds of the policy in the administrator's hands. What is the meaning of the words "heirs" as used in this policy? Under our statute of distributions, which is the same as the statute of descent or inheritance, when the decedent leaves no widow this word certainly means "the next of kin." Code, §§ 2484, 2570. As the assured was unmarried and childless, he, doubtless, intended to provide for those who would, at the time of his death, be entitled to his estate as his legal distributees, unless, during his life, he should choose to divert in another direction the proceeds of the policy by himself assigning it. As he never did assign it, and as he remained unmarried up to the time of his death, we are satisfied the intention remained with him to the last that his next of kin should take the proceeds of the policy by virtue of the contract he had made in their behalf with the insurance company. Reference is had to the statute simply for the purpose of ascertaining who are the beneficiaries of the policy; but, when thus ascertained, their right to the money is not derived from the statute, but solely from the contract embraced in the policy. In other words, they take the proceeds, not as heirs or distributees of the deceased, but as purchasers. This being so, the proceeds of this policy were not, under the facts of this case, any part of the estate of the assured, and therefore not subject to the claims of his creditors. Had any fraud, actual or constructive, been committed by the assured upon their rights, either in taking out or keeping up the policy, they might be equitably entitled to follow and reclaim money which the assured had invested in the policy, and which ought to have been used, or reserved for use, in satisfying their demands. No reference is here intended to the class of cases falling under section 2820 of the Code. Where the assured directs the money due upon a policy to be paid to any of the persons designated in that section, even though he may be insolvent, and use in paying premiums money to which his creditors are equitably entitled, no person can defeat the policy. This is so because the law so de-

clares in express terms. But granting that in the present case the creditors of Hardwick might, for any equitable reason, have been entitled to follow and reclaim money invested in this policy, no such equitable reason appears in the facts. It was not shown that, by reason of insolvency, or by reason of his using his means in paying premiums upon the policy, they lost or were deprived of any money which they ought to or otherwise would have received.

It was strenuously insisted for the creditors that the true construction of the words "heirs or assigns," as used in this policy, would make it mean that the policy was payable to the legal representatives, or to the estate, of the deceased; and that, therefore, its proceeds were assets for the payment of his debts in the due course of administration. We confess that the question is not altogether free from doubt, but we have given the instrument that construction which, in our judgment, best accords with the real intention and purpose of the assured. Men much more rarely take life insurance for the benefit of creditors than for the benefit of those to whom they are related by ties of blood or affection. In support of the creditors' contention, the case of Rawson v. Jones, 52 Ga. 458, was relied upon. There the policy taken out by Jones was payable to "his heirs, executors, administrators, or assigns." He had no wife or child, never having been married. This court held that this policy was payable to the legal representative of Jones, and therefore was legal assets in his hands for the payment of debts and for distribution. Judge Trippe stated that the introduction of the word "heirs" did not affect the construction, and added: "The terms 'heirs,' 'executors,' and 'administrators' are not words that are used where those who are next of kin are intended to have a right given them directly by the instrument,—for instance, as purchasers,—but are the terms usually employed to signify that, if they take at all, it is not directly, but through an administration." The use of the words "executors and administrators" manifested a clear intention on the part of the assured to vest the proceeds of the policy in his legal representatives, and the mere fact that the word "heirs" was used in connection with these other words would not authorize a court to give the policy a construction which would defeat the obvious intention of the assured. because, taking all together the language employed, it was just such language as in other instruments disposing of personal property would vest it in an administrator. We think the present case is different from the one just cited. Here there were no words manifesting a positive intention that the proceeds of the policy should become a part of the estate of the assured. If the word "assigns" had not been used, but only the word "heirs," there could be no doubt the next of kin would be entitled to its proceeds. The effect of inserting the word "assigns" was not to make the assured the owner of the proceeds, but merely

amounted to a reservation to him of the power to appoint who should take. With this word in the policy, the assured could have cut off those who were to become his heirs at law by appointing others in their place while he yet lived. As he did not do this, their rights under the policy as purchasers remained intact and complete.

We are aware there are decisions contrary to the conclusion we have reached in this case, but we are nevertheless satisfied with the correctness of our judgment, and will mention a few authorities which, to some extent, sustain it. The case of *Mullins v. Thompson*, 51 Tex. 7, in which it was held that a policy payable to the "heirs or assigns" of the assured was assignable by him, but, not having been assigned, the heirs were entitled to its proceeds on the death of the assured, is very much in point. In *Pace v. Pace*, 19 Fla. 438, the words "for the benefit of the estate of the insured" were, by the aid of extrinsic evidence, construed to mean that the policy was for the benefit of a minor child, and that its proceeds did not go to the administrator of the assured. The supreme court of Missouri, in *Loos v. Insurance Co.*, 41 Mo. 538, held that the words "heirs or representatives," in a policy of life insurance, entitled the heirs or next of kin to the money, as against the executor or administrator of the assured, it appearing from the context that the object of the assured was to make provision for his family. So, in *Hodges' Appeal* (Pa.) 9 Ins. Law J. 709, it was held that the phrase "heirs and legal representatives," in an insurance policy, meant the next of kin, and that the fund was no part of the decedent's estate which his administrator was entitled to receive. In *Griswold v. Sawyer*, 125 N. Y. 411, 28 N. E. 464, it was held that the words "legal representatives" may be shown to be the dependent family of the assured, and not his administrator, overruling *Griswold v. Sawyer*, 56 Hun, 12, 8 N. Y. Supp. 517, 585, 960. In *Welsert v. Muehl*, 81 Ky. 336, it appeared that the assured took out a policy payable "to his heirs"; and it was held that the persons answering that description at the time of his death were entitled to the proceeds of the policy in preference to the widow, to whom the assured had specifically bequeathed the amount due on this policy by will. As to the meaning of the words "heirs" and "legal heirs," as used in policies of life insurance, see *Wilburn v. Wilburn*, 83 Ind. 55, and *Gauch v. Insurance Co.*, 88 Ill. 251. Many of the above-cited cases strongly support the interpretation we have given the word "heirs," as used in the policy before us; and the reasoning of these cases, and the authorities they cite, also, as stated above, sustain our conclusion that the creditors of Hardwick were not entitled to the proceeds of this policy as against the claim of his heirs at law. The fact that the money was paid by the insurance company to the administrator, while it may tend to show that, in the opinion of the managers of the insurance company, he was the

proper person to receive it, will not prevent the heirs from claiming the money, if they are really entitled to it, as we have held. Judgment affirmed.

(33 Ga. 792)

# REAB v. SHERMAN.

(Supreme Court of Georgia. July 16, 1894.)

JUDGMENT BY DEFAULT—SETTING ASIDE—DELAY  
—MERITORIOUS DEFENSE.

Judgment having been rendered on an open account, there being personal service on the defendant, but no appearance when the case was called, although the name of counsel was marked on the docket, and there being no suggestion in the transcript of the record that the case was called out of its order, and defendant's counsel having had knowledge on the following day that the judgment had been rendered, and having waited almost three months, and until the last day of the term, before making a motion to set the judgment aside and reinstate the case, and on the hearing of that motion no evidence whatever as to the existence of a meritorious defense having been submitted, but, on the contrary, the plaintiff having then proved by the affidavits of witnesses that the account was just and unpaid, the court committed error in ordering the judgment set aside and the case reinstated. In the exercise of a sound discretion, on all the facts and circumstances, especially the delay to move, the court should have overruled the motion.

(Syllabus by the Court.)

Error from city court, Richmond county; W. F. Eve, Judge.

Action by Mary A. Sherman against L. A. R. Reab on an open account. Judgment by default was rendered in favor of plaintiff, and, from an order setting the same aside, plaintiff brings error. Reversed.

Salem Dutcher, for plaintiff in error. D. G. Fogarty and C. H. Cohen, for defendant in error.

LUMPKIN, J. This was a motion to reinstate a case in the city court of Richmond county, in which a judgment had been rendered against the defendant by default. The action was upon an open account, and the defendant had been served personally. When the case was called for trial there was no appearance, and there is no suggestion in the record that the case was called out of its order. The evidence submitted to the judge on the motion to reinstate tends very strongly to show that at the time the judgment was rendered there had not been marked on the docket the name of any counsel for the defendant; but there was evidence to the contrary, and the court was authorized to find that the name of the defendant's attorney had been so marked before the case was called for trial. Be this as it may, it is absolutely certain that this attorney did know of the rendition of the judgment on the very next day after it was rendered. The date of the judgment was August 7, 1893, which was the first day of the August term of the court,—that being the trial term of the case. On the next day the defendant's attorney ascertained, by reading the morning paper, that judgment had been

rendered against his client. With this knowledge, he waited until the 31st day of October, which was the last day of that term, before making the motion to set the judgment aside and reinstate the case. Thus, he allowed almost three months to pass before taking any steps in the matter, and by this delay it is almost, if not quite, certain the plaintiff would have been deprived of a trial during that term, if he had acquiesced in the judgment ordering the case to be reinstated. The record also shows that on the hearing of the motion not a particle of evidence was submitted to the presiding judge as to the existence of a meritorious defense to the action. Under the circumstances, it was incumbent on the defendant's attorney to demonstrate that his client had a good defense, and to show what it was. Nothing of the sort was done, but, on the contrary, the plaintiff, in resistance of the motion, proved by the affidavits of several witnesses that the account was just, due, and unpaid. Nevertheless the court ordered the judgment set aside and the case reinstated. So doing was, in our opinion, erroneous. We think that, in the exercise of a sound discretion, the motion to reinstate should have been overruled. There was nothing in the facts and circumstances presented entitling the defendant to a favorable exercise of the court's discretion, and the delay in moving to set the judgment aside was so palpably inexcusable, and in such utter disregard of the plaintiff's rights in the premises, the plaintiff's judgment ought to have been allowed to stand. Judgment reversed.

(94 Ga. 104)

**MACKEY v. MUTUAL AID, LOAN & INVESTMENT CO.**

(Supreme Court of Georgia. June 30, 1894.)

**PLEADING AND PROOF—VARIANCE—DIRECTING VERDICT.**

1. To an action brought by a corporation, a plea which alleges a contract made by the defendant with the plaintiff, through its officers and agents, is no basis for receiving evidence of a contract made by the defendant with individuals, setting forth certain undertakings which they, as contracting parties, are themselves to perform, and making no reference to the plaintiff, or to any contract or undertaking by it, or to any agency for it or for any one else. In this case the contracts tendered in evidence were inadmissible because of a fatal variance from those described in the plea.

2. Plaintiff's case being fully made out, and no evidence being before the jury to support the plea, it was not error to direct a verdict for the plaintiff. The striking of the plea for want of evidence to support it was a harmless irregularity.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by the Mutual Aid, Loan & Investment Company against W. E. Mackey for money loaned. Judgment was rendered for plaintiff, and defendant brings error. Affirmed.

Bishop & Andrews and Hulsey & Bate-man, for plaintiff in error. F. A. Quillian and C. L. Anderson, for defendant in error.

LUMPKIN, J. 1. The Mutual Aid, Loan & Investment Company brought an action against Mackey for \$1,000, principal, as an advance from it to him on 13 shares of its stock which he held, and for various other items. Among other things, the defendant pleaded, in substance, that, being importuned by the officers and agents of the plaintiff, he was induced to buy from them a house and lot near Atlanta; that, through these agents, the company agreed to sell him the lot, and build a house thereon, according to certain plans and specifications agreed upon between them; and that, throughout the transaction, it was acting through Evans, its vice president, Carter, its secretary and treasurer, and Taylor, its general manager; that the company had failed and refused to carry out its contract; and that he had expended a considerable sum of money in making needed improvements and repairs upon the house. By an amended plea, he alleged that Carter and Evans, as agents of the plaintiff, fraudulently procured him to enter into the contract before set out by agreeing to erect upon the plaintiff's land, adjacent to the lot they were endeavoring to sell defendant, a church and schoolhouse, and representing that they "would build a lake and boathouse, and would place therein boats." The plaintiff made out its case, and closed. The defendant, being introduced as a witness, testified that the contract for the sale of the land was in writing, and identified a bond for titles presented to him as the contract under which he went into possession. The court, on inspection of this bond, discovered that it was the individual contract of Carter and Evans to sell their own lands to Mackey, and that there was in it no covenant as to the church, schoolhouse, lake, or boats. The court thereupon rejected this paper as irrelevant, on the ground that Carter and Evans could not, in selling their own land, make promises that would bind the corporation of which they happened to be officers. Mackey also testified that the contract for building the house was likewise in writing, and identified a building contract signed by Douglass and Carter and Evans. The court also ruled out this document, because, on inspection, it appeared to be the individual contract of the parties who had signed it, and did not even purport to be a contract of the company. That these rulings were correct is manifest without discussion. Certainly, the defendant could not defeat the plaintiff's action by showing that other persons, although they may have been its officers, had made contracts with him, and utterly failed to perform the same; these contracts being in writing, and containing no reference to the plaintiff, or to any contract or undertaking

by it, or any agency for it or for any one else. The pleas may have set up a good defense, but the contracts tendered in evidence were inadmissible, because totally variant from those described in the plea.

2. After the evidence offered in support of the defendant's plea had all been ruled out, the court, on motion, struck the plea, and directed a verdict for the plaintiff. That the plea was totally unsupported by evidence was no ground for striking it, but so doing was a mere harmless irregularity; and as the plaintiff's case was fully made out, and there was no evidence before the jury to sustain the plea, a recovery by the plaintiff was inevitable, and consequently there was no error in directing a verdict in the plaintiff's favor. Judgment affirmed.

(93 Ga. 780)

**EVERIDGE v. BERRYS et al.**

(Supreme Court of Georgia. June 25, 1894.)

**CERTIORARI—WHEN LIES—COUNTY COURT.**

The writ of certiorari does not lie from a decision of the county judge in a case pending in the county court until after the final determination of the case in which the decision was made, even though the decision involved the question of jurisdiction to entertain the case, and would, had it been rendered as claimed by the plaintiff in certiorari, have been a final disposition of the case.

(Syllabus by the Court.)

Error from superior court, Bartow county; W. M. Henry, Judge.

Action on an account by Berrys & Co. against William Everidge in the county court. Defendant's motion to dismiss for want of jurisdiction was overruled, as was his demurrer, for the same reason. The assignment of the errors by certiorari was dismissed in the superior court, and defendant brings error. Affirmed.

Following is the official report:

A suit on an account for \$147.49 was brought February 17, 1885, to the April monthly term of the county court of Bartow. At that term defendant appeared, and moved to dismiss the case on the ground that said term had no jurisdiction. The motion was overruled, and the judge, over defendant's objection, ordered that the suit be passed to the next June quarterly term, which should be the appearance term. At that term defendant appeared, and demurred on the grounds: First, that the court to which the suit was brought had no jurisdiction to try the case, it being a monthly term of the said court, at which term the court had no jurisdiction to try any case where the principal sum exceeded \$100; and, second, that the quarterly term had no jurisdiction, because the county judge had no jurisdiction as a court at the April monthly term, and no legal authority to pass an order transferring the case to the June

quarterly term. The demurrer was overruled, and by certiorari defendant assigned each of the foregoing rulings as error. In the superior court the certiorari was dismissed on the ground that it did not appear that the case in which the errors complained of were alleged to have been committed had been finally determined. To this ruling defendant excepted.

J. B. Conyers and A. S. Johnson, for plaintiff in error. Akin & Harris, for defendant in error.

LUMPKIN, J. In addition to the brief report of the facts contained in the reporter's statement it is only necessary to add that the record does not show the case had been finally disposed of in the county court when the certiorari was sued out. In the argument here counsel did not so claim, but contended that the plaintiff in certiorari had the right to take the case up to the superior court before its final disposition in the county court, because, if the decision of which he complained (being one involving the jurisdiction of the court) had been otherwise, it would have been a final disposition of the case. In this view we do not concur. The rule contended for is applicable, under section 4250 of the Code, to the suing out of bills of exceptions from the superior court to this court; but, as we understand the law of certiorari, the writ does not lie from an inferior judicatory while the case is still pending therein. We think the words, "the decision or judgment in such cause," as used in section 4052 of the Code, refer to the final decision or judgment rendered in the case. Section 317a of the Code provides that "in civil cases the right of certiorari from the county court shall be as provided in section 287." The section last cited, while in terms it provides for the suing out of a certiorari to a judgment of the county judge in cases where the principal sum or damage claimed does not exceed \$50, declares that in the petition for certiorari the party applying for the same "may state all the decisions and judgments complained of as erroneous from the beginning to the end of the case." The words quoted very strongly imply that there can be no certiorari till the case is ended in the county court. Conceding the right to sue out a certiorari where the amount claimed exceeds \$50, there is nothing in the statute suggesting that the rule with reference to such cases is, or should be, in any sense different from that pertaining to cases where the amount involved is \$50 or less. The court, therefore, was right in dismissing the certiorari on the ground that it did not appear that the case in which the errors complained of were alleged to have been committed had been finally disposed of in the county court. Judgment affirmed.



(93 Ga. 765)

**EPPS v. WARING.**

(Supreme Court of Georgia. June 25, 1894.)

**PROMISSORY NOTE — CONDITIONS — ACTION BY PAYEE — DEFENSES — PAROL EVIDENCE — ADMISSIBILITY.**

To an action on a promissory note which expresses on its face that it was "given for the purchase money for a lot in" a named city, it is a good defense that by the contract of sale, which was in parol, the vendor undertook and agreed to build upon the premises a house of a certain description and value, and to open a street so as to afford access to the property; that, without these improvements, the premises would be of no value; that before the note was given, and the bond for titles taken, the plaintiff represented to the defendant that the house was in process of construction, and the street would be opened according to contract; that these representations were fraudulently made, and the defendant, relying upon them, paid a part of the purchase money, and gave several notes for the balance, one of which is the note now in suit; that the street has not been opened; and that the house is not such as the contract stipulated for, but of less size, inferior quality, and of less than one-half the value; and that for these reasons the defendant refused to accept the premises, and has never entered into possession or taken control of the same, but, immediately upon discovering the plaintiff's failure to perform, offered to rescind the contract, which he refused to do. The plaintiff having fraudulently procured the notes for the purchase money, he cannot enforce them in violation of the terms of the real contract between the parties, although the contract was in parol, and depends for its establishment upon parol evidence.

(Syllabus by the Court.)

Error from superior court, Morgan county; C. L. Bartlett, Judge.

Action by John Waring against W. P. H. Epps on a promissory note, executed to plaintiff by defendant as part payment for certain real property. On an order striking out his special pleas in answer, defendant brings error. Reversed.

Calvin George, for plaintiff in error. Foster & Butler, for defendant in error.

LUMPKIN, J. Waring brought suit against Epps upon a promissory note, which was one of a series given for the purchase of a city lot. The note contained this sentence: "This note is given for the purchase money of a lot in Madison, Ga." The defendant filed certain special pleas, which were stricken on motion of the plaintiff, and a verdict was then rendered in favor of the latter, the defendant introducing no evidence. The material allegations of the special pleas were, in substance, as follows: The defendant had purchased from the plaintiff the lot in question under a parol contract, by the terms of which Waring undertook and agreed to build upon the same a good, substantial, properly constructed and appointed dwelling house, to cost not less than \$400, and to be actually worth not less than that sum, and also to cause a street to be opened so as to give the defendant access to the property. Without the house and the opening of the street, the lot was practically

worthless, and these undertakings by the plaintiff were the sole consideration which induced the defendant to enter into the contract for the purchase of the lot. It was expressly understood and agreed that the contract was not to be completed and executed until the house was erected and finished to the satisfaction of the defendant, and the street was opened. Some weeks after the terms of the contract had been agreed upon, the plaintiff's agent represented to the defendant that the house was actually in process of construction, and that the street would be opened according to contract; and, relying upon these representations, the defendant paid a part of the purchase money, and gave several promissory notes for the balance, one of which is the note now in suit, and accepted from the plaintiff's agent a bond for titles to the property. After executing the notes, the defendant discovered that the street had not been opened, and that the plaintiff had not complied with his agreement with reference to the house, but, instead of so doing, had erected a smaller house, which was meanly constructed, at a cost of not exceeding \$150, and that, in consequence of the failure to open the street, there was no way of ingress to and egress from the lot. The defendant had never taken possession of the premises, and, upon making the discoveries above mentioned, immediately notified the plaintiff he would not accept the property, offered to surrender the bond for titles he had received, and rescind the contract, and demanded from the plaintiff the return of the notes defendant had given for the purchase of the lot, together with the cash he had paid. The plaintiff declined to rescind, and the defendant refused to take possession of the property. The representations of the plaintiff's agent above set forth were false and fraudulent, and were made for the express purpose of inducing the defendant to sign the notes and pay a part of the purchase money. There were prayers for a rescission of the contract, a cancellation of the bond for titles and the purchase-money notes, and that the plaintiff be required to pay back that portion of the purchase money which he had received, with interest.

In our judgment, these special pleas set up a good defense to the plaintiff's action and ought not to have been stricken. The trial judge struck the pleas upon the idea that, accepting as true the allegations therein made, the plaintiff was attempting by parol to vary the terms of an absolute written contract. At first glance, this may seem to be true, but a more careful examination will lead to a contrary conclusion. In the first place, it is evident from the facts alleged in the pleas that the note in suit does not contain the entire contract between the parties. There were other notes and a bond for titles; and, besides, the main stipulations between the parties lay in parol, and it was not their

intention that these stipulations should be merged in and covered by the writings. But, independently of all this, the pleas distinctly allege that the notes were fraudulently procured by representations falsely made; and, if all the allegations of the pleas are true, the deliberate purpose of these representations was to deceive the defendant. If this be so, there is no principle, either of law or justice, which will allow the plaintiff to enforce payment of the notes in palpable violation of the terms of the real contract between himself and the defendant, and this is true although that contract was in parol, and depends for its establishment upon parol evidence. It is a universally recognized doctrine, supported by all respectable text writers, and upheld in every well-considered case bearing upon this subject, that, where a party has been induced to enter into a contract by a willful fraud on the part of the other party, calculated to deceive and which does deceive, the defrauded party may set up the fraud in his defense to an action upon the contract. The facts alleged in the pleas in the present case constituted sufficient grounds for rescission, and the effect of a rescission would be to defeat a recovery by the plaintiff upon the purchase-money notes, including the one now in controversy. Judgment reversed.

(94 Ga. 146)

**SAVANNAH ST. R. R. v. FICKLIN.**

(Supreme Court of Georgia. July 16, 1894.)

**SPECIAL INSTRUCTIONS—REVIEW ON APPEAL.**

1. In so far as the 33 requests to charge presented by the defendant's counsel were legal and pertinent, they were covered by the general charge of the court, of which no complaint was made, and which submitted the case to the jury with the utmost fairness to the defendant. In other respects these requests were illegal, not warranted by the evidence, or inapplicable to the issues involved, and many of them were inappropriate because completely ignoring the plaintiff's right to a partial recovery in the event he was guilty of contributory negligence. The refusal to give the requests singly or collectively was no cause for a new trial.

2. The verdict, although it could have been for the defendant, was not unwarranted by the evidence, and there was no error in refusing to set it aside.

(Syllabus by the Court.)

Error from city court of Savannah; A. H. MacDonell, Judge.

Action by Benjamin Ficklin against Savannah Street Railroad for personal injuries. Judgment was rendered for plaintiff, and defendant brings error. Affirmed.

Saussy & Saussy, for plaintiff in error. McAlpin & Laroche, for defendant in error.

**LUMPKIN, J.** We have carefully read and thoroughly considered the evidence in this case, a condensation of the material parts of which appears in the reporter's statement. As a result of our deliberations, we have concluded to allow the verdict to stand. The

jury might properly have found for the defendant, but we cannot say their finding for the plaintiff was unwarranted, or that the trial judge erred in refusing to set the verdict aside. The charge of the court was full and accurate, and submitted the case to the jury with the utmost fairness to the defendant. Indeed, no complaint whatever was made of it in the motion for a new trial. The defendant's counsel presented to the court 33 written requests to charge the jury, all of which were refused. In the midst of the overwhelming labor with which this court is burdened, we cannot, for the absolute want of time, set out and discuss these requests in detail. If we could, it would hardly be profitable. The pertinent and legal principles of law embraced in these requests were covered by the general charge of the court. In other respects, which are indicated in the headnote, the requests were of such character that the court did right in refusing to give them in charge. Upon a full review of the whole case, we find no legal reason for granting a new trial. Judgment affirmed.

(93 Ga. 301)

**GEORGIA RAILROAD & BANKING CO. v. PHILLIPS.**

(Supreme Court of Georgia. July 16, 1894.)

**LIABILITY OF CARRIERS—LOSS OF BAGGAGE.**

1. There being sufficient evidence to warrant the jury in believing that the agent of the defendant in charge of its baggage room refused to deliver the plaintiff's trunk to her upon her demand for the same, on arrival at destination, and that he informed her it could not be delivered until the following morning, and the trunk having been destroyed by fire during the night, the following charge was warranted: "If the plaintiff demanded her baggage of the company immediately after reaching her destination, and the railroad refused to deliver until morning, and before morning the baggage was destroyed by fire, then, and in that event, you should find for the plaintiff."

2. The evidence warranted the verdict, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from city court of Richmond. W. F. Eve, Judge.

Action by Fannie Phillips against Georgia Railroad & Banking Company to recover the value of a trunk destroyed by fire while in defendant's custody. Judgment was rendered for plaintiff, and defendant brings error. Affirmed.

J. B. Cumming and Bryan Cumming, for plaintiff in error. P. J. Sullivan, for defendant in error.

**LUMPKIN, J.** Where a passenger upon a railroad checks his baggage to destination, he is allowed a reasonable time in which to call for and take it upon reaching the end of his journey. Whatever may be in this respect a reasonable time, it is quite certain that the passenger is not too late in demanding his baggage if he does so immediately after

reaching his destination. On the other hand, the railroad company is also entitled to a reasonable time within which to deliver the baggage. What will constitute a reasonable time in this respect must necessarily vary according to circumstances. In some instances a few minutes will be all the time to which the company is entitled. In other instances the lapse of a much longer period before delivering the baggage would not be unreasonable. A passenger alighting from a train at a small country station should be able to get his trunk at once; while a visitor to Chicago during the World's Fair would have had no just cause of complaint against the railroad which landed him in that city if he failed to receive his trunk until after the lapse of several hours. These two extreme illustrations are mentioned to show that no absolute rule can be laid down applicable alike to all cases. Each must necessarily depend upon its own facts and circumstances.

We are satisfied, however, that, during the time within which a railroad company may reasonably detain a passenger's baggage, the relation of carrier and passenger still exists between the parties, and the liability of the railroad company does not become that of a mere warehouseman. Of this there can scarcely be a doubt, if the passenger himself has exercised due diligence in point of time in calling for his baggage. Under the evidence in the present case, the jury were authorized to find that the plaintiff called for her baggage immediately upon her arrival in Macon, and that the agent of the company informed her it could not be delivered until the following morning. Assuming these to be the facts, and granting that the detention until the next morning by the railroad company would have been reasonable, the company was liable as a common carrier for the destruction of the plaintiff's baggage by fire during the night; and therefore the court was warranted in giving the charge quoted in the first headnote. The evidence for the defendant, if true, showed that the plaintiff's baggage was not called for at all until the morning after the fire, and that if it had been called for, as claimed by the plaintiff, it would have been delivered. If so much of this evidence as showed that detention until next morning was unnecessary be taken as true, and the other portion of it rejected, the liability of the company would be still more apparent, because it would then appear that the plaintiff's baggage was improperly detained during the night, and that it might have been delivered upon her application before the fire occurred. We do not mean to say this would be the fairest and most reasonable view to be taken of the testimony introduced by the defendant, nor are we satisfied that the finding of the jury was right. On the contrary, a verdict for the defendant would have received our full approbation. But this court has no control over questions of fact. Where the evidence is sufficient to authorize a given verdict, and no

legal reason appears for setting it aside, we are compelled to allow it to stand. For this reason we do not feel at liberty to disturb the verdict in the present case. Judgment affirmed.

(93 Ga. 781)

### CONLEY v. MAHER.

(Supreme Court of Georgia. June 30, 1894.)

EXECUTION—ILLEGALITY OF LEVY—SALE OF MORTGAGED PERSONALTY—STATUTORY FINE—ACCEPTANCE OF PARTIAL PAYMENT—EFFECT THEREOF.

1. The execution levied being against a principal debtor and two sureties, and having been levied upon the principal's property, the levy itself reciting that it was made to satisfy the interest of one of the sureties (naming him) to the extent of the payment made by him and entered on the *fi. fa.*, and the principal, more than three years afterwards, having filed an affidavit of illegality in resistance to the enforcement of the levy, setting up that the *fi. fa.* was fully paid off on a given date intermediate the date of the levy and the date of the affidavit, if the payment proved at the trial satisfied and extinguished the *fi. fa.* as to all interest of the surety for whose benefit the levy, according to its own terms, was made, the affidavit was well founded, and should have been sustained.

2. The receipt and acceptance by a mortgagee of one-half of the fine imposed upon the mortgagor of personalty, as a punishment for fraudulently selling the mortgaged property, operates, by express provision of the statute (Code, § 4601), to extinguish the debt to secure which the mortgage was executed. The term "debt," as used in the statute, embraces interest as well as principal; and the mortgagee cannot accept any of the proceeds of the criminal sentence without submitting to have his whole debt thereby extinguished, whether his share of the proceeds in fact equals the aggregate of principal and interest or not. In this case, the debt, as between the mortgagor and the mortgagee, was the whole amount which the latter was compelled to pay and did pay to the creditor of the mortgagor upon the debt on which the mortgagee was one of the sureties of the mortgagor, the mortgage having been executed to indemnify and protect the mortgagee on account of his suretyship.

(Syllabus by the Court.)

Error from superior court, Fulton county; M. J. Clarke, Judge.

Execution by Michael E. Maher, levied on certain property of John L. Conley, to reimburse plaintiff for payments made by him, as surety for defendant, on a judgment in trover brought by one Thornton against defendant. Defendant had secured Maher by chattel mortgages on certain of his personalty, and had disposed of it while so mortgaged, for which he was fined on prosecution by Maher. The latter's attorneys accepted payment on the fine to the amount of his original disbursement, and this execution is issued for interest thereon. On a directed verdict for plaintiff, defendant brings error. Reversed.

D. P. Hill, A. A. Manning, W. R. Hodgson, and John L. Conley, for plaintiff in error. Arnold & Arnold, for defendant in error.

LUMPKIN, J. Thornton brought an action of ball trover against Conley, and Maher.

Buck, and some other persons became sureties for Conley on the bail bond. Conley executed and delivered to Maher a mortgage on personalty to indemnify him against loss by reason of his said suretyship, the mortgage further providing that, if a judgment should be rendered against Conley in the trover case, Maher should be at liberty to seize and take possession of the mortgaged property for the benefit of himself and cosureties on the bail bond, and deliver the same into court, etc. Thornton recovered a judgment against Conley, and execution was duly issued, upon which Maher, as surety, on May 28, 1888, paid \$3,076.49, and Buck, one of the other sureties, on June 16, 1888, paid \$2,926.57. Afterwards, Conley disposed of the mortgaged property without reimbursing his sureties, and for so doing was prosecuted to conviction by Maher, and fined in the sum of \$6,152.98, which he paid into court. In fixing the sentence, which, under the law, had to be double the sum or debt which the mortgage was given to secure, the court, as will have been seen, took into consideration the amount only which had been paid by Maher, the prosecutor, and not the amount which had been paid by Buck. Buck was no party to the criminal prosecution, and refused to take part in it. On May 28, 1890, the sheriff paid Arnold & Arnold, attorneys for Maher, one-half of the fine which Conley had paid into court; these attorneys acknowledging in writing that the payment to them by the sheriff was made under authority of section 4601 of the Code, though not receiving it in complete extinguishment of Maher's claim. Maher thus received the identical amount he had paid upon the execution against Conley; but his reimbursement being exactly two years, to a day, from the time he had paid out the money, his contention is that he is entitled to enforce the execution against Conley for the interest which had accrued during these two years, and all interest subsequently accruing. Accordingly, he caused the execution to be levied upon Conley's property, the levy reciting that it was made "to satisfy the interest of one of the sureties, Michael E. Maher, to the extent of the payment made by him and entered on the attached fi. fa." The date of this levy, as appears by the record, was May 14, 1888; but as the payment which it recites had been made by Maher was in fact made on May 28, 1888, there must be some mistake in the date of the levy. This, however, is not material, because it is perfectly manifest from the record that Maher certainly did not cause a levy to be made on Conley's property until after he (Maher) had paid the \$3,076.49. To this levy Conley, on June 22, 1891, filed an affidavit of illegality, alleging that the fi. fa. was fully paid off, satisfied, and extinguished by him on May 28, 1890; this being the date when Maher, by his attorneys, received one-half of the fine. Upon the facts stated, the court directed the jury to find for the plain-

tiff, Maher. Conley moved for a new trial on various grounds, and, his motion being overruled, he excepted.

1. Although it cannot be literally true, as stated in Conley's affidavit of illegality, that the execution was fully paid off by him, because there is no pretense that Buck has been reimbursed one cent of the money paid by him, still we think the affidavit should be construed solely with reference to Maher's claim upon the execution; Buck not being a party to the levy nor to the present case, and the real and only issue being whether, as between Maher and Conley, the former has been fully reimbursed all he was entitled to claim upon the execution. If, therefore, Conley succeeded in proving at the trial that he had satisfied and extinguished the execution as to all the interest therein of Maher, for whose benefit alone the levy was made, the illegality was well founded, and ought to have been sustained.

2. We will now proceed to inquire whether Conley did establish that Maher's claim upon the execution was in law fully extinguished and satisfied. According to section 4601 of the Code, when, in a case of this kind, the fine has been imposed and collected, one-half of it should be paid over to the holder of the mortgage, "and the payment shall extinguish the debt to secure which the mortgage was executed." As between Conley and Maher, the debt was the whole amount which Maher was compelled to pay and did pay to Thornton, the creditor of Conley, together with interest upon the amount so paid. We entertain no doubt that the term "debt," as used in the section just cited, embraces interest as well as principal. It was undoubtedly the right of Maher to insist upon both principal and interest; but, if he chose to avail himself of the method provided by that section for the collection of his debt, he was bound to accept one-half of the fine in full satisfaction of his entire debt, including both the principal and the interest. It does not matter that one-half the fine was not enough to pay the entire amount due him by Conley. There is no authority of law for allowing him to accept one-half of the fine as a credit upon his debt or in part payment of the same. The meaning of the statute is clear and unequivocal that, if he accepts one-half of the fine at all, he must do it in extinguishment of his debt; and therefore, by such acceptances, he necessarily submits to the cancellation of his entire debt. It may be that, in fixing the amount of the fine, the court should have added the interest of the debt, and then made the fine double the amount thus produced. This, however, was not done, and Maher had the option to accept one-half of the fine imposed in full satisfaction of his demand, or to refuse to accept it, and take his chances to collect his debt otherwise. It appears, therefore, in the view we take of the law, that the affidavit of illegality

was sustained, so far as Maher is concerned; and, instead of directing a verdict for him, the court should have directed a verdict in favor of Conley. As Buck is not a party to the present case, we express no opinion as to his interest in the matter. Whether or not he was a beneficial party to the mortgage executed by Conley, and whether or not in fixing the fine against Conley the amount paid by Buck on the execution should have been taken into consideration by the court, are questions not now before us. Judgment reversed.

(93 Ga. 345)

# WESTERN UNION TEL. CO. v. TIMMONS.

(Supreme Court of Georgia. Oct. 30, 1893.)

TELEGRAPH COMPANIES — NEGLIGENCE IN DELIVERY OF MESSAGE — STATUTORY PENALTY — REQUIREMENTS — EXTENSION BY CUSTOM OF COMPANY.

1. A nonresident of a city does not make himself a resident, within the meaning of the proviso to the second section of the act of October 22, 1887, touching the duties of telegraph companies, by giving to the company an address within the city at which he can be found temporarily.

2. The second section of the act deals exclusively with the duty of delivery to residents of cities and towns, and to persons residing within a limit of one mile from the telegraph office. The duty of delivery to other persons is not embraced in that section, but in the general requirement set forth in the first section; and, as to nonresidents, the question whether due diligence in making delivery requires the company to go outside of its office to deliver, at a designated place within a city or town, is one of fact for the determination of a jury on the circumstances of each case, including any right and reasonable usage of the company in dealing with messages of this kind. If the company, in the conduct of its business, delivers outside of its office to one customer, it must to another under like circumstances and conditions. The court erred in not granting a new trial.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action by B. E. Timmons against the Western Union Telegraph Company to recover for defendant's negligence in the matter of delivering a certain telegram. On orders overruling its motion for a nonsuit, and one for a new trial, defendant brings error. Reversed.

The following is the official report:

Timmons sued the telegraph company for damages and for the statutory penalty for failure to deliver with impartiality, good faith, and due diligence a certain telegram. At the close of the evidence for plaintiff, defendant moved for a nonsuit, which motion was overruled, and to this ruling it excepts. The motion was upon the grounds: (1) The statute allows the penalty only when the sendee is a resident, and it appears that the sendee was not a resident. (2) The address given by plaintiff to defendant was not a definite address, as it did not state at what place in the Union Depot plaintiff could be found. (3) Plaintiff did not wait all of the time at the depot, but was absent one and

a half hours, and during his absence the telegram might have been brought to the depot. The evidence was: Plaintiff had left his address at defendant's office in Atlanta, as he was expecting the telegram, on February 8, 1891 (the date of the telegram). He told the operator in defendant's office to send it to the Union Depot in Atlanta, where he (plaintiff) was from about 5 p. m. until 11 that night, except about an hour and a half when he went to supper. During this hour and a half he left a gentleman in both the gentlemen's and ladies' saloons to watch for the telegram, and receipt for it in his name. Receiving no telegram up to 11 o'clock that night, he went to defendant's office, and received the telegram in question. He asked the operator who handed him the telegram why it had not been delivered before, and the operator simply seemed confused, and gave no special reason; called up some one else, and made some inquiry, but gave plaintiff no satisfaction. It was not claimed by him, or any one in the office at the time, that the telegram had been sent to the Union Depot as directed by plaintiff, or that any effort had been made to deliver it to him. It was paid for by the sendee. The face of the telegram showed it was received by the defendant at 5:30 p. m. Plaintiff resided in Augusta, Ga. There was a verdict for plaintiff for the penalty, and, defendant's motion for new trial being overruled, it excepts also to this. The motion contained the general grounds that the verdict was contrary to law, evidence, etc.; also because defendant objected to plaintiff's testimony that he had left his address at its office in Atlanta, on the ground that the testimony implied that the address was in writing, and that such writing ought to be first produced, or its absence accounted for, but the court overruled the objection; because after this testimony had been admitted defendant moved to rule it out on the ground that it did not show any definite address, which motion was overruled; because the court charged that if plaintiff left with defendant a definite address in Atlanta, where the telegram could be delivered to him, although plaintiff was not a resident of the city, he could recover, provided the other points necessary to his case, shown by the statute, had been proved to the satisfaction of the jury; alleged to be error because, under the statute, plaintiff, being a nonresident, could not recover; and because there was no evidence warranting the charge as to the giving of a definite address by plaintiff to defendant. Error in charging: "It is the duty of the telegraph company to deliver impartially, in good faith, and with due diligence, all telegrams transmitted over its wires to the persons to whom they are addressed; and if you find from the evidence that the defendant was in the possession of a message prepaid which had come over its wires, addressed to the plaintiff, as set out in the declaration, and you find that the de-

defendant had the definite address of the plaintiff, he not being a resident of the city of Atlanta, and you find that the defendant failed to deliver said message impartially, in good faith, and with due diligence, the plaintiff would be entitled to recover the amount sued for." Alleged to be error because omitting facts made material, by the statute giving the penalty, to plaintiff's right of recovery; and because that part of the charge as to defendant having the definite address of plaintiff is unauthorized by the statute and unwarranted by the evidence.

Bigby, Reed & Berry, for plaintiff in error.  
A. A. Murphy and F. A. Arnold, for defendant in error.

**BLECKLEY, C. J.** 1. We can see nothing in the telegraph company penalty act of October 22, 1887, which gives color to the theory that a nonresident of a city makes himself a resident, within the meaning of the proviso to the second section of the act, by giving to the company an address within the city at which he can be found temporarily. Since this case arose, delivery to nonresidents whose address may be furnished by the senders of dispatches has been provided for by the act of December 20, 1892 (Pamph. Laws, p. 96).

2. The second section of the act of 1887 deals exclusively with the duty of delivery to residents of cities and towns, and to persons residing elsewhere within a limit of one mile from the telegraph office, the language of the section being as follows: "That such companies shall deliver all dispatches to the persons to whom the same are addressed, or to their agents, on payment of any charges due for the same: provided, such persons or agents reside within one mile of the telegraphic station, or within the city or town in which such station, is." The duty of delivery to other persons is embraced in the general requirement set forth in the first section of the act in this language: "That from and after the passage of this act that every electric telegraph company, with a line of wires wholly or partly in this state, and engaged in telegraphing for the public, shall, during the usual office hours, receive dispatches, whether from other telegraphic lines or from individuals; and on payment or tender of the usual charge, according to the regulations of such company, shall transmit and deliver the same with impartiality and good faith, and with due diligence, under penalty of one hundred dollars, which penalty may be recovered by suit in a justice or other court having jurisdiction thereof, by either the sender of the dispatch, or the person to whom sent or directed, whichever may first sue: provided, that nothing herein shall be construed as impairing or in any way modifying the right of any person to recover damages for any such breach of contract or duty by any telegraph company, and said penalty

and said damages may, if the party so elect, be recovered in the same suit." The only error which the court committed in trying the present case was in assuming, as matter of law, that a duty rested upon the company to deliver outside of its office to persons who furnished a definite address within the city, though they might themselves be nonresidents of the city. This assumption, we think, is embraced in or underlies the charge of the court as set out in the reporter's statement. According to the evidence, there was no delay in delivering the message when it was called for at the office. The delay complained of occurred before that time. The question whether due diligence in making delivery required the company to go outside of its office to deliver at the Union Depot, the place designated beforehand by the plaintiff, was a question of fact for the determination of the jury on the circumstances of the particular case, together with all pertinent facts, including, if there had been any evidence on the subject, any right and reasonable usage of the company in dealing with messages of like kind. There should have been evidence of how the company conducted its business with respect to such messages. If it delivered them outside of its office to one customer, who furnished his address within the city, it would have to do so to others under like circumstances and conditions, for the duty of observing impartiality is imposed as well as the exercise of due diligence. It is forbidden to the company to be a respecter of persons. Whether, under correct instructions from the court, the jury could have found on the evidence before them that there was any failure in diligence, we will not undertake to say. There was certainly not that full illumination which the case seemed to require, and of which it probably admitted. The plaintiff appears to have rested his right to recover upon the assumption of legal duty, which the court recognized. In making that assumption the plaintiff misconceived, and in charging conformably with it the judge misconstrued, the statute. For this reason there was error in not granting a new trial. Judgment reversed.

(33 Ga. 349)

**WESTERN UNION TEL. CO. v. MANSFIELD.**

(Supreme Court of Georgia. Nov. 6, 1893.)

**TELEGRAPH COMPANIES — FAILURE TO DELIVER MESSAGE—STATUTORY PENALTY—NON-RESIDENT SENDER.**

Where a message was delivered to a telegraph company for transmission, which received and transmitted it promptly, the charges being prepaid by the sender, and the sendee applied for the message at the office to which it was transmitted three hours after such transmission, and the company failed to deliver it, he is, in an action for the statutory penalty, entitled to recover, although he did not reside within the city at which the message was received, nor within a mile of the telegraph office.

For not delivering in the company's office, the nonresidence of the sendee is no excuse.

(Syllabus by the Court.)

Error from city court of Atlanta. Howard Van Epps, Judge.

Action by E. W. Mansfield against the Western Union Telegraph Company to recover for its failure to deliver a certain message. On judgment for plaintiff, defendant brings error. Affirmed.

Bigby, Reed & Berry, for plaintiff in error. Upshaw & Upshaw, for defendant in error.

**BLECKLEY, C. J.** This case is not within the proviso to the second section of the penalty act of October 22, 1887, but is within the first section of that act, the language of which is as follows: "That from and after the passage of this act, every electric telegraph company with a line of wires wholly or partly in this state and engaged in telegraphing for the public, shall, during the usual office hours, receive dispatches whether from other telegraphic lines or from individuals; and on payment or tender of the usual charge according to the regulations of such company, shall transmit and deliver the same with impartiality and good faith, and with due diligence under penalty of one hundred dollars, which penalty may be recovered by suit in a justice or other court, having jurisdiction thereof by either the sender of the dispatch or the person to whom sent or directed, whichever may first sue: provided that nothing herein shall be construed as impairing or in any way modifying the right of any person to recover damages for any such breach of contract or duty by any telegraph company, and said penalty and said damages may, if the party so elect, be recovered in the same suit." The nonresidence of the sendee was no excuse for not delivering the message to him when he called for it in the company's office. There surely can be no doubt of the obligation of such companies to make prompt delivery in their offices, whatever justification there might be for delaying delivery elsewhere. We have already in the case of *Telegraph Co. v. Timmons* (decided at this term) 20 S. E. 649, put a negative upon any construction of the act which would limit the penalty to messages addressed to residents of cities and towns, and to persons residing within one mile from the telegraph office. The trial court committed no error. Judgment affirmed.

(95 Ga. 123)

#### ENGLISH et al. v. STATE.

(Supreme Court of Georgia. Nov. 26, 1894.)

#### HOMICIDE—INSTRUCTIONS—VOLUNTARY MANSLAUGHTER.

1. The evidence introduced by the state and the statements of the accused upon the trial having presented the issue as to whether they were guilty of murder or of voluntary

manslaughter, and the judge having undertaken to charge the jury generally as to voluntary manslaughter, it was his duty in so doing to state the law on this subject correctly in all respects. Accordingly, the following charge was erroneous: "I charge you that it could neither justify nor reduce the killing, unless [the person killed] made the assault, and the assault was of a character to put the other's life in imminent peril at the time, or it appeared to him to do so."

2. Otherwise than as above specified, no material error was committed upon the trial.

(Syllabus by the Court.)

Error from superior court, Habersham county; C. J. Wellborn, Judge.

Joseph English and another were convicted of murder, and appeal. Reversed.

The following is the official report:

Joseph and Jack English were indicted for the murder of H. N. Waldrep. They were found guilty, with a recommendation that Jack English be imprisoned in the penitentiary for life. Their motion for new trial was overruled, and they excepted.

The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also error in charging: "I charge you that if you shall be satisfied from the evidence in this case that Waldrep was killed by either one of them, and that death resulted either from the use of the pistol or of the knife, if they were acting with common intent to take his life, then both would be responsible for the use of the weapon which resulted in the death, if death resulted from the use of only one of them." Alleged to be error because without evidence to support it, there being nothing to indicate a common intent or purpose on the part of both defendants to take the life of Waldrep. Error in charging: "In this case, if Joe English shot and killed Waldrep, and the shooting was done in the execution of a common intent on the part of both Joe and Jack English to assault the person of Waldrep with weapons, then both would be guilty of the shooting." It is alleged that there was no evidence to sustain this charge, and that the court several times repeated and emphasized the idea that there was conspiracy or common intent on the part of defendants, when there was no evidence to warrant it. Error in charging, after defining malice: "If one declares his purpose to take the life of another, and he does take it, his malice may well be said to be express, unless some lawful cause for the killing appears." Alleged to be error because clearly implying that the killing was done with malice, and because it is an expression of opinion that a threat to take life will make a killing murder. Error in charging: "If one takes the life of another without any words disclosing the state of his mind or the reason for his act, the circumstances attendant upon the killing will be looked to in order to determine the presence or absence of malice." Alleged to be error because erroneously implying that the circumstances attending the killing will be looked to in order to de-

termine the presence or absence of malice only in case no words were used by defendant disclosing the state of his mind or the reasons for his act; and further, because it assumes that, if threats were made, malice shall be found to exist, whereas, in the definition of both express and implied malice, it is declared that the circumstances are the resort for the jury from which to determine the presence or absence of malice. Error in charging: "I give you the definition of voluntary manslaughter for the reason that it has been insisted that that law is applicable in this case. I do not undertake to determine that question. I give you the rule,—the definition of what manslaughter is,—and you will be able to determine from the evidence in this case whether that is the offense committed by these parties, or either of them, or whether it is some other, or whether they are not guilty of anything." It is alleged that the error consists in saying he gives in charge the law of voluntary manslaughter because it had been insisted on, and not because the court believed it applicable to the case. In leaving to the jury to determine the law of the case, when it is the duty of the court to charge what is the law applicable to the case, the jury might well infer from the language of this charge that the court considered the defendants guilty of murder under the evidence. Error in charging: "It is not insisted even that this could be involuntary manslaughter of any sort." Alleged to be error, in not saying either that the law of involuntary manslaughter does or does not apply to the case, but in declaring that it was not insisted even. Because the contention of defendants' counsel was that in this case there was no provocation by mere words or gestures, but an actual assault made by Waldrep upon Joe English; that he seized him with both hands violently; that he was physically a stronger man; that he choked him; that there was manifest intention to engage in mutual combat; and that these circumstances were sufficient to justify the excitement of passion, while they exclude all idea of deliberation whatever. It was not insisted "that there was an assault upon the part of deceased upon these parties, and that assault was of a character which rendered the killing of Waldrep an absolute necessity," but it was insisted that Waldrep assaulted Joe English, and that the assault was of such character as to reduce the homicide to manslaughter on the part of Joe English, while Jack English was guilty of no offense whatever. It was therefore error in the court to charge as follows: "It is insisted here that there was an assault upon the part of the deceased upon these parties, and that that assault was of a character which rendered the killing of Waldrep a necessity." This charge did not fully and fairly represent the contention of defendants' counsel, which was that in any event Joe could not be guilty of a higher offense than voluntary manslaughter,

and that he was guilty of nothing if the circumstances were such as to excite the fears of a reasonable man, and that he acted under the excitement of these fears, and not in a spirit of revenge. After giving the usual charge in reference to the statements made by defendants, the court added: "It is supposed that a statement will not have weight with the jury unless it is the truth, and they believe it to be the truth. The law trusts you, trusts your discretion to use these statements, and trusts that discretion to the extent of saying that the jury may believe the statements in preference to the sworn testimony." Alleged to be error, because, while applicable to the evidence as well as to the statements as an abstract truth, yet, using it in reference to the statements, it tended to disparage the statements, and to lead the jury to give less consideration and effect to them than they otherwise would have done, or than what the law justifies. Error in charging: "I charge you further, that if the defendant acted in self-defense, that if the evidence satisfies the jury that it was made to appear to him at the time he did the act that resulted in death to the party that it was necessary that he should do it in order to save his own life, then he would be justified, unless he brought about, or was responsible in bringing about, the state of affairs that put him in peril. If he did that, if you should believe that English was the original assailant here, why then he could not kill the other party, and be guiltless, whether he was put in danger or not; whether his life was put in peril or not, he could not be justified." Alleged to be error in the addition of the words beginning with the word "unless" after the word "justified," because the charge as given excluded the possibility of being justified if he originated the difficulty, and also excluded the possibility of reducing the killing from murder to manslaughter. Error in giving the following at the conclusion of the charge: "I charge you that it could neither justify nor reduce the killing unless Waldrep made the assault, and the assault was of a character to put the other's life in imminent peril at the time, or it appeared to him to do so." Alleged to be error because excluding all idea of excitement of passion or hot blood, which is largely the ingredient of voluntary manslaughter, except in case of peril to life, and the law does not so restrict; and, this being the very last of the charge, its effect was to impel the jury to find the defendants guilty of murder. Further, because the tenor of the whole charge was put upon a wrong basis. It assumes as true what was not proven, and does not fully and fairly present the law as applicable to the proven facts and as contended by defendants' counsel.

Jones & Bowden, Chas. L. Bass, and J. B. Estes, for plaintiffs in error. Howard Thompson, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.



ATKINSON, J. 1. The defendants were jointly indicted for the offense of murder, were found guilty, and made a motion for a new trial upon many grounds, all of which appear in the official report of this case. A number of exceptions were taken to the charge of the court, and error assigned thereon; but upon a careful examination of the text of the full charge, which comes up in the record, we are constrained to the opinion that, save as to that portion of the charge to which we will hereafter refer, whatever of verbal inaccuracies may seem to appear in these fragments of the charge, when they are considered in the light of the entire instruction to the jury the same are free from substantial error.

2. One ground of the motion for a new trial assigns error upon the following charge of the court: "I charge you that it could neither justify nor reduce the killing, unless [the person killed] made the assault, and the assault was of a character to put the other's life in imminent peril at the time, or it appeared to him so to do." We have carefully examined the general charge to ascertain whether thereby the judge in any manner qualified this instruction, but we find that he did not; so that in grading the degree of the homicide this is made the rule of decision by which the jury is to be guided in its deliberations. Was this a correct rule? If not, let us inquire wherein consists its error. In order to justify a homicide it must appear that at the time of the killing the circumstances were such as to impress a reasonably courageous man with the belief that at the hands of the deceased he stood in imminent peril of his life, or of the infliction upon him of injuries amounting to a felony. Such degree of peril, however, is not necessary to reduce the offense from murder to voluntary manslaughter. If the deceased should commit an assault or battery upon the slayer, though such attempted or actual violence should not in any way imperil his life nor amount to the commission of a felony upon his person, such assault or such battery would be sufficient to reduce the killing to voluntary manslaughter, provided the jury should believe it to be of such a character as to excite in the person assaulted that violent, sudden impulse of passion supposed to be irresistible, and, further, that the fatal shot was fired under the inspiration of such overmastering passion, and not in a spirit of revenge. Whatever may have been the real truth of the transaction, the statements of the accused presented such a state of facts that, if the jury had believed them true, they could have found that the deceased had made an assault upon the slayer, and could have inferred in the slayer the frame of mind which would have reduced the degree of his guilt to the lower grade of homicide. Yet by the instruction now under consideration they are charged that in no event could an assault by the person slain have the effect to reduce

the grade of the offense committed by the slayer, unless such assault was of a character to put the life of his adversary in imminent peril. This is not the standard fixed by the law. According to the standard fixed by the court, the slayer would be justified under the law; and to require a jury to find a homicide justifiable before they would be authorized to reduce the degree of a homicide from murder to voluntary manslaughter is to demand of the defendants a higher degree of exculpatory evidence than the law requires. He satisfies the law that he is entitled to have his offense graded as voluntary manslaughter without showing that his life was imperiled. He may, to that point, satisfy the law by showing the commission upon him of a battery not amounting to a felony. But he can meet the requirement of this instruction by the court, and have his offense graded as voluntary manslaughter, only by showing the commission upon him of such a battery as places him in imminent danger of his life. This was the final paragraph in the charge of the court. It was the parting injunction to the jury as they retired to their room. There was nothing said by the court to neutralize its effect. It was directly to the point, and may have had a controlling influence in moulding the verdict; and giving, as it did, an erroneous rule for the guidance of the jury upon a vital point in the case, we are constrained to award a new trial.

The verdict was excepted to as being contrary to the evidence, but, as the cause goes back to be retried, we forbear to make any observation upon that branch of the case. Judgment reversed.

(33 Ga. 797)

#### MOSS v. CITY COUNCIL OF AUGUSTA.

(Supreme Court of Georgia. July 16, 1894.)

##### LIABILITY OF CITY—MALFEASANCE OF OFFICER.

A municipal corporation is not liable in damages to the owner of a dog for the wanton and malicious killing of the animal by a person appointed by municipal authority to execute an ordinance providing for the killing of all dogs found running at large in the city during a designated period, except such as might wear collars provided by the city for their protection. This is true although the dog in question was, at the time of the killing, provided with and wearing a collar as prescribed, and although the killing was done under a pretense of carrying out the ordinance, the validity of the ordinance not being questioned in the present controversy.

(Syllabus by the Court.)

Error from city court of Richmond; W. F. Eve, Judge.

Action by John B. Moss against the city council of Augusta for damages for the killing of a dog by one of defendant's employes. Judgment was rendered for defendant, and plaintiff brings error. Affirmed.

The following is the official report:

Moss sued the city council of Augusta in an action for damages alleged to have been sus-

tained by him because of the killing of his dog by an employé of defendant. The defendant demurred, the demurrer was sustained, and Moss excepted.

The declaration alleged: "Several years ago petitioner bought a fine young collie dog, for which he paid \$25, and which he took to his home, and carefully raised as a pet in his family. Defendant has, and for many years has had, in force in the city, ordinances providing that the mayor shall provide annually a sufficient number of collars or badges, shall appoint some suitable person to dispense them, and the person so appointed shall furnish the owner of any dog with a collar, to be worn by the dog, upon payment of a dollar and a quarter, which shall protect dogs wearing the same from being killed, except during an alarm of hydrophobia in the city, or in the event of any dog wearing such collar being dangerous to the life or safety of any person; that all dogs found running at large in Augusta during the summer months, and such other times as the council might designate, except such as might wear a collar or badge as provided above, should be shot; and that it should be the duty of the mayor to appoint one or more discreet men to execute this order, and he should give ten days' notice in the official gazette of the city of the time of commencing to shoot dogs as above mentioned. Before the time designated for shooting dogs in 1892, collars were duly furnished, the sale of the same arranged for, and notice of shooting given, as provided for in the ordinances. In 1892, in full time as required by said ordinances and notices, petitioner bought a collar for his dog, paying for it a dollar and a quarter, though its actual cost to the city was not more than twenty-five cents, and put it on his dog's neck. One J. W. Prescott was duly appointed to execute said ordinances in reference to shooting dogs. About day, on July 19, 1892, Prescott shot and killed the dog, in the street near petitioner's residence, under the claim or excuse of carrying out said ordinances. At the time of the shooting the dog had on its neck said collar which the ordinance declares shall protect dogs wearing the same from being killed. There was no alarm of hydrophobia in the city, nor was the dog dangerous to the life or safety of any person. The dog was then of the actual market value of \$125, and, because of being a pet in petitioner's family, was of far more value. Petitioner claims and charges: (1) That defendant is liable to him in \$125 for the killing of the dog as aforesaid. (2) That defendant is so liable to him because Prescott, appointed to execute said ordinances, was not a discreet man, as required by the ordinance; his want of discretion appearing more especially from the fact that he shot the dog while the collar was on its neck, and exposed to the view of any one who would take the precaution to look at it; and the shooting was wanton and malicious in the eye of the law. (3) That defendant is so liable to him because it con-

tracted with him that if he bought a collar for a dollar and a quarter, and put it on his dog, the dog should be protected from being killed under said ordinances, which contract was broken in the manner above stated." The demurrer was upon the grounds that the declaration did not set forth any legal cause of action against defendant. Further, specially to the first and second count of the declaration, that in said counts there was no legal cause of action set out against defendant; because, under the law, defendant is not liable for the alleged tort charged to have been committed, and because the dog, under the law, is not the subject-matter of a tort alleged to have been committed. Further, specially to the third count, that the same sets forth no legal cause of action against defendant, because the dog alleged to have been killed could not be the subject-matter of a contract between defendant and petitioner.

Fleming & Alexander, for plaintiff in error.  
John S. Davidson and Wm. T. Davidson, for defendant in error.

LUMPKIN, J. The facts appear in the reporter's statement. No question was made in the present case as to the validity of the ordinance therein mentioned, and our decision has been made upon the assumption that the municipal authorities of Augusta had the right to adopt this ordinance.

The doctrine that a city is not liable for the illegal and tortious acts of its police officers has been well settled by repeated decisions of this court. *Attaway v. Mayor, etc.*, 68 Ga. 740, and cases there cited. The learned counsel for the plaintiff in error recognized and admitted the force and effect of the rule established by these cases, but sought to draw a distinction between them and the case at bar, upon the idea that the "dog-killer" appointed under the ordinance in question was not a police officer, but rather an employé acting as agent for the city in a different capacity from that of a policeman. Accordingly, they insisted that he was acting in the performance of a duty private in its nature, and that, in appointing him to discharge this duty, the municipal authorities were not exercising a power belonging to the city as a political division of the state. Their contention was that the killing of dogs under the provisions of this ordinance was a sort of private enterprise, in which the general welfare of the public was not involved. We cannot concur in these views. The "dog-killer" was, in a large sense, a police officer of the city; and in the sphere of his particular business as such as much a public servant as a policeman charged with the duty of making arrests and preserving the public peace and safety. We are therefore quite confident that the city was no more liable for the wanton and malicious acts of a person appointed to execute the "dog-killing" ordinance than it would be for such acts of a regular full-fledged policeman.

Nor do we think there is any merit in the contention that the city, in effect, contracted with the plaintiff, in consideration of his purchasing from the city a collar for his dog, that it would protect the animal, while wearing the collar, from being killed. The ordinance was strictly a police regulation, covering an element of taxation, but it did not raise any contractual relations whatever between the city and the owners of dogs within the corporation. The trial court was right in sustaining the demurrer to the declaration. Judgment affirmed.

(93 Ga. 789)

**GROOMS et al. v. OLLIFF et al.**

(Supreme Court of Georgia. July 16, 1894.)

**PROMISSORY NOTE—FRAUD IN PROCUREMENT—RIGHTS OF BONA FIDE HOLDER.**

The phrase, "fraud in its procurement," as used in section 2785 of the Code, has no reference to fraud in the contract out of which a negotiable security arises, or in the consideration for which it was given. Hence, fraud in these respects does not affect a bona fide holder for value, who receives a negotiable promissory note before it is due, and without notice of any defect or defense.

(Syllabus by the Court.)

Error from superior court, Bullock county; R. L. Gamble, Judge.

Action by J. W. Olliff & Co. against W. J. Grooms and others on a promissory note. Judgment was rendered for plaintiffs, and defendants bring error. Affirmed.

H. B. Strange, for plaintiffs in error. D. R. Groover, for defendants in error.

LUMPKIN, J. Olliff & Co. brought suit in a justice's court upon a promissory note signed by Grooms, indorsed by Outland, and payable to Donalson or bearer. The defendants pleaded that the note was procured by fraud, for that it was given for the purchase of a mare sold to Grooms by one Warters, who represented that the animal was perfectly sound in every respect, when in point of fact she was, both before and at the time of the purchase, diseased and totally worthless, all of which was well known to Warters, who fraudulently made the representations above mentioned for the purpose of deceiving Grooms, and did thus deceive him into making and delivering the note to Donalson. At the trial before a jury in the magistrate's court, the plaintiffs moved to strike the plea on the ground that "fraud in the procurement of a note," "as specified in the Code, meant fraud in the procurement by the holder thereof, and could not be set up against a bona fide purchaser, before due, without notice of the fraud." The magistrate overruled this motion, and plaintiffs thereupon introduced the note, and proved that they traded for it before maturity, for value, and without notice of any fraud or any failure of consideration. The magistrate then admitted evidence to sustain the plea, and the jury found for the de-

fendants. The plaintiffs took the case by certiorari to the superior court, alleging that the magistrate erred in refusing to strike the plea, and in admitting evidence to support it. The judge of the superior court sustained the certiorari, and gave final judgment for the plaintiffs. The defendants excepted, and brought the case here for review.

The judgment of the court below was right. The plea of the defendants was really a plea of failure of consideration. Although it, in substance, alleges that Warters fraudulently procured the defendant Grooms to sign the note by falsely representing that the mare was sound, when in fact she was not, in its essence it simply means that the note was given for a worthless animal, and therefore that there was a total failure of consideration. It very often happens that the consideration of a promissory note totally fails because of fraud on the part of the person to whom, or at whose instance, the note is given, but the mere fact that a fraud is thus practiced does not change the real nature of the defense. We are quite certain that the phrase, "fraud in its procurement," as used in section 2785 of the Code, has no reference whatever to fraud in the contract out of which a negotiable security arises, or in the consideration for which it was given. This court, in *Robenson v. Vason*, 37 Ga. 66, construed the above-cited section of the Code, and held that "fraud in the procurement of a note," as therein specified, meant fraud in the procurement by the holder thereof, and not fraud in the procurement of the note as between the original parties, of which the holder for value had no notice. This ruling was followed in *Bealle v. Bank*, 57 Ga. 274, but on page 276 Judge Jackson said: "We admit that such a construction does not appear to us at all clear, or even satisfactory, and the whole subject needs legislation." Counsel for the plaintiffs in error sought to question the soundness of these cases. Whether sound or not is immaterial to the present controversy, they really being inapplicable to the question at issue. The fraud referred to in section 2785 of the Code does not mean fraud practiced in inducing one to enter into a contract which results in the making and signing of a promissory note or other negotiable instrument, but fraud in obtaining possession of such a paper in the hands of another by procuring or inducing the latter, whether the maker or a third person, to part with it. Fraudulently inducing a person to sign his name to a paper, and to willingly deliver it, is quite a different thing from fraudulently obtaining from that person the possession of a paper already signed and in existence. If, for instance, one should make and execute a promissory note, intending not to deliver it except in a certain contingency, and another should fraudulently get possession of the note before the contingency arose, this would be a case of fraud in the procurement of the note. Another instance would be where one, by falsely and fraudulently representing to a blind or illiterate person the

contents of a writing, should induce that person to sign it, not knowing its contents, and believing them to be different from what they really were. Again, if one, falsely pretending to be a collecting agent of a party whom he did not really represent, should induce a debtor of the latter to make and deliver to the pretended agent a check, promissory note, or other negotiable instrument, payable to himself or his order, this would perhaps be another such instance. So, also, a thief who stole a promissory note, or a robber who took it by force from the possession of another, would be guilty of fraud in the procurement. Other illustrations to which the words "fraud in its procurement" would be applicable might be given, but the above will suffice. We feel very sure that the words were not intended to apply to cases of deceit, bad faith, or false representations used and made for the purpose of inducing one to enter into a contract, and to make and deliver his promissory note, knowingly and intentionally, as an evidence of the same. It follows, we think, that fraud in these respects does not affect a bona fide holder for value, who obtains a negotiable promissory note before its maturity, without notice of any defect or defense. Such holder will be protected, even though the note was entirely without consideration, and was given as a result of the basest fraud practiced upon the maker in inducing him to make the contract evidenced by the note. Judgment affirmed.

(93 Ga. 796)

**GREGORY v. DANIEL et al.**

(Supreme Court of Georgia. July 16, 1894.)

**BILL OF EXCEPTIONS — SIGNING CERTIORARI—NOTICE OF HEARING.**

1. It affirmatively appears that the bill of exceptions was signed and certified within 30 days after the adjournment of the term of the court at which the decision complained of was made. In view of the act of December 18, 1893, no cause appears for dismissing the writ of error. Lumpkin, J., concurring dubitante.

2. Under Code, § 4057, a certiorari is returnable to the term of the court first held after 20 days from the time the writ is issued; and, by section 4059, notice of the sanction and of the time and place of hearing is sufficient if given 10 days or more before the sitting of the court to which the writ is returnable. It follows that the time when the petition for certiorari was sanctioned is immaterial upon the question of whether the notice was too late or not.

(Syllabus by the Court.)

Error from superior court, Burke county; H. C. Roney, Judge.

Action by J. H. Daniel & Son against J. B. Gregory. The action was originally brought in a justice's court, which rendered judgment for plaintiff. A writ of certiorari issued by the superior court was dismissed, and defendants bring error. Reversed.

Jas. P. Brinson and J. B. Gregory, for plaintiffs in error. John J. Jones & Son and Josiah Holland, for defendant in error.

LUMPKIN, J. 1. When this case was called in this court a motion was made to dismiss the writ of error (1) because it did not appear that the bill of exceptions was certified by the judge within 30 days from the adjournment of the court; (2) because no parts of the record were specified in the bill of exceptions as being material to be brought up to the supreme court; and (3) because the judge's certificate was in the form prescribed by the law prior to the passage of the supreme court practice act of November 11, 1899. The motion to dismiss was overruled. The bill of exceptions recites that the case was tried at the December term, 1893, of Burke superior court, and was certified on the 28th day of the same month. Burke superior court convenes on the first Monday in December and the third Monday in May, so it affirmatively appears that the bill of exceptions was certified in time. As to the other questions made in the motion to dismiss, we will simply remark that under the broad provisions of the act of December 18, 1893 (Acts 1893, p. 52), we felt it to be our duty to retain the case, and hear it on its merits. The writer reached this conclusion with grave doubt, but yielding to the better judgment of his associates, and accepting in good faith the legislative policy indicated by this act and many others, finally concluded to concur in the judgment of the majority. This court has no disposition whatever to dismiss cases on technical grounds, but there should be some observance of essential requirements in bringing cases before it; and, with all due respect, we feel that the general assembly has gone quite far enough in encouraging, in the legal profession, negligence and inattention to the forms of procedure which even very slight care would be sufficient to prevent.

2. The case was tried in a justice's court at the June term, 1892, resulting in a verdict for the plaintiffs, Daniel & Son. The defendant, Gregory, applied for a writ of certiorari, and the same was sanctioned by the judge of the superior court July 2, 1892. The writ of certiorari ought to have been issued, and the case made returnable to the December term, 1892, of Burke superior court, but the clerk failed to issue the writ. At the term last mentioned the court passed an order directing the writ of certiorari to issue, and that the same stand for trial at the next term of the court. The writ was accordingly issued on March 18, 1893, and made returnable to the May term, 1893, of the superior court. Notice of the sanction of the writ of certiorari, and of the time and place of hearing, was properly given April 27, 1893. The case was finally heard at the December term, 1893, of the superior court, when a motion was made to dismiss the certiorari on the ground that notice of the sanction, etc., had not been given 10 days before the December term, 1892, of the superior court, to which term the certiorari ought to and would have been made returnable, had the writ been duly

issued. The court sustained the motion and dismissed the certiorari, and in so doing committed error. Under section 4057 of the Code, a certiorari is returnable to the term of the superior court first held after 20 days from the issuing of the writ of certiorari. As the writ in the present case was not issued until March 18, 1893, the certiorari was undoubtedly returnable to the May term, 1893, of the superior court; and the notice was given 10 days before the sitting of that term, as required by section 4059 of the Code. It is immaterial, so far as relates to the question in hand, at what time the petition for certiorari was sanctioned, or when the writ ought to have been issued. Under the plain terms of the sections of the Code cited, the notice was given in time, and the case ought not to have been dismissed. Judgment reversed

(94 Ga. 37)

DEDGE et al. v. BRANCH, Sheriff.

(Supreme Court of Georgia. June 11, 1894.)

TAX COLLECTOR—BOND—SUFFICIENCY—BLANKS FILLED BY ORDINARY—PRESUMPTIONS—LIABILITY OF SURETIES.

1. When, from its contents and the facts and circumstances connected with its execution and delivery, together with the subsequent conduct of the parties and the ordinary, it is manifest that a writing subscribed by the tax collector and several others was intended to be used and treated as the official bond required by law of the tax collector to entitle him to enter upon the discharge of his duties touching the collection of county taxes, the writing, though not under seal, is, by virtue of section 4, par. 7, and section 167, of the Code, whether the ordinary has approved it in writing or not, and whether he has recorded it or not, to be treated, after the tax collector has acted upon it and received the county taxes for the year in which it was given, as though it were the official statutory bond which should have been taken, approved, and recorded, and execution may issue thereon against the tax collector and all who subscribed with him for the amount of any default in accounting for and paying over such taxes.

2. The writing being in blank at the time it was delivered as to the amount of the penalty, and the ordinary having by law general authority to fix and determine the penalty of tax collector's bonds applicable to county taxes, the fair, if not the necessary, inference from the execution and delivery of the instrument with a blank in the appropriate place for expressing the amount is that the ordinary was expected by those who subscribed the writing to fill the blank with such amount as he deemed proper, and their consent and authority for him to do so was sufficiently manifested. As to the blank left for the insertion of the names of the sureties, it was immaterial, under section 4, par. 7, of the Code, whether this was filled or not. From the evidence the jury could have inferred that the ordinary rightfully and properly filled both blanks before any of the county taxes for the year were received by the tax collector.

3. There was no error for which a new trial should be granted.

(Syllabus by the Court.)

Error from superior court, Appling county; J. L. Sweat, Judge.

v.20s.E.nc.18—42

Action by J. G. Dedge and others against D. J. Branch, sheriff, to enjoin a sale of certain lands under execution against plaintiffs. There was a judgment for defendant, and plaintiffs bring error. Affirmed.

G. J. Holton & Son and E. P. Padgett, for plaintiffs in error. E. D. Graham, for defendant in error.

LUMPKIN, J. The ordinary of Appling county issued an execution against one Baxley as tax collector of that county, as principal, and Padgett and others, as sureties, upon his official bond as tax collector of that county, for an alleged default on the part of Baxley, as such tax collector, in paying over a certain amount collected by him as county taxes for the year 1887. This execution was placed in the hands of the sheriff, who levied it upon lands belonging to the sureties, and advertised the same for sale. These sureties united in an equitable petition against the sheriff, the purpose of which was to enjoin him from further proceeding with the execution. The petition, in substance, alleged: Petitioners are not, and have never been, the legal bondsmen of Baxley as such tax collector. The bond or blank that they signed was entirely blank. There was no amount written in the paper. The names of the securities, if they can be called such, were not inserted in the so-called "bond," but there was a place left blank for the filling in of such names. There was no date to the paper. The ordinary was not present when it was signed, but petitioners merely signed their names at their respective places of business, in the presence of Baxley, seeing and knowing it was blank as stated; and it has never been approved nor recorded by the ordinary, as required by sections 931 and 916 of the Code. Since petitioners signed, one blank has been filled with their names as securities. In another place, a blank has been filled so as to make the amount of the bond \$12,243.96; and the words "September 19th" have been inserted in the blank left for dating the bond. All the above words and figures have been inserted since petitioners signed the paper, without their knowledge or consent, and not in their presence, and these facts make the paper null and void. On the trial there was a verdict for the defendant. The plaintiffs moved for a new trial, which was overruled, and they excepted. The motion contained numerous grounds. The nature of such of them as are material is indicated in the headnotes, in which we have endeavored to condense the rules of law by which the case is controlled.

It is manifest, beyond question, from the contents of the writing subscribed by the tax collector and the plaintiffs in error, and from the facts and circumstances connected with its execution and delivery, together with the subsequent conduct of the parties

and the ordinary, as shown by the evidence appearing in the record, that all the persons who signed this instrument intended that it should be used and treated as the official bond which the law required of the tax collector in order to entitle him to enter upon the discharge of his duties touching the collection of the county taxes of Appling county. Paragraph 7 of section 4 of the Code is as follows: "When a bond is required by law, an undertaking in writing, without seal, is sufficient; and in all bonds where the names of the obligors do not appear in the bond, but are subscribed thereto, they are bound thereby." And section 167 of the Code provides: "Whenever any officer, required by law to give an official bond, acts under a bond which is not in the penalty payable and conditioned, nor approved and filed, as prescribed by law, such bond is not void, but stands in the place of the official bond, subject, on its condition being broken, to all the remedies, including the several recoveries which the persons aggrieved might have maintained on the official bond." In view of the provisions of these sections, the fact that the instrument in question does not, in the body thereof, purport to be under seal, is of no consequence; nor is it material whether the ordinary approved and recorded it or not. It is, nevertheless, after the tax collector has acted upon it and received the county taxes for the year in which it was given, to be treated as if it were in all respects the official statutory bond which should have been taken, approved, and recorded; and consequently it was the right and duty of the ordinary to issue against the tax collector, and all who subscribed with him, an execution for the amount of any default made by that officer in accounting for and paying over such taxes. In principle most of the questions involved in this case are ruled by *County of Fulton v. Clarke*, 73 Ga. 665. Inasmuch as the law gives the ordinary general authority to fix and determine the penalty of the tax collector's bonds with reference to county taxes, it is certainly a fair (if not a necessary) inference that the parties who subscribed Baxley's bond as sureties intended, by executing and delivering the instrument with a blank in the appropriate place for expressing the amount of the penalty, that the ordinary should fill this blank with such amount as he deemed proper. Taking into view all the facts and circumstances, there can hardly be a reasonable doubt that these sureties expected the ordinary to so fill this blank, and we are fully satisfied that their consent and authority for him to do so was sufficiently manifested. If this is not true, they were playing the part of mere triflers; and in a matter so serious the law will not tolerate such conduct. Under section 4, par. 7, of the Code, already cited, it made no difference whether the blank left for the names of the sureties

was filled or not. It was not absolutely clear and certain from the evidence that the ordinary filled the blanks before any of the county taxes for the year were received by the tax collector, but there was evidence from which the jury could have rightly so inferred. This being so, we are not disposed to interfere with their finding. We are satisfied that when Baxley and the plaintiffs in error signed the blank bond they all expected and intended that it should be completed, approved, filed, and recorded so as to become in all respects a valid statutory tax collector's bond. The persons signing as sureties therefore intended to put it within the power of Baxley to assume and exercise the duties of tax collector, and to get into his hands money belonging to the county, and to make themselves responsible for the payment of the same by him into the county treasury. It is therefore no hardship upon them, either legally or morally, to hold them bound by their contract, just as if, in making it, there had been due compliance with all the legal requirements. To discharge them would, under the circumstances, be neither more nor less than to allow them to perpetuate a fraud upon the public. We are at some loss to conjecture why the ordinary should have attended to his duties in connection with this bond in the loose and careless manner indicated by the record; but his negligence in the matter presents no reason for relieving the sureties of an obligation they manifestly intended to assume when they signed their names to the paper. After a careful examination and consideration of the entire record, we find no error which would authorize this court to grant a new trial. Judgment affirmed.

(29 W. Va. 704)

STATE ex rel. TRUDGEON v. BLAIR et al.  
(Supreme Court of Appeals of West Virginia.  
Dec. 18, 1894.)

CONTEMPT—DISREGARD OF UNAUTHORIZED SUPERSedeas.

The disregard of a supersedeas improvidently issued, and annulled and vacated for want of jurisdiction, will not be punished as for a contempt of the lawful process of this court.

(Syllabus by the Court.)

Rule for contempt, issued against R. L. Reynolds, L. C. Carter, J. H. Amonett, and A. C. Blair for contempt in violating a writ of error and supersedeas awarded to orders of circuit court. Rule dismissed.

Malcolm Jackson, for relator. J. W. Kennedy, for respondents.

DENT, J. On the application of Charles Trudgeon, a rule was issued by this court against R. L. Reynolds, L. C. Carter, J. H. Amonett, and A. C. Blair, requiring them to

show cause why they should not be punished for contempt in violating, disobeying, and disregarding a writ of error and supersedeas awarded to the orders of the circuit court of Kanawha county, incorporating the town of Union Mines, in said county. The defendants therein appeared to and answered the rule, and, to purge themselves of their contempt, alleged that, at the time said writ of error and supersedeas was served upon them, they were engaged in holding an election for the officers of said town in accordance with law, and thereupon an agreement was entered into by the parties interested on both sides of the controversy concerning the incorporation of said town that the election should proceed to a finality, and no further steps be taken until the controversy was disposed of in this court. The truth of this answer was controverted, and, from the affidavits filed, it seems to be fairly established that when the writ of error was executed one of the defendants—A. C. Blair, an attorney of this court—advised the continuance of said election, stating that the supersedeas was a mere “bluff,” and did not amount to anything, and that the commissioners were not bound to regard the same. Mr. Blair seems to have changed his mind afterwards, and concluded that the better part of discretion was to rely upon an understanding or an agreement, rather than upon his advice, and so, in his answer, he abandons the broad ground that the writ of error and supersedeas did not amount to anything.

This court has heretofore disposed of the supersedeas, and annulled and vacated the same, as improvidently issued concerning a matter wherein it had no jurisdiction. “It is settled by the authorities that if this court had no jurisdiction to award this process the parties cannot be punished for a contempt in disobeying it, for in such a case the order of this court granting the supersedeas might be treated as a mere nullity.” *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 877; *Swinburn v. Smith*, 15 W. Va. 500. By the decision of this court, the question of jurisdiction having been settled (see *In re Town of Union Mines*, 39 W. Va. —, 19 S. E. 398), the defendants will not be punished as for a contempt in disregarding unlawful process, but the supersedeas must be treated as a mere nullity, as though it had never been issued. Courts never usurp authority, and then punish for contempt of their usurpation. Justice forbids such action. Their process is without legal warrant, and no man is bound to regard it. It would be otherwise if they had jurisdiction. A man who disobeys legal process must decide the question of jurisdiction for himself, and if he makes a mistake it is his misfortune, and he must suffer the consequences, but if he determines rightly the courts have no power to punish him. For the foregoing reasons the rule in this case must be discharged at the costs of the relator, Charles Trudgeon.

(39 W. Va. 627)

## MINEAR et al. v. TUCKER COUNTY COURT.

(Supreme Court of Appeals of West Virginia. Dec. 15, 1894.)

COUNTY SEAT—ELECTION TO RELOCATE — RETURN OF ELECTION COMMISSIONERS — PRESUMPTIONS—COUNTY CANVASSING BOARD — NOTICE OF MEETING.

1. Where, on petition to the county court by the requisite number of legal voters an election has been ordered and held to determine the question of relocating the county seat, under section 15 of chapter 39 of the Code, and the county court has ascertained its result and declared that three-fifths of the votes cast are in favor of relocation at a particular place, and entered the fact in its record book, this place is, from the date of said declaration, by operation of law, the county seat.

2. The return of a poll by commissioner of an election is prima facie the true result of the election, and will not be reversed by this court because of misconduct on the part of the election officers or other persons, unless it plainly appears that such misconduct changed the result of the election.

3. It is not necessary that it should appear affirmatively on the record that all the directions of the statute in reference to posting a copy of the order directing the election to be held at each and every precinct in the county, or as to publishing a copy of such order in a newspaper, etc., have been complied with. If it appears that the county court, with the poll books, tally sheets, and certificates of election from the various precincts before it, has canvassed the returns, and declared the result, it will be presumed to have acted rightly, unless the contrary is made to appear.

4. Where the commissioners of a county meet as a canvassing board, five days after an election, for the sole purpose of declaring the result of said election, counting the vote, etc., no notice is required, as to the object of said meeting, to be posted, as is necessary when special sessions are to be held for other purposes.

(Syllabus by the Court.)

Error to circuit court, Tucker county.

Proceedings for the relocation of the county seat of Tucker County, W. Va. There was an order in vacation by the judge of the Third judicial circuit refusing to award a writ of certiorari to the county court of such county requiring it to remove the record of such proceedings to, and produce the same before, the circuit court of such county, etc., and A. O. Minear and others bring error. Affirmed.

A. B. Parsons, for plaintiffs in error. A. Jay Valentine, J. P. Scott, A. M. Cunningham, and A. G. Dayton, for defendant in error.

ENGLISH, J. This writ of error was awarded on the petition of A. C. Minear and others to an order made in vacation by the judge of the Third judicial circuit on the 26th day of July, 1893, refusing to award a writ of certiorari against the county court of Tucker county requiring it to remove the record of the proceedings in relation to the relocation of the county seat of said county at Parsons, as specified in the petition, and to produce the same before the circuit court of said county, and to abide by and perform

any order of said court that might be made in relation thereto; and the only error assigned and relied on by the plaintiffs in error is as to the action of said judge in refusing to award said writ of certiorari.

It appears from the record of the proceedings of said county court, which was presented with the petition for said writ of certiorari to said judge in vacation, that at a regular session of the county court of said county of Tucker held on the 4th day of January, 1893, petitions were filed by J. S. Heaton, A. H. Bonnifield, Joseph Fauley, A. Jay Valentine, J. W. Runner, J. W. Johnston, C. L. Griffith, and 663 other citizens and legal voters of the county of Tucker and state of West Virginia, desiring the relocation of the county seat to be at the town of Parsons, in said county, said petitions being severally verified by the affidavits of Ward Parsons that he verily believed that all the subscribers to said petitions were legal voters of said county, and it appearing that two-fifths and upwards of all the legal voters of said county, as estimated by allowing one vote for every six persons in said county as shown by the last census of said county, it was ordered that a vote be taken upon the question of the proposed relocation at Parsons, Tucker county, W. Va., at a special election to be held on the 28th day of April, 1893, and provided for the copies of the order being certified to the respective voting places in said county by the clerk, and for posting one of said copies at each of said places of voting at least 40 days before the election, and that a copy of said order be published in some newspaper printed in said county once in each week for four successive weeks before said special election; also providing what words should be written or printed on the ballots used at said election, and also providing that said vote should be taken, superintended, conducted, and returned to the clerk of the county court within the same time they are required by law to deliver the result of the election of officers, and that said clerk should lay the same before the county at its next session thereafter, and that the said court should thereupon ascertain and declare the result of said vote, and enter the same of record. And in compliance with said petitions said county court fixed and ordered a special election to be held on the 28th day of April, 1893, upon the question of the relocation of the said county seat, proper bond in the penalty of \$5,000 having been given and acknowledged by the proper parties conditioned to pay all the legal costs of holding said election as required by law. At a special session of the county court of said county, held on the 4th day of May, 1893, the vote on said election was canvassed, and, it appearing to the court that three-fifths and upwards of all the legal votes of said county of Tucker were cast in favor of removal of county seat from St. George to Parsons, it was therefore de-

clared carried, whereupon A. O. Minear tendered a bill of exceptions to the action of the county court in declaring the result of said election: (1) Because the act of the legislature of West Virginia (section 15 of chapter 39 of the Code of 1891) is unconstitutional and void; that the legislature had no right to authorize a special election to be held for the purpose of relocating any county seat; that the said act is clearly and unquestionably against the spirit and intent of section 39, art. 6, of the constitution of the state of West Virginia. (2) Because the ballots received from the commissioners holding the said election at the following places, to wit: Precinct No. 1 in Black Fork district, where there were 263 votes cast for removal, and precinct No. 1, Fairfax district, where there were 199 votes cast for removal of said county seat to the town of Parsons, and precinct No. 2 in Dry Fork district, where there were 21 votes cast for the removal of said county seat to the town of Parsons,—were not indorsed across the seal of the envelope or package containing the said ballots by the said commissioners of election at said voting places, as required by section 67 of chapter 3 of the Code. (3) Because the commissioners of election and clerks at precinct No. 2 in Black Fork district were not sworn as required by section 11, c. 3, of the Code. (4) Because the clerk of the circuit court of said county failed to have published in two newspapers within the county the question to be voted on at said election for 10 days before said election. (5) Because no place was designated in the notice given by the court for holding the election in Black Fork district at precinct No. 1; that the same was left blank. (6) Because the notice as required by section 6 of chapter 39 of the Code for holding special sessions of the county court was not posted the two days before the said session of court as required by law.

The errors in the action of the county court relied upon in the petition for the certiorari were, first, that the petition for the relocation of the county seat was not presented till the 4th day of January, 1893, and that said petition or petitions were gotten in the year 1892, and were informal and insufficient for the said court to order the said special election; but, as one of said petitions appears to have been signed the 31st day of December, 1892,—only four days before it was presented,—and as this portion of the assignment is not insisted on in argument, my conclusion is that it is not seriously relied upon. It is, however, insisted that the petitions do not conform to the statute, in that they do not conclude with a prayer that the county court should make an order that a vote should be taken at a special election to be held in the county upon the question of the relocation of the county seat at the place named in said petition. By referring to the petition, however, we see that the petition was addressed to the county court of Tucker



county, and the petition is a short one, and reads as follows: "We, the undersigned, citizens and legal voters of Tucker county, West Virginia, do most respectfully petition your honorable body for a relocation of the county seat of said county at the town of Parsons, in said county, and to this end we ask that your honorable body fix a day for, and order the holding of, a special election upon the question of such relocation, in accordance with the provisions of section 15 of chapter 39 of the Code of West Virginia." This petition was signed by two-fifths of the legal voters of said county, as appears by the affidavit of Ward Parsons, appended thereto, and by the order of the county court, entered when the same was filed; and we think it conforms to the statute, and must be regarded as sufficient.

The third assignment of error is: "Because the clerk of said court did not, as required by law, so far as the record shows, certify any copy of the said order directing the said vote on said question to be taken, as petitioners were informed; nor were the copies of said order posted by the sheriff for forty days, as the said order required; and because the record nowhere shows that said order, as the same required, was printed for four successive weeks in some newspaper printed in Tucker county." Now, while the record does not show affirmatively that the order directing said vote on said question was posted and published as directed by the statute, yet it does appear by an order entered by the county court of said county on the 23d day of May, 1893, that at the special election held on the 28th day of April, 1893, upon the question of the relocation of the county seat of Tucker county, the legal cost of conducting, superintending, advertising, certifying, and declaring the result of said election amounted to the sum of \$357.90, as ascertained by the court; so it appears that a considerable expense was created in advertising, conducting, superintending, certifying, and declaring the result, which was audited by the court; and in the order immediately following, which was entered on the 10th day of July, 1893, that it appeared to the court from the order made on the 4th day of May, 1893, at a special session of said court, at which session it canvassed, ascertained, and declared the result of the vote of the special election held on the 28th day of April, 1893, on the question of relocation of the county seat at the town of Parsons for the county of Tucker, and it appearing to the court that three-fifths and upwards of all the legal votes of said county cast at said election were cast in favor of removal of the county seat from St. George to Parsons, it was therefore declared carried. And when we refer to said order of the 4th of May, 1893, we find that it appears on the face of said order that "the clerk in whose custody the ballots, poll books, tally sheets, and certificates of

the special election held on the 28th day of April were placed, on that day filed the same before the court for examination, and the court, in compliance with section 68 of chapter 3 of the Code, proceeded to count the ballots, giving the number of ballots cast at each precinct, declaring the number of votes cast for relocation and against relocation of the county seat, and ascertained that three-fifths and upwards of all the legal votes of said county of Tucker were cast in favor of removal of the county seat from St. George to Parsons, and that it was therefore declared carried." Now, in the case of *Hamilton v. Court*, 38 W. Va. 74, 18 S. E. 8, Brannon, J., delivering the opinion of the court, says: "Now, when such an election has been held, and the county court has ascertained its result, and declared that three-fifths of the votes cast are in favor of relocation at a particular place, and entered the fact in its record book, this place is, from the date of said declaration, by operation of law, the county seat. It is the duty of the county court to expressly declare it the county seat, but that is directory in the statute, and if it has declared the result of the election, and that the requisite three-fifths vote is in favor of relocation at a particular place that alone in law removes the county seat to the new place; otherwise the popular will would be defeated. The statute plainly means that if three-fifths of the voters vote for the relocation, and it be so found and declared, and entered by the county court from that date, the date of such declaration, the new point is the county seat. In one clause the statute provides for the ascertainment by the county court whether a three-fifths vote has been cast for relocation, and by another clause it enacts that, if such vote has been cast, the place receiving such vote shall thenceforth be the county seat. It is the vote when so ascertained to be a three-fifths vote that works the change. All else is directory or ministerial." It is not necessary that it should appear affirmatively on the record that all the directions of the statute in reference to posting a copy of the order directing the election to be held at each and every precinct in the county, or as to publishing a copy of such order in a newspaper, etc., have been complied with. If it appears that the county court, with the poll book, tally sheets, and certificates of election from the various precincts before it, has canvassed the returns, and declared the result, it will be presumed to have acted rightly, unless the contrary is made to appear. This court held in the case of *Dial v. Hollandsworth* (W. Va.) 19 S. E. 557, that the return of a poll by the commissioners of election is prima facie the true result of the election, and will not be reversed by this court because of misconduct on the part of the election officers or other persons unless it plainly appears that such misconduct changed

the result of the election. Although A. O. Minear, a citizen and taxpayer, on behalf of himself and all other citizens and taxpayers of said county objected to the said court certifying and declaring the result of said election, and that a majority of said votes so cast be counted, and asked that the same be rejected upon the grounds hereinbefore stated as set out in said bill of exceptions, yet there was no proof in the cause to sustain the grounds set forth in said bill of exceptions, and hence we hold that said assignment of error was not well taken.

The fourth assignment of error is: "Because the commissioners of election did not make out and sign and return separate certificates of the result of said election." The answer to this assignment of error is that the vote upon this question was not taken at a general, but at a special, election, held for the sole purpose of ascertaining the will of the voters of said county upon the single isolated question as to whether the county seat of said county should be relocated; and, this being the only result to be declared or ascertained by the election, there was no other result to certify, and for that reason the certificate was a separate certificate of the result.

It is next contended and assigned as error that the action of the county court was unwarranted, because the act of the legislature of West Virginia (section 15 of chapter 39 of the Code of 1891) is unconstitutional and void, and that the said act is contrary to and against the spirit and intent of section 39 of article 6 of the constitution of this state, and because the object and purpose of said act of the legislature were not expressed in the title to said bill, as required by the constitution, and it is therefore void for that reason. Is said section unconstitutional and void because contrary to and against the spirit and intent of section 39 of article 6 of the constitution of this state, which provides that the legislature shall not pass local or special laws in any of the following enumerated cases,—that is to say, among others, "locating or changing county seats?" Now, this proceeding was not under any special law, but under a law which would have to be brought into requisition and proceeded under in any county in the state in which an attempt was made to relocate the county seat. Anderson, in his Dictionary of Law, "Judicial Definitions," etc., says under the word "Statute": "A general or public statute; an universal rule that regards the whole community. Local statute applies to citizens of a part of the state, etc. Special or private statute: This is rather an exception than a rule, being that which operates only upon particular persons and private concerns." See 1 Tuck. Comm. p. 11. This question was discussed by Green, J., in the case of *Welch v. County Court*, 29 W. Va. 87, 1 S. E. 337. He quotes from section 15 of chapter 39: "Whenever the citizens of any county desire

the relocation of their county seat, they may file a petition," etc. The section then prescribes the details of the manner in which a county seat may be relocated by a vote of the people of the county, and says: "This language is as broad and comprehensive as it can well be, and its terms apply to all counties." There can be no question then but that this statute must be considered general, and not special.

It is also contended that this act is unconstitutional and void because the object and purpose of said act of the legislature was not expressed in the title to the said bill as required by the constitution. When we turn to the title of the bill, we find it reads as follows: "Concerning the county courts, their jurisdiction and powers;" and, referring to said section 15, we find it provides for the jurisdiction and powers of the county court in reference to directing an election, when a proper petition is presented to it praying a relocation of the county seat; so that we must hold that the object and purpose of said act was expressed in said bill as required by the constitution. On this point, see a decision of the supreme court of Pennsylvania, reported in 18 Atl. 993 (*Appeal of Borough of Millvale*), where it is held that: "If the title fairly gives notice of the subject of the act, so as reasonably to lead to an inquiry into the body of the bill, it is all that is necessary; it need not be an index to its contents."

The sixth assignment of error is that the ballots received from the commissioners holding the election in certain places where majorities were given for removal were not indorsed across the seal of the envelope or package containing the said ballots by the commissioner of election at said voting places, and because the commissioners of election and clerk at precinct No. 2, Black Fork district, were not sworn as required by section 11 of chapter 3 of the Code; also because the said election was not conducted as provided in the order of January 4, 1893, at the regular term of the court, or as provided by the general law (Code, c. 3) known as the "Australian Ballot System." The answer to these objections assigned as error is that no such facts are disclosed by the record, and there is no proof that such defects in the proceedings exist, and for the same reason there is nothing before the court to enable us to pass upon the questions raised by the seventh and eighth assignments of error as to publishing notice in two newspapers within the county of the question to be voted on at the said election, and as to whether any place was designated in the notice given by the court for holding the election in Black Fork district, in precinct No. 1, or in any of the other districts in Tucker county.

The ninth assignment of error is claimed to consist in the fact that the notice required by section 6 of chapter 39 of the Code for special sessions of the county court was not posted for two days before the said session of

court, as required by law, and because the order entered on the 4th day of May, 1893, at the special session does not state the purpose for which said special session in obedience to said notice was called. This we do not regard as necessary, for the reason that under section 68 of chapter 3 of the Code it is provided that commissioners of the county shall be ex officio a board of canvassers. They shall convene as such canvassing board at the courthouse on the fifth day (Sundays excepted) after every election held in their county, or in any district thereof, and the officers in whose custody the ballots, poll books, etc., have been placed shall lay the same before them for examination, etc. The statute requires that they shall meet as a canvassing board on the fifth day, etc., and no notice is required, as when they meet in special term to transact other business.

The tenth and last assignment of error is that the courthouse of said county was located on the lands of Enoch Minear, on the east side of Cheat river, by an act of the legislature of the state of Virginia passed March 7, 1856, and that the present county seat at St. George was located on its present site by agreement of proper parties to the contract between the county court by its commissioners and the people, who, by said contract and act, agreed that the said county seat should be permanently located at St. George, the present site. Now, if this error could be sustained, no county seat could be relocated under the statute, for the reason that all of them have been located by act of the legislature, and uniformly the site for the courthouse building is fixed by agreement between the county court and the owners of the land; and again, in this instance, the majority of the voters of Tucker county seem to have determined that they want the courthouse located now at Parsons, and, if it depended upon the voice of the people, it has been properly located by their votes. For these reasons my conclusion is that the judge of the Third judicial circuit committed no error in refusing to award said writ of certiorari, and the order complained of must be affirmed, with costs and damages.

(39 W. Va. 688)

### ROUSH v. MILLER

(Supreme Court of Appeals of West Virginia.  
Dec. 15, 1894.)

#### DOWER—PURCHASE-MONEY MORTGAGE—PRIORITIES.

1. As long as the legal title to land is retained, a lien for the purchase money exists; and such lien is paramount to the right of dower of the widow of the purchaser.

2. Where a conveyance of the legal title to such purchaser is made, in pursuance of the agreement of the parties, in order that the purchaser may, by deed of trust made at the same time, pass on the title to the trustee in the trust deed to secure the payment of such purchase money to the cestui que trust who has paid it for him, the two deeds are to be treated as parts of one and the same transaction, made to

retain on the face thereof a lien on the land for such unpaid purchase money, and the right of dower of the widow of the purchaser is subordinate to the lien of the deed of trust.

3. It is but another mode of expressly reserving on the face of the two conveyances, treated as one transaction, a lien for such unpaid purchase money. See the case for statement of facts to which the principle is applied, and out of which the point arises.

(Syllabus by the Court.)

Appeal from circuit court, Mason county.

Action by Mrs. Mina E. Roush against C. O. Miller and others to determine dower rights. Judgment for plaintiff, and defendant Miller appeals. Reversed.

Tomlinson & Wiley, for appellant. J. B. Menager, for appellee.

HOLT, J. The question involved is, is plaintiff, Mrs. Mina E. Roush, widow of Peter E. Roush, deceased, entitled to dower in the tract of land of 57 acres bought by Roush at a judicial sale, and conveyed to him by H. R. Howard, special commissioner? The circuit court of Marion, by decree entered on the 20th day of February, 1894, held her to be entitled to dower, and ordered it to be set apart to her, and from this defendant Miller obtained this appeal.

The facts out of which the point of law involved must arise are as follows: On the 13th day of October, 1883, H. R. Howard, as special commissioner, acting in pursuance of a decree, sold the tract of 57 acres to Peter E. Roush, for the price of \$1,036, of which sum he paid in cash \$259. This sum he borrowed from defendant C. C. Miller, giving his note therefor, with his father, A. J. Roush, as surety. But no question is involved as to this; it is only mentioned as one of the circumstances of the transaction. For the residue, Roush, the purchaser, executed to Howard, the commissioner, his three several bonds, for \$259 each, payable in 1, 2, and 3 years, with interest from date. By decree entered on the 23d day of October, 1894, the sale was confirmed, and Roush was put into and retained actual possession, and Howard was appointed a commissioner to make him a deed on payment of the unpaid purchase money. When Roush applied to defendant Miller in September, 1888, to borrow \$259, the cash payment, he asked defendant Miller to take a deed of trust on the land for the entire amount he expected, as the proceeds of sale, to the extent of something over \$1,400, was going to Miller, as the sum decreed him. This Mr. Miller declined to do, but he afterwards agreed, if Roush would give him a note with Albert J. Roush, his father, as surety, for \$259, that he would take a trust deed on the land for the balance of the purchase money, provided he did not bid beyond the value of the land. On the 22d day of December, 1888, the principal and interest on the Roush notes amounted to \$786.06; and on that day Miller gave Commissioner Howard a receipt for that amount of the sum decreed to be paid to him out of the proceeds of sale. In

consideration thereof, Commissioner Howard gave up to Roush his purchase-money notes as paid, and made him a deed for the land; and Roush, in consideration of what Miller thus settled for him, executed to Miller his note for the same, and, with his wife, the present plaintiff, executed a deed of trust to Rankin Wiley, trustee, on the 57 acres, to secure the payment of the note given by Roush to defendant Miller. This was all done on one and the same day, without any money passing between any of the parties. But the wife, Mina E. Roush, being but 19 years old at the time, it is conceded that her joining in the execution of the deed of trust had no efficacy, as the case stands, in barring any right of dower she might have had. Peter E. Roush died on the 14th day of September, 1893, intestate, leaving his wife, the plaintiff, Mina E., and one child, his infant daughter, Bertha G. Roush. In October, 1893, Mina E. Roush instituted this suit, claiming dower in the tract of land of 57 acres, praying that dower be assigned to her. Defendant Miller demurred to and answered the bill, but the court overruled the demurrer, and, being of opinion that plaintiff was entitled to dower, appointed three commissioners to set apart and assign the same to her, and defendant Miller appealed.

The demurrer was properly overruled, for neither the common-law remedy retained nor the summary remedy by motion given by statute shall be construed to take away or affect the well-established jurisdiction which courts of chancery have long exercised over the subject of dower (see section 8, c. 65, of the Code); and Rankin Wiley, as the trustee, invested with the legal title, and defendant Miller, the beneficiary, and as claiming his trust deed to be paramount to her claim of dower, were both proper parties.

The only remaining question is, was the court right in holding her entitled to dower? The authorities, as far as they have been brought to our attention,—and we have been able to examine them,—seem to be all one way, holding with one accord that a conveyance of land to the husband, who, at the time he secures his deed, executes a deed of trust to secure the unpaid purchase money, does not give the husband such a seisin in the land as will entitle his wife to dower. The statute says: "A widow shall be endowed of one-third of all the real estate whereof her husband or any other to his use was, at any time during the coverture, seized of an estate of inheritance, unless her right to such dower shall have been lawfully barred or relinquished." Code, c. 65, § 1. And this has been our statute law since 1705. See 1 Rev. Code 1819, p. 403, note a. But it has always been held that where the land is conveyed to the husband, and he, by deed of the same date, conveys the land to a trustee, in trust to secure the purchase money, the two conveyances are parts of one and the same transaction, and, the seisin of the hus-

band being instantaneous and transitory, the widow to that extent is not entitled to dower. *Gilliam v. Moore* (1832) 4 Leigh, 30. It has become a rule of property, and "a different decision at this day would be exceedingly mischievous, and open an inexhaustible source of litigation." Carr, J., *Id.* 32. See *McCauley v. Grimes* (1830) 2 Gill & J. 3:3; *Wheatley v. Calhoun* (1841) 12 Leigh, 264, and *Wilson v. Davisson*, 2 Rob. (Va.) 384, where it was held that the vendor's lien for unpaid purchase money is paramount to the wife's right of dower, although the husband has the legal seisin; and, by section 3 of chapter 65, the law giving her dower in the surplus after satisfying the lien is made to conform to the dissenting opinion of Judge Allen. *Robinson v. Shacklett* (1877) 29 Grat. 99; *Summers v. Darne* (1879) 31 Grat. 791; *Holbrook v. Finney*, 4 Mass. 566; *Clark v. Munroe* (1817) 14 Mass. 351. Dower must give way to the vendor's lien (*Slinnett v. Crolle*, 4 W. Va. 600; *Hunter v. Hunter*, 10 W. Va. 321; *Holdens v. Boggess*, 20 W. Va. 63; *Martin v. Smith*, 25 W. Va. 580); and the lien remains as long as the legal title is retained (*Findley v. Armstrong*, 23 W. Va. 113; *Poe v. Paxton's Heirs*, 26 W. Va. 607). In *Cowardin v. Anderson* (1883) 78 Va. 88, it was held that the doctrine of treating the deed of conveyance and the trust as constituting one and the same transaction, and therefore the seisin acquired as transitory, applies equally in favor of a third person who advances the purchase money, and at the time of the conveyance takes a mortgage on the land as his indemnity; and, although not a case involving the right of dower, I see no reason why the same principle should not be applied in such cases. See *Coffman v. Coffman* (1884) 79 Va. 504. And in *Hurst v. Dulaney* (1891) 87 Va. 444, the principle was held in a case involving the right of dower to apply for the benefit of an assignee of the purchase money; and I see no reason why it should not be applied to one who, as in this case, is an assignee,—in substance, a quasi assignee,—as well as to an assignee in the proper sense; and this view was taken in *Kaiser v. Lembeck* (1880) 55 Iowa. 244, 7 N. W. 519, not in a case, however, involving the right of dower. And so in *Curtis v. Root* (1858) 20 Ill. 53, 57, the same doctrine had been laid down in favor of one taking a mortgage for the money advanced by him to pay the purchase money. *Moring v. Dickerson* (1881) 85 N. C. 466. In *Welch v. Buckins* (1859) 9 Ohio St. 331, the rule was held to apply, whether the mortgagee (as defendant Miller was in this case) conveys the land to the mortgagor (like Roush was in this case), conveys the land himself, or procures one who can convey the legal title to do so, as was done by Howard, commissioner. In this case, at the instance of Miller. The fact of such cross conveyances was held not to affect the case; for the substance, not the form merely, of the transaction, is to be

regarded. This was, like the case here, a case of dower; but, by virtue of a statute in Ohio and Maryland, it has been held that money advanced by a third person to enable the purchaser to buy is no party to the transaction. He who thus advances the money is not privy to the sale. See *Stansell v. Roberts* (1844) 13 Ohio, 149, 157, and *Heusler v. Nickum* (1873) 38 Md. 270. With us there is no statute to negative by implication the application of the doctrine to such a case as the one in hand, where the two deeds are made at the same time, as dependent parts of one and the same transaction, by which, in pursuance of agreement, defendant Miller turns the lien paramount to dower held by the court for him into one of like dignity held by himself. Such is the intent of the parties which the law imputes, drawn from the nature of the transaction. Therefore, considering that the original lien in this case was held for the benefit of defendant Miller confessedly paramount to plaintiff's right of dower, and that, by the agreement of the parties, the legal seisin was to be and was in Roush only in transitu on its way to Wiley, the trustee, to be held by him for the purpose of securing the identical money, by a private instrument, under the more complete and effectual control of the parties, it would be a harsh construction of the law to hold such agreement abortive and ineffectual to accomplish the lawful purpose plainly intended (see *Childers v. Smith* [1820] *Gilmer*, 196, 200); for it is but another mode of expressly reserving on the face of the two conveyances, treated as one, a lien on the land for the payment of the unpaid purchase money. With this view of the case, we are of opinion that the decree complained of is erroneous, and that plaintiff is only entitled to dower in the surplus after the deed of trust is satisfied. Reversed and remanded.

(39 W. Va. 644)

**HART et al. v. SANDY et al.**(Supreme Court of Appeals of West Virginia.  
Dec. 15, 1894.)**FRAUDULENT SALE — KNOWLEDGE OF PURCHASER  
—BADGES OF FRAUD.**

1. S. purchases a sawmill and fixtures in October, 1889, from H., and pays him \$300 cash, and executes two notes for \$290 each, payable in 9 and 18 months, with interest for the residue, and agrees to give a deed of trust on said property to secure said deferred payments. He does not execute the trust at the time, for the pretended reason that he is in a hurry to remove the property to another county, where he resides, but promises H. that, if he will prepare and send the trust deed to him, he will execute it, and have it placed on record. In the month of February following, said deed of trust was prepared and presented to said S. on two occasions, when he declined to execute it. In the month of April following he sold said property to the widow of his deceased brother, who, through her husband and agent, had notice of the debt due H., the agreement to execute said trust, and the refusal on the part of S. to comply therewith. At the time of

the sale a written conveyance of this personal property was executed, acknowledged, and recorded, and more than 20 days thereafter \$480 of the purchase money was counted out by defendant N., the second husband, as the agent of his wife, to S., in the presence of a witness who was called in. About the time of the purchase of said mill and fixtures by S. he sold his lands for \$2,100. Shortly after the sale of the mill property he sold his horse to said husband, which was all the property owned by him in this state, and said S. then left the state without securing the notes of H., and has remained away ever since. *Held*, that these circumstances show that the sale of said mill property was made with intent to hinder, delay, and defraud H., and that N., the wife of said agent, had notice of the fraudulent intent, and that said sale was void as to H.

2. A creditor cannot purchase the goods of his debtor at a price in excess of his debt, when he knows that the excess so paid such debtor is by the latter to be placed beyond the reach of his other creditors. Such purchaser is a participant in the fraud of his debtor, whether his purpose be to aid him or not.

3. Wherever there appears to be connected with the transaction circumstances indicating excessive effort to give it the appearance of fairness or regularity, which are not usual attendants of such business, the courts will regard such circumstances as badges of fraud.

(Syllabus by the Court.)

Appeal from circuit court, Roane county.

Suit by C. M. Hart and another against G. W. Sandy and others, to set aside a conveyance of real and personal estate. Judgment for defendants, and plaintiffs appeal. Reversed.

Wells & Pendleton, for appellants. Wm. A. Parsons, J. W. C. Armstrong, and Geo. F. Cunningham, for appellees.

**ENGLISH, J.** This was a suit in equity brought by C. M. and J. B. Hart in the circuit court of Roane county against G. W. Sandy, Samuel Noe, Letitia Noe, William E. Swiger, trustee, B. F. Lowe, John Nay, and G. T. Harrison. The plaintiffs say in their bill that on the 15th of October, 1889, they sold to the defendant G. W. Sandy a boiler for use in a steam mill, a sawmill rig and fixtures, a bill of pulleys, small shafting, boxing, piping, belts, and an inspirator and fixtures for use in connection with said sawmill, at the price of \$880, of which sum said Sandy paid \$300, and executed to plaintiffs his two promissory notes for \$290, each bearing date the 15th day of October, 1889, and falling due, respectively, at 9 and 18 months, with interest from date at 6 per cent. per annum for the residue of said purchase money; that at the time of said sale to said Sandy, and the execution of said notes by him, it was expressly understood and agreed, by and between the plaintiffs and said Sandy, that he should execute a deed of trust upon said property so purchased to secure said two promissory notes, and that said notes recite on their face that they are secured by deed of trust, but the said deed of trust was not then prepared, for the reason that said Sandy was in a hurry to get his said mill and fixtures removed to the place where he expected to set the same up, and

the plaintiffs then agreed to have said deed of trust drawn up and sent to said Sandy for his signature and acknowledgment at an early day; that plaintiffs did afterwards have said trust deed prepared, and about the 1st of February sent the same to said Sandy for his signature and acknowledgment, but he failed and refused to sign or acknowledge said trust deed, and has not as yet signed the same; that, at the time of the purchase of said property from plaintiffs, said defendant was the owner of a steam engine and fixtures for a gristmill, which he had purchased from the defendants B. F. Lowe, John Nay, and G. T. Harrison, and which was then located in the county of Harrison; that after said purchase from plaintiffs he moved the property purchased from plaintiffs, and the property purchased from Lowe, Nay, and Harrison, to the county of Roane, in this state; that, after said Sandy had run said sawmill for several months, he, by and with the advice of the defendant Samuel Noe, made a voluntary and fraudulent transfer of said sawmill and fixtures, and said gristmill and fixtures, and also of a horse, saddle, and bridle, which he then owned, to the defendant Letitia Noe, who was then and still is the wife of said Samuel Noe; that the said Samuel Noe pretended to be acting as the agent of his wife in the purchase of said property from the defendant Sandy; that said transfer was made by written instrument in the form of a deed, and was brought to the town of Spencer by said Noe, and filed in the clerk's office for record, and is now of record in said clerk's office, a certified copy of which is filed as Exhibit A; that the said transfer of said property was made by said Sandy with intent to hinder, delay, and defraud his creditors of and from what they are entitled to, and especially to hinder, delay, and defraud the plaintiffs in the collection of their said debt against him, and to screen said property so that it could not be reached by legal process in any proceeding which plaintiffs might institute for the recovery of their said claim; that said Letitia Noe and Samuel Noe had full notice and knowledge of the fraudulent intent of said G. W. Sandy in making said transfer, and full notice that Sandy was largely indebted to the plaintiffs and to other persons, and had contracted to give plaintiffs said deed of trust to secure said debt to them; that said Samuel Noe was the confidential adviser of said Sandy in said transaction, and participated with him in said scheme, for the purpose of aiding him in carrying out his fraudulent designs against the plaintiffs, and colluded with the said Sandy, and procured him to make said conveyance to the said Letitia, for the further purpose of profiting himself thereby; that said transfer to said Letitia was voluntary, and not upon a consideration deemed valuable in law; that, if any money or other thing of value passed from said Letitia to Sandy as a consideration for said transfer, it was again returned to her by said Sandy; that,

if any payment of money was made, the said Sandy furnished the same, and caused it to be paid, for the purpose of giving color and semblance of fairness to said transaction; that, soon after said fraudulent transfer of said property, said Samuel Noe, pretending to be acting as the agent of his said wife, called in a witness, and turned over to the said Sandy \$480, claiming the same was the last payment on said mills, which he pretended to be paying for his wife, Letitia Noe, and took from the said Sandy a written receipt for said money, all of which plaintiffs charge was done for the purpose of giving color to said alleged sale, and for no other purpose, and which money was either furnished by the said Sandy for said purpose, or was returned by him to the said Samuel and Letitia Noe; that said Sandy left the state soon after said transfer, without having provided for the payment of the plaintiffs' demand, or securing the same in any way, and that the property so transferred was the only property owned by said Sandy at that time, and was worth at least \$2,000; that said Sandy had taken said Samuel Noe in as a partner in said milling business a short time before said transfer, and that said Letitia was, prior to her marriage to said Samuel Noe, the widow of a deceased brother of said Sandy; that said Sandy was an unmarried man, and boarded in the family of said Samuel Noe for some time previous to said transfer; that the said sawmill, boiler, and fixtures, etc., are now located on the lands of Samuel Noe, in Roane county, and were so located prior to said transfer; that about the 1st day of October, 1889, said G. W. Sandy executed to the defendant W. E. Swiger, trustee, a deed of trust upon said engine and gristmill and fixtures, to secure to the defendants B. F. Lowe, John Nay, and G. T. Harrison the sum of \$500 therein mentioned, but plaintiffs are not informed whether the same has been paid or not, which deed of trust was duly admitted to record, and the plaintiffs call on said Lowe, Nay, and Harrison to answer, and say how much, if anything, has been paid on said trust debt, and what amount remains unpaid thereon; and they pray that said fraudulent transfer of said property to said Letitia Noe may be set aside and declared fraudulent and void as to the plaintiffs' demand, that they may have a decree for their claim against said Sandy, and that said sawmill and fixtures, etc., may be sold to satisfy the plaintiffs' demand, etc. B. F. Lowe, John Nay, G. T. Harrison, and W. E. Swiger, trustee, answered said bill, denying that anything had ever been paid on their trust deed. Samuel Noe also answered said bill, stating that G. W. Sandy owed him \$600 in April, 1890, and that Letitia Noe, his wife, had something over \$500 in cash, which she had received as a sum in gross in lieu of dower in her former husband's estate; and that to enable him to save said \$600 she agreed to purchase the mill property, fixtures, etc., of said Sandy, if re-

spondent would pay as much as \$500 on said property, and wait on her until a sale of said property could be made to enable her to repay him, which proposition was agreed upon, and she made the purchase; and he proceeds to put in issue every material allegation of the plaintiffs' bill. Letitia Noe also filed her answer, putting in issue the allegations of the bill as to her connection with the transaction. The plaintiffs also filed an amended bill, in which they alleged that the agreement made and entered into between said G. W. Sandy and the plaintiffs, at the time of the sale of said sawmill and fixtures, that the said Sandy would give a deed of trust on the said property as security to the plaintiffs for the said two promissory notes of \$290 each, was a part of the consideration of said sale to said Sandy, and created an equitable lien upon said property in favor of the plaintiffs, of which the said Samuel Noe and Letitia Noe had notice at the time the defendant Letitia Noe purchased the said property from said Sandy through the said Samuel Noe as her agent; and they pray that in the event the court should be of opinion that the transfer of the entire property from said Sandy to said Letitia is not fraudulent or voluntary, then the plaintiffs' equitable lien created by said agreement may be enforced against the said property, and the same be sold to satisfy the plaintiffs' debt and costs. G. W. Sandy demurred to said amended bill, and Samuel Noe and Letitia Noe answered the same, and the cause was heard upon the bill, amended bill, answers to each, and replications thereto, and upon the demurrer to said amended bill, which demurrer, upon consideration, was overruled by the court, and disallowed; and the court held that the plaintiffs were not entitled to the relief prayed for, and dismissed their original and amended bills, with costs, but without prejudice as to any suit the plaintiffs might thereafter institute against said G. W. Sandy; and from this decree the plaintiffs appealed.

The first error assigned and relied upon by the appellants is that the court erred in holding said transfer of said property to Letitia Noe valid as against appellants' debt, claiming that the proofs show clearly that there was fraud in the transfer, and that defendants Samuel and Letitia Noe had notice of G. W. Sandy's fraudulent intent, and participated therein. In determining a question of this character, this court has frequently held that the surrounding circumstances may be taken into consideration, and, from the fact that fraud seeks concealment, circumstantial evidence is frequently the only evidence that can be obtained. The question, then, presented for our determination is, did G. W. Sandy convey the property in the bill mentioned to Letitia Noe with intent to hinder, delay, and defraud the plaintiffs in the collection of their debt, and did said Letitia Noe have notice of said fraudulent intent? When we go to the date of the purchase of the mill

and machinery by G. W. Sandy from the plaintiffs, we find that said Sandy, shortly before purchasing said machinery, had sold his land for \$2,100 in cash, and a horse valued at \$75, and that out of this he paid the plaintiffs the cash payment of \$300 on said sawmill and fixtures on the 15th day of October, 1889, and executed to the plaintiffs his two notes for \$290 each, payable, respectively, in 9 and 18 months, with interest from date for the residue, which notes were to be secured by deed of trust upon said sawmill and fixtures when said machinery was delivered to him. C. W. Gould states in his testimony that the reason said deed of trust was not executed at the time the sale was made was that it was the middle of the afternoon before the trade was consummated, and G. W. Sandy did not want to wait until the deed could be prepared, as he wished to get to Jane Lew, in Lewis county, that evening; but he made arrangements with the plaintiffs to prepare same, and send it to him in Roane county (Sandy's home), and then he would execute said deed, and have it put on record in Roane county, at the plaintiffs' expense. Said witness also states that the plaintiffs prepared said deed of trust, and sent it to said Sandy by him, and that he communicated the facts concerning the agreement between plaintiffs and said Sandy to execute said deed of trust to said Samuel Noe, the defendant, by reading to him a letter from C. M. Hart to witness, setting forth said agreement, prior to the 1st of April, 1890; that he was trying to induce Noe to influence said Sandy to execute the deed of trust which he had at the time, as he, Sandy, was liable to have trouble unless he did so; that at the time witness read the letter to said Noe from Hart, before referred to, which was prior to April 1, 1890, he (Samuel Noe) remarked to witness that he had no interest in the controversy of Sandy with Hart, and that Sandy would have to settle that, but he (Noe) had already bought a one-third interest in said mill and machinery, and had paid Sandy for same in cattle and lands, which conversation took place at the Taylor schoolhouse. The witness further says that he presented said deed of trust to said Sandy twice in the month of February, 1890, and he refused to execute it each time, but did not deny his agreement with plaintiffs to execute the same. Now, it appears that Letitia Noe, to whom this property was conveyed on the 26th day of April, 1890, before she became the wife of Samuel Noe, was the widow of G. W. Sandy's brother. She was sick in bed at the time this property was conveyed to her. It also appears that on the 22d day of February, 1890, she had received from W. S. Haymond the sum of \$544.50 as a gross sum in lieu of her dower in certain lands of which her first husband died seised and possessed, and that in order to save about \$600, which G. W. Sandy owed her husband, Samuel



Noe, she agreed to purchase said mill property and fixtures from said Sandy, her said husband acting as her agent in the transaction. This statement, however, does not comport well with the statement made by said Samuel Noe to the witness Gould, that he had already bought one-third of said mill and machinery from said Sandy and paid him in land and cattle. The question naturally suggests itself, that, if said G. W. Sandy owed said Samuel Noe \$600, why did he pay him in lands and cattle for said one-third interest, and why the necessity of said Letitia Noe advancing her \$500 to aid in purchasing said property to save a debt of \$600 due her husband, when said husband had been paying said Sandy in lands and cattle for a portion of the property? And again, the witness Gould says that said Samuel Noe asked him "if he did not think that Sandy (or we) had set that job up nicely on Hart." Samuel Noe states in his deposition that he acted as the agent of his wife, Letitia Noe, in the purchase of the mill property, and that he had heard from one Gould that said Sandy was to give a deed of trust to plaintiffs to secure their debt, but that Sandy denied it.

The evidence, then, clearly shows that Samuel Noe had notice of the existence of the debt from said Sandy to plaintiffs, and that he had agreed to secure the same by trust deed. When we consider the intimate relations between husband and wife, and the relationship existing between said Sandy and Letitia Noe, and the further fact that said G. W. Sandy had been doing business in partnership with Samuel Noe, and that said Letitia was called upon to pay out her own money she had received from her deceased husband's estate, there can be no doubt that this transaction had been thoroughly discussed between said G. W. Sandy and Samuel Noe and his wife. Said Samuel Noe, in his deposition, states that said Sandy told him that he owed plaintiffs about \$500, and, when asked the question, "Did you not agree with G. W. Sandy to pay plaintiffs' claim against him?"—replied, "I did not; Sandy told me that he would leave a payment for Hart at Charleston." Again, it appears in evidence that when G. W. Sandy conveyed to said Letitia Noe said mill property he parted with all the visible property he owned, except a horse, saddle, and bridle, which the defendant Samuel Noe says he afterwards purchased from him, paying him therefor \$100. Another circumstance, which should be given some importance in this case, is that the witness Geary states that on the 20th day of May, 1890, 24 days after the date of said conveyance to said Letitia Noe, and 21 days after said conveyance was acknowledged and admitted to record, Samuel Noe paid G. W. Sandy \$480, for the defendant Letitia Noe, which witness counted, and Mr. Noe took a written receipt for the money, which he witnessed at their request. Why was this par-

ticularity and formality observed, if there was not some apprehension? and that there was not only notice, but apprehension, of some difficulty in making the purchase, is apparent from the testimony of Edmund Hugill, who states that he asked Mr. and Mrs. Noe if there was any arrangement to pay the notes given by Sandy to Hart for the mill. Their answer was that there was no arrangement made, and that they would not pay the notes. He then informed them that he would sell the mill if they did not pay said notes. Mr. Noe said he would be with us, or something to that effect. Witness then asked Noe if he did not know that the trade with Sandy was not to be closed until the deed of trust was executed as agreed by Sandy. He answered, in the presence of Letitia Noe, that he knew about the deed of trust, or that he had heard of the deed of trust, but that he had taken counsel of an attorney, and that he had told him (Noe) that there was nothing on record against said property, and that he would be safe in buying it. Now, while it is true this conversation occurred after said Sandy had sold said property to Letitia Noe, yet it shows an admission on the part of said Samuel Noe that he knew about the deed of trust, or had heard about the deed of trust, and had taken counsel of an attorney in regard to the matter, who advised him that there was nothing on the record against said property, and he would be safe in buying it. The circumstances shown by the evidence in this cause can lead to no other conclusion than that G. W. Sandy made this conveyance to his relative Letitia Noe with the intention of hindering, delaying, and defrauding the plaintiffs. Shortly before purchasing this mill and machinery from the plaintiffs he had sold his land for \$2,100 cash and a horse valued at \$75. At the time of the purchase of said machinery he was in so much of a hurry to leave Shinnston and reach Jane Lew that he had not time to execute the deed of trust to secure the notes given by him for the deferred payments, and when the trust deed was prepared and sent to him for execution in Roane county, and although the same was presented to him twice in the month of February, 1890, with a request that he should execute it, he positively refused. His scheme was to sell said mill and fixtures to his relatives in such a way that it could not be reached by plaintiffs, pocket the proceeds, and go to the Western states. At least, this was what he attempted to do, and this was the reason that Samuel Noe consulted counsel, as shown by the deposition of the witness Hugill, to ascertain whether he would be safe in buying the property.

Did Letitia Noe have notice of the fraudulent intent of G. W. Sandy in selling and conveying said property to her (for a written conveyance was executed and acknowledged and recorded when the property would have passed by delivery, being personal property)? It appears from the testimony of Samuel Noe,



and from the answer of himself and wife, that he acted as the agent of his wife in making the purchase of this machinery. Upon the question of notice, we find the law stated thus in 1 Am. & Eng. Enc. Law, p. 419: "In the relation of the principal to a third party, the undisputed rule exists that notice to the agent is notice to the principal, if the agent comes to the knowledge of facts while he is acting for the principal. But notice to the agent, to bind the principal, must be within the scope of the agent's employment." In the case of *Jackson v. Sharp*, 9 Johns. 163, it was held that, "if a subsequent purchaser have notice at the time of his purchase of a prior unregistered deed, it is the same to him as if such deed had been registered; and if the agent of such subsequent purchaser, at the time of making the purchase, knows of the prior or unregistered deed, it is the same as notice to his principal." 1 Pars. Cont. (8th Ed.) p. 75, states the law upon this point as follows: "A principal is affected by notice to his agent respecting any matter distinctly within the scope of his agency, when the notice is given before the transaction begins, or before it is so far completed as to render the notice nugatory. The notice to an agent may be implied as well as expressed; knowledge obtained by the agent in the course of that very transaction is notice." And in the note it is said: "The reason generally given for charging the principal with notice is that it is the duty of the agent to communicate to his principal the knowledge he has of the subject-matter of the agency; and in the latter class of cases (that is, where it was recently acquired) it is said that he is bound to do so irrespective of when the information was acquired, and that he is presumed to discharge this duty." Upon this point we find it stated in *Story, Ag. § 140*, that "notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from or is at the time connected with the subject-matter of his agency; for, upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal, and, if he does not, still, the principal having intrusted the agent with the particular business, the other party has the right to deem his acts and knowledge obligatory upon the principal; otherwise the neglect of the agent might operate most injuriously to the rights and interests of such party." *Bump, on Fraudulent Conveyances*, on page 494, says: "The notice of the fraud need only be sufficient to put a man of ordinary prudence and experience in business transactions upon the inquiry. \* \* \* Whatever is sufficient to direct his attention to the prior rights and equities of creditors, and to enable him to ascertain their nature by inquiry, will operate as notice. When a purchaser has knowledge of any fact sufficient to put him upon inquiry, he is presumed either to have made the inquiry and ascertained the extent

of the right that he may possibly prejudice, or to have been guilty of a degree of negligence fatal to the claim to be considered a bona fide purchaser. This notice may be derived from the statement of creditors or other parties. \* \* \* The purchaser is chargeable with notice of all the matters which appear to be within the knowledge and memory of his agent." Again, on page 204, the same author says: "It is not necessary that the grantee shall be one of the originators of the fraudulent scheme. \* \* \* There is no difference between those who form the design and those who afterwards enter into it with a knowledge of its character, and aid in carrying it out. The grantee is also bound by the acts of his agent which he adopts and confirms, and, if they are fraudulent, his own innocence will not suffice to protect the transfer." Other authorities might be cited showing that notice to the agent while acting in the scope of his authority must be regarded as notice to the principal, but these are regarded as sufficient. I will, however, call attention to a portion of the opinion of *Cabell, J.*, in the case of *French v. Loyal Co.*, 5 Leigh, 658, who says: "But although the law in many cases imputes notice to a man on evidence far short of that which, if its weight only were considered, would be necessary to prove actual notice, yet, if we attend to the nature and character of the facts which the evidence in such cases does establish, we shall see that the law in imputing notice acts with its usual justice and equity. Thus, on proof of notice to an agent, the law at once imputes notice to the principal, not because notice to the agent is proof that the principal actually had notice also, but because it is a fact of such a character that the principal ought to be as much bound by it as if he had notice." See, also, *Newlin v. Beard*, 6 W. Va. 111, and *Fidelity Ins., T. & D. S. Co. v. Shenandoah Val. R. Co.*, 32 W. Va. 244, 9 S. E. 180, where this court held that notice to a trustee was notice to a cestui que trust, etc.

Now, all these authorities, when applied to the facts and circumstances of this case, preclude the defendant *Letitia Noe* from denying that she had notice of the fact that *G. W. Sandy* was indebted to the plaintiffs in the sum of \$580, and that he had agreed to execute a deed of trust upon the property she purchased from him to secure the payment of said sum, and, although said deed of trust had been prepared and presented to said *Sandy* for execution, he had refused to execute and acknowledge the same. In the case of *McVeagh v. Baxter*, 82 Mo. 518, it was held that "a creditor cannot purchase the goods of his debtor at a price in excess of his debt, when he knows that the excess so paid such debtor is by the latter to be placed beyond the reach of his other creditors; such purchaser is a participant in the fraud of his debtor, whether his purpose be to aid him or not." The intimate relation

between the parties to this transaction were such that we must conclude that Samuel Noe was aware of the fact that G. W. Sandy was arranging his business with the intention of leaving the state, which he did shortly after the sale of his property; and he must have known, from his refusal to execute the deed of trust to secure plaintiffs, that he did not intend to pay the plaintiffs' debt. The first note would fall due in July, and he left the state in June, without complying with his agreement to secure the plaintiffs' notes. Not only so, he had sold the property on which he agreed to secure them. Now, again, as to the particularity observed in counting the money and executing the conveyance for the transfer of this property, we find in 8 Am. & Eng. Enc. Law, p. 783, the law is stated thus: "Whenever there appear to be connected with the transaction circumstances indicating excessive effort to give it the appearance of fairness or regularity, and which are not usual attendants of such business, the court and juries are often influenced in favor of the creditor. If parties not usually very exact in their negotiations carry out a transaction with great precision, accurate calculations, and the claim of the grantee made to overbalance the valuation, these, with other facts, will lead the court to believe the transaction is not bona fide. Generally, bona fide transactions do not need to be clothed with extraordinary pretenses of prompt payment." So in the case of Comstock v. Rayford, 12 Smedes & M. 370, it was held that "where it is not necessary to record a bill of sale of slaves, and yet the record of it is made, it looks as though it might have been done for effect," etc. In view, then, of the circumstances detailed by the evidence in this case, there can be no question as to the fact that the sale of this mill and fixtures by the defendant G. W. Sandy to Letitia Noe was made with intent to hinder, delay, and defraud the plaintiffs out of their just debt; and it is equally as evident that the defendant Samuel Noe, while acting as the agent of said Letitia Noe, aided said Sandy in carrying out his fraudulent intent, and had full notice thereof; and that notice to him, under the circumstances, was notice to the said Letitia, and said sale and conveyance must be held void as to the plaintiffs' claim.

The appellants assign, as an additional ground of error, that "the court should have held that the express agreement made by Sandy at the time of his purchase of said property, to give a trust deed upon the same to secure them, is enforceable in equity against Samuel and Letitia Noe, they having had notice of said agreement at the time of their purchase." But as I have already arrived at the conclusion that said conveyance and sale of said property was made with intent to hinder, delay, and defraud the plaintiffs, and that said Letitia Noe had notice of such intent, and said sale was there-

fore void as to plaintiffs' claim, it is unnecessary to discuss or pass upon the other assignment of error in this case. The decree complained of is reversed, and the cause remanded, with costs of appellants.

(30 W. Va. 672)

# RHEIMS v. STANDARD FIRE INS. CO. OF WHEELING.

(Supreme Court of Appeals of West Virginia.  
Dec. 15, 1894.)

INSURANCE—ACTION ON POLICY—INFORMAL PLEADINGS—WHAT CONSTITUTE—CONDITIONS OF POLICY—WAIVER—PROOFS OF LOSS—ORDER SUSTAINING DEMURRER—SETTING ASIDE AT SUBSEQUENT TERM—NEW TRIAL.

1. In an action of assumpsit against an insurance company to recover the amount of a policy, where the declaration is drawn in accordance with the form prescribed in section 61, c. 125, Code, and additional statements are filed, as required by sections 62, 63, and 65 of said chapter, such statements so filed must be regarded as informal pleadings.

2. Provisions in a policy of insurance, prescribing a limit of time within which notice of loss is to be given, will not be construed as causes of forfeiture, where not so expressly stipulated in the policy; and where it is provided that no suit or action against the company for the recovery of any claim by virtue of the policy shall be sustainable until after full compliance by the assured with all the foregoing requirements, nor unless suit or action be commenced within six months after the date of the fire, proofs of loss may be furnished in a reasonable time after the fire, and, if accepted and retained by the insurer without objection, all objection to the form of the proofs and the time in which they are presented will be considered as waived.

3. Proofs of loss are no part of a contract of fire insurance, nor do they create the liability to pay a loss; they serve to fix the time when it becomes payable, and when an action may be commenced to enforce a liability.

4. If the evidence shows that the preliminary proofs required by a policy of insurance have been waived by the company, the insured is entitled to recover, though no such proofs were in fact furnished.

5. Where additional statements are filed by the plaintiff in an action upon an insurance policy, which are necessary in order to allow the plaintiff to show material facts therein stated bearing upon the waiver by the defendant of conditions contained in the policy, and the court erroneously sustains a demurrer to such statements, and thereby precludes the plaintiff from producing testimony upon said points, the court may at a subsequent term set aside the order sustaining said demurrer.

6. Where a demurrer thus sustained has precluded the plaintiff from introducing material testimony upon the trial, and the court, having discovered the error, sets aside the verdict of the jury, and awards a new trial upon that ground, this is not error.

(Syllabus by the Court.)

Error to circuit court, Ohio county.

Action by Leon Rheims against the Standard Fire Insurance Company of Wheeling, W. Va., on a fire insurance policy, in which there was a verdict for defendant. There was a judgment sustaining plaintiff's motion for a new trial, and defendant brings error affirmed.

W. P. Hubbard, for plaintiff in error. Caldwell & Caldwell, for defendant in error.

ENGLISH, J. Leon Rheims obtained a policy of insurance from the Standard Fire Insurance Company of Wheeling for \$1,000 on certain merchandise contained in brick building and on sidewalks adjoining, situate Nos. 5, 7, and 9 Union Square, New York, through, to, and fronting on Fifteenth street, from the 11th day of January, 1892, at 12 o'clock noon, to the 11th day of January, 1893, at 12 o'clock noon, subject to the conditions and stipulations of said policy. On or about the 21st day of January, 1892, said merchandise was lost by fire in the city of New York, and on the 10th day of June, 1892, the said Leon Rheims brought an action of trespass on the case in assumpsit against said insurance company to recover the amount of said policy. The declaration is in the short form prescribed by section 61, c. 125, Code, and a copy of the policy was filed with the declaration. One of the conditions of the policy was that proof of loss should be furnished within 30 days after the fire occurred, and that payment of the policy should be made 60 days after compliance by the assured with the conditions of the policy, and that no suit should be brought for the same until the assured had complied with the requirements of the policy. In addition to the statutory plea, said insurance company stated, by way of defense, the failure on the part of the plaintiff to comply with certain requirements of said insurance policy, as follows:

"In the Circuit Court of Ohio County, W. Va. Leon Rheims vs. Standard Ins. Co. of Wheeling, West Va. The defense in the above case, being, with other things, that the action cannot be maintained because of the failure to perform and comply with and the violation of certain clauses, conditions, and warranties in the policy sued on, the defendant here specifies, as the particular clauses, conditions, and warranties in respect to which such failure or violation is claimed to have occurred, the following: 'Third. This entire policy shall become void in each of the following instances, viz.: \* \* \* If, any usage of trade or manufacture to the contrary notwithstanding, there be kept, used, or allowed on the above-described premises \* \* \* rubber cement.' Defendant states that rubber cement was kept, used, and allowed on the premises in the policy described. 'Eighth. Proceedings in case of loss: \* \* \* And within thirty days after the fire the assured shall render a particular and detailed statement of the loss and claim in writing, signed and sworn to by the assured, setting forth: (1) A copy of the written portions of this policy, with the indorsements thereon; (2) copies of the written portions of all other policies, whether valid or not, attaching in whole or in part to the property insured hereunder, and of all indorsements thereon; (3) the cash value at the time of the fire of each item of the property, and the amount of loss claimed thereon; (4) a

full and specific account of the nature of assured's interest in and title to the property, and that of all others interested therein; (5) all incumbrances or liens upon the property, or any part thereof; (6) the time, origin, and circumstances of the fire; (7) any change in the title, use, occupancy, location, possession, or exposure of said property since the policy was issued; (8) by whom and for what purpose any parts thereof were occupied at the time of the fire; (9) the amount claimed of this company. And shall also furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the assured, nor a sufferer by the fire) living nearest the place of the fire, stating that he has examined the circumstances, and believes the assured has honestly sustained loss to amount claimed. \* \* \* Ninth. No suit or action against the company for the recovery of any claim, by virtue of this policy, shall be sustainable in any court of law or equity until after full compliance by the assured with all the foregoing requirements.' W. P. Hubbard, Attorney for Defendants.

"State of West Virginia, Ohio Co., to wit: Personally appeared before me John W. Mitchell, clerk of the circuit court of said county, in my office, E. B. Bowle, who, being duly sworn, says on his oath that he is secretary of the defendant, the Standard Fire Ins. Co. of Wheeling, and that he believes that the matter of defense above stated by the said company will be supported by evidence at the trial of the above-entitled action. E. B. Bowle.

"Taken, sworn to, and subscribed by the said E. B. Bowle before me in my said office this 13th day of Sept., 1892. John W. Mitchell, Clerk of the Circuit Court."

On the 8th day of October, 1892, on motion of the plaintiff, the defendant was required to file an additional statement, which was done, and which additional statement reads as follows: "Leon Rheims vs. Standard Fire Insurance Company. In Assumpsit. The defendant, to comply with the order of the court made herein on the 8th day of October, 1892, says that it expects to prove at the trial of this action that the assured did not within thirty days after the fire render any statement in writing of its loss and claim, signed and sworn to by the assured. The assured never furnished a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the assured, nor a sufferer by the fire) living nearest the place of the fire, stating that he had examined the circumstances, and believed that the assured had honestly sustained loss to the amount claimed,"—which additional statement was sworn to by E. B. Bowle, secretary of said company; and on the 21st day of November, 1892, the plaintiff tendered a demurrer to the plea of defendant with the original statement of defense, and said addi-

tional statement, filed in aid of said plea, and also a demurrer to said statements, and each of them, on the ground that they did not nor did either of them set forth any defense sufficient in law to said action; and on the 28th day of January, 1893, the defendant having joined in said demurrer, the same were overruled as to the defendant's plea, with so much of the statement filed by defendant in aid of it as relates to the proof of loss not being furnished within 30 days after the fire; and also overruled the demurrer of the plaintiff to the defendant's plea, with so much of the statements filed by the defendant in aid of it as relates to a certificate of a magistrate or notary public not being filed; and also overruled the demurrer of the plaintiff to the defendant's plea, with so much of the statements filed by the defendant in aid of it as relates to the rubber cement being kept, used, and allowed.

The plaintiff thereupon filed the following statement: "Leon Rheims v. The Standard Fire Ins. Co. of Wheeling. In Assumpsit. The plaintiff, Leon Rheims, files the following statement in writing of matters upon which he intends to rely in waiver, estoppel, and in confession and avoidance of the matters as to furnishing proofs of loss, and the certificate of a magistrate or notary public, stated by the defendant in its statements heretofore filed; that is to say: (1) That the policy sued upon does not expressly make the failure to furnish the defendant the proofs of loss within thirty days after the fire a cause of forfeiture of the policy and of the claim of the plaintiff. (2) That the policy sued upon does not expressly make the failure to furnish the defendant the certificate of the magistrate or notary public a cause of forfeiture of the policy and of the claim of the plaintiff. (3) That it was provided in the policy sued upon as follows: 'It is hereby understood and agreed that, in case of loss or damage by fire to the property covered by this policy, this company agrees to abide by the adjustment made and accepted by the companies interested belonging to the New York Board of Fire Underwriters'; that the companies interested belonging to the New York Board of Fire Underwriters began such adjustment at once after the fire took place, on the 21st day of January, 1892, and such adjustment was proceeded with with all reasonable diligence until completed, but was not completed within thirty days after the fire; that as soon as it was completed it was accepted by the companies interested belonging to the New York Board of Fire Underwriters; proofs of loss were prepared in accordance with said adjustment, and mailed from Jersey City, N. J., to the defendant, to wit, on the 9th day of March, A. D. 1892, and received within three days by the defendant by mail, in due course, at Wheeling, West Va., to wit, on the 12th day of March, A. D. 1892. (a) That it was impossible to furnish the defendant with proofs of loss, as

per that adjustment, until it was completed as aforesaid, and that such proofs of loss were furnished to the defendant as aforesaid as soon as the said adjustment was made, completed, and accepted as above set forth. (b) That the agreement in the policy to abide by the adjustment so made and accepted was a waiver of the furnishing of proofs of loss by the plaintiff to the defendant. (c) That no objections to the proofs of loss have ever been made by the defendant to the plaintiff, and defendant has retained said proofs of loss ever since they were received by it as aforesaid. (d) That the said adjustment could not be and was not completed with reasonable diligence, and accepted by the companies interested belonging to the New York Board of Fire Underwriters, within thirty day after the fire, and that the agreement in the policy sued on, that the defendant would abide by the adjustment so made and accepted, was a waiver, under the circumstances, of the provision that the proofs of loss should be furnished to the defendant within thirty days after the fire. (4) That the plaintiff did not unreasonably delay furnishing such proofs of loss, but furnished them to the defendant as aforesaid, and that the defendant has in no way been prejudiced by the delay of furnishing the same after the said thirty days as aforesaid. (5) That the agreement of the defendant in the policy sued on, to abide by the adjustment made and accepted by the companies interested, belonging to the New York Board of Fire Underwriters, was a waiver by the defendant of the furnishing of the said certificate of a magistrate or a notary public. (6) That the plaintiff, by his agent, on or about March 9, 1892, notified the defendant as follows: 'The settlement papers are on file with the Home Insurance Company of New York, and if you desire any further information will you kindly address them, or if you will advise us we will obtain it for you.' (e) No such request was afterwards made, nor has any such request or notice or information at any time since said fire been given by the defendant to the plaintiff that such certificate was required, or that the proofs of loss were imperfect, defective, or deficient because such a certificate was not furnished or included in them; and, as to all other allegations contained in the statements heretofore filed by the defendant, the plaintiff denies them to be true. Leon Rheims,"—which statement was also verified by affidavit.

To this statement the defendant demurred, which demurrer was sustained as to portions of said statement, and overruled as to the residue; the court holding that the policy did not expressly make the failure to furnish the proofs of loss within 30 days, or to furnish the certificate of the magistrate, a cause of forfeiture of the policy, and that by the policy the defendant agreed to abide by the adjustment of companies interested belonging to the

New York Board of Fire Underwriters; that such companies began an adjustment at once after the fire, and proceeded with diligence, but did not complete it within 30 days; that when completed it was accepted by the companies belonging to that board, and proofs of loss were prepared and mailed March 9th; that plaintiff did not unreasonably delay furnishing said proofs, and the defendant had not been prejudiced by the fact that they were furnished after 30 days. The plaintiff tendered an amended statement, which was objected to by the defendant, and the objection sustained by the court, and by consent said amended statement was made a part of the record, to be considered as if incorporated in a bill of exceptions, which amended statement detailed additional circumstances connected with the transaction accounting for the delay in furnishing proofs of loss, and assigned additional facts in support of his original statement, which on account of its length is not here inserted. On the 19th day of December, 1893, the case was submitted to a jury, who found a verdict for the defendant, the plaintiff's evidence having been excluded from the jury. The plaintiff moved to set aside the verdict, and award him a new trial, and on the 24th day of March, 1894, this motion was sustained, and the defendant excepted, and applied for and obtained this writ of error.

The first question to which our attention is directed by the petition of the plaintiff in error is as to whether the statements provided for by sections 62, 63, and 65 of chapter 125 are pleadings or mere notices. Now, the nature and object of these statements are clearly indicated by the statute itself. Section 62 provides that, "if good cause therefor be shown or appear, the court or judge in vacation may order the plaintiff to file a more particular statement in any respect of the nature of his claim, or the facts expected to be proved at the trial and may stay the action until a reasonable time after such order is complied with," etc.; and the sixty-third section provides that "in like manner if good cause therefor appear, and there be no unreasonable delay on the part of the plaintiff in applying for such order, the court or judge in vacation may order the defendant to file a more particular statement in any respect of the nature of his defense or the facts expected to be proved at the trial," etc., both of which statements are required to be verified by affidavit that the same will be supported by evidence at the trial. Section 64 gives the form of the plea, and further provides that "if in any action on a policy of insurance the defense be that the action cannot be maintained because of the failure to perform or comply with or violation of any clause, condition or warranty in, upon or annexed to the policy or contained in or upon any paper which is made by reference a part of the policy the defendant must file a statement in writing, specifying by reference thereto or

otherwise the particular clause, condition or warranty in respect to which such failure or violation is claimed to have occurred, which statement is required to be verified," etc. Section 65 provides that upon the plea mentioned in section 64 the plaintiff may join issue without other pleading. But, if the plaintiff intends to rely upon any matter in waiver, estoppel, or in confession and avoidance of any matter which may have been stated by the defendant as aforesaid, the plaintiff must file a statement in writing, specifying in general terms the matter on which he intends to rely, and such statement must be verified, etc.; and the affidavit must state that he believes that the matter of reply therein stated will be supported by evidence at the trial. Section 66 provides that "if either party to such action fail to file any statement required of him by the four preceding sections of said chapter or by the other party pursuant to any of the provisions of the said sections or if the statements be adjudged insufficient in whole or in part, the court as justice may require may grant further time for filing the same, or permit the statement filed to be amended, or may at the trial exclude the evidence offered by the party in default as to any matter which he has so failed to state or has insufficiently stated. But no statement which in the particulars required by or under the said sections to be stated or referred to therein is sufficient to notify the adverse party in effect of the nature of the claim or defense intended to be set up against him shall be adjudged insufficient."

It is apparent, from the language of the statute, that these statements were authorized and intended to be in aid of the pleadings. A short form for a declaration upon an insurance policy is prescribed in section 61, which is a departure from the common-law pleading in declaring upon insurance policies, having for its object brevity and simplification, and, instead of effecting that object, it necessitates the enactment of the following sections, which allow the court or judge in vacation, for good cause, to require additional statements as to the notice, nature of the plaintiff's claim, or the nature of the facts expected to be proved; and for like cause the court or judge in vacation may order the defendant to file a more particular statement of the nature of his defense, or of the facts expected to be proved; and, if the plaintiff intends to rely upon any matter in waiver, estoppel, or in confession or avoidance of any matter which may have been stated by the defendant as aforesaid, the plaintiff must file a statement in writing, specifying in general terms the matter on which he intends to rely; and this is required although he may have joined issue on the plea prescribed in the sixty-fourth section, "that he is not liable to the plaintiff as in said declaration is alleged." These statements must, then, be considered as in aid of the pleadings, and the fact that section 65 provides that, if the plaintiff intends to rely

upon any matter in waiver, estoppel, or in confession and avoidance of any matter which may have been stated by the defendant as aforesaid, he must file a statement in writing, specifying in general terms the matter on which he intends to rely, clearly indicates that these statements must be regarded as informal pleadings; and that the object is to avoid technicality is clearly apparent from the language of the last clause of section 68, which provides that "no statement which in the particulars required by or under the said sections to be stated or referred to therein, is sufficient to notify the adverse party in effect of the nature of the claim or defense intended to be set up against him, shall be adjudged insufficient."

The next question for consideration is whether, under the provisions of the policy sued on, it is essential to the plaintiff's right of recovery that he render proofs of loss within 30 days after the fire. It is true that one of the conditions of the policy sued upon is that within 30 days after the fire the assured shall render a particular and detailed statement of the loss and claim in writing, signed and sworn to by the assured, setting forth certain matters therein stated, and, among other things, the amount claimed of the company; and shall also furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor nor related to the assured nor a sufferer by the fire) living nearest the place of the fire, stating that he has examined the circumstances, and believes the assured has honestly sustained loss to the amount claimed; and another condition of said policy provided that "no suit or action against said company, for the recovery of any claim by virtue of said policy, should be sustainable in any court of law or equity, until after full compliance by the assured with all the foregoing requirements, nor unless such suit or action shall be commenced within six months next after the date of the fire," etc. Was the fact that the proofs of loss were not furnished by the plaintiff within 30 days after the fire occurred a bar to the recovery in this case, and was the want of the certificate of the nearest magistrate waived or cured by the action of the defendant in receiving and retaining the proofs of loss without calling the attention of the plaintiff to the defect, and was it a waiver of its right to object to said proof of loss on that ground? This question was before the supreme court of Wisconsin in the case of *Vangindertaelen v. Insurance Co.*, 82 Wis. 112, 51 N. W. 1122. In that case the policy provided that notice of the loss should be given within 6 days, and that proofs of loss should be furnished within 30 days thereafter, and that the loss should be paid 60 days after the proofs were received at the company's office. It was held that, in the absence of a provision to that effect, a failure to furnish the proofs of loss within the time prescribed did not

operate as a forfeiture of the policy, but merely postponed the maturity of the claim, and that the reception and retention of the proofs of loss by the company without objection was a waiver of defects therein. The court in its opinion in that case, among other things, says: "The policy required the plaintiff to render particular verified proofs of loss within thirty days after such notice of loss,—that is to say, within 36 days after the fire,—but the policy nowhere makes the failure to render such proofs within the time named operate as a forfeiture of the policy. To prevent such forfeitures, courts are bound to construe such contracts as strongly against the insurer, and as favorably for the insured, as their terms will reasonably permit"; citing *Kircher v. Insurance Co.*, 74 Wis. 473, 43 N. W. 487. "The most that the policy did do in the regard mentioned was to provide that the loss should not be payable until 60 days after such proofs had been received at the Chicago office of the defendant. The delay in furnishing the proofs at that office until December 11, 1890, therefore, merely operated to postpone the maturity of the claim until 60 days thereafter." A clause in a policy of insurance identical with the one under consideration was construed by the supreme court of Michigan in the case of *Steele v. Insurance Co.*, 93 Mich. 81, 53 N. W. 514, in which case it was held that time is not of the essence of the provision of the Michigan standard fire insurance policy, requiring proofs of loss to be rendered within 60 days after the fire; and the further provision, that no suit can be brought on the policy "until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months after the fire," refers to the requirements as to notice, proofs, and adjustment of the loss, and its intent is to provide that no suit can be maintained unless commenced within one year after the fire, and in no event until after compliance with such requirements (under the policy we are considering, within six months). Again, in the case of *Tubbs v. Insurance Co.*, 84 Mich. 647, 48 N. W. 296, it was held that "failure to make proofs of loss within thirty days, as provided for in an insurance policy, will only operate to postpone the right of action of the assured until the proofs are supplied, where there is no limitation in the policy as to the time within which suit must be brought, nor provision for forfeiture in case proofs are not made within the 30 days." So, also, in the case of *Association v. Evans*, 102 Pa. St. 281, it was held that "provisions in a policy of insurance prescribing a limit of time within which notice of loss is to be given, etc., will not be construed as causes of forfeiture, where not so expressly stipulated in the policy"; and that "where a policy provided that notice of loss should be given within 24 hours after it occurred, but provided no penalty or forfeiture for failure to

give such notice, held, that the insured might recover if he gave notice of loss within a reasonable time after he knew it." In the case of *McMaster v. Insurance Co.*, 53 N. Y. 222, the court held, as we think rightly, that "proofs of loss are no part of a contract of fire insurance, nor do they create the liability to pay a loss; they serve to fix the time when it becomes payable, and when an action may be commenced to enforce a liability"; that, "for the purpose of upholding a contract of insurance, its provisions will be construed strictly against an underwriter"; and the supreme court of Illinois, in the case of *Insurance Co. v. Scammon*, 100 Ill. 645, held that a clause in a policy of insurance, that "in case of loss the insured shall give immediate notice thereof in writing, and shall render to the company a particular account of said loss in writing, under oath, etc., where it is further provided that until such proofs and certificates are produced, and examination and appraisal permitted, the loss shall not be deemed proved or payable, does not require that proof of the loss shall be furnished immediately, as in the case of notice of loss. But the loss not being payable until sixty days after furnishing proof thereof, and the insured being limited by the terms of the policy to one year after the loss in which to sue, the insured is required to furnish the proofs within ten months from the loss." So, also, in the case of *Insurance Co. v. Mattingly*, 77 Tex. 162, 13 S. W. 1016, it was held that proof of loss by the insured is only serviceable as a basis for an amicable adjustment; such proof is useless when the insurer denies all liability under the policy. Proof of loss was furnished the insurer. An officer of the insurance company replied that it was unsatisfactory, and denied liability upon the policy. Held, whether the letter denying liability was a waiver of further proof of loss was a matter of law, and not of fact, and that a refusal to pay was a waiver of further proof of loss by the insurance company. And in the case of *Insurance Co. v. Sheets*, 26 Grat. 854, it was held that, if the evidence shows that the preliminary proofs required by a policy of insurance have been waived by the company, the insured is entitled to recover, though no such proofs were in fact taken. This we regard as a correct statement of the law. The court of appeals of Kentucky held, in the case of *Insurance Co. v. Downs*, 90 Ky. 236, 13 S. W. 882, that "where a policy of fire insurance prescribes the various acts or causes which shall work a forfeiture of the policy, and omits to provide that the failure to furnish proofs of loss within the time required by the policy shall operate as a forfeiture, and provides that no suit can be maintained on the policy unless brought within six months after the fire, with a proviso that no action shall be commenced until the conditions of the contract have been complied with, the failure to furnish proofs of loss within thirty

days, the time fixed by the policy, does not prevent a recovery. It is sufficient if proofs of loss are furnished before suit is brought." See, also, *Insurance Co. v. Meyer*, 39 N. J. Law, 482, where it is held that "delay in objecting to formal defects in the preliminary proofs, under the conditions of a policy of insurance, which might be obviated in time to preserve the right of action if made promptly, is evidence of a waiver of such defects." Upon the question of waiver, *Wood on Fire Insurance*, at page 832, § 496, says: "When the insurer, knowing the facts, does that which is inconsistent with its intention to insist upon a strict compliance with the conditions precedent of the contract, it is treated as having waived their performance, and the assured may recover without proving performance. \* \* \* So, too, the production of proofs of loss, or defects therein, may be waived, and such waiver may be implied from what is said or done by the insurer,"—citing *Insurance Co. v. Dunmore*, 75 Ill. 14, in which the court held that where formal proofs of loss are made and tendered to the agent of the company insuring, and refused on the alleged ground that the company is not liable for the loss, this will estop the company from making any formal objections to the proofs when sued on its policy for the loss." Also *Patterson v. Insurance Co.*, 64 Me. 500, where it was held that "failure to notify the assured that the proofs of loss furnished by him to the company are insufficient will be deemed a waiver of defects, and the objection cannot be made at the trial." The foregoing authorities, and the weight of others we have had an opportunity of examining, have a strong tendency to show that the condition in a policy requiring proofs of loss to be furnished in a specified time is to be construed liberally, and the insurer cannot defeat the policy on that ground, where strict compliance has been excused or waived by the acts or conduct of the agents of the insurance company. The courts should not, on slight technical grounds, allow an insurance company to avoid its policy; for while it is true that such companies, so long as they comply in good faith with their engagements, give confidence to those having capital to invest, and are of great assistance in promoting the advancement of commerce, yet all must agree that a loss of confidence in these institutions should be regarded as a public calamity.

Now, when we apply the principles asserted in the foregoing authorities to the circumstances disclosed in this case, we find that the policy on its face contained the following stipulation: "It is hereby understood and agreed that, in case of loss or damage by fire to the property covered by this policy, this company agrees to abide by the adjustment made and accepted by the companies interested belonging to the New York Board of Fire Underwriters"; that an adjustment was made, requiring considerable delay, which was sat-



Isatisfactory to said companies, and of them all, in pursuance of said adjustment, as appears by the testimony of W. K. Underhill, the defendant alone refused to pay. The defendant had prompt notice of the loss, and in the same letter the defendant was informed that the loss was being adjusted with the New York companies interested, and as soon as the adjustment was made proofs of the loss would be forwarded. To this letter no reply was received. When the proofs of loss were sent to defendant, on the 9th day of March, defendant was notified that the settlement papers were filed with the Home Insurance Company of New York, and an offer was made to furnish any desired information. On May 18th the plaintiff's agent wrote to defendant, expressing surprise that the draft for the amount of the policy was returned not paid. On May 21st defendant, through its agent, telegraphed to plaintiff's agents at New York, "Finance committee will act on it next week." After several letters had been sent to the defendant, and ineffectual efforts made to get a response, on the 1st day of June, 1892, plaintiff drew on the defendant at Wheeling a sight draft for \$1,000, which was duly presented, but defendant paid no attention to same, except to say to the bank messenger, "Not correct." This was long after the proofs of loss had been received by the defendant without a word of objection, and without designating a single defect therein. The object of the proof of loss ordinarily is to enable the defendant to make a proper adjustment of the loss. In this instance, however, it had agreed to abide by the adjustment of said New York companies, and the proof of loss, however formal in all respects, could have been of no service to the defendant, when the further fact is considered that the proofs of loss were received by the defendant without exception, and when, long after they were so received, and the defendant was urged to pay the amount of the policy as the other companies interested had done, without even then raising any objection to the proofs of loss tendered, it simply informed the plaintiff "that the finance committee would act on it next week," and refused subsequently to pay the plaintiff's draft for the amount, merely answering, "Not correct." These facts were set up by the plaintiff in his additional statements, but the defendant demurred to them, and the demurrer was sustained. By sustaining the demurrer to these statements, the circuit court precluded the plaintiff from introducing his testimony tending to show a waiver on the part of the defendant of a strict compliance on the part of the plaintiff with the conditions of said policy as to furnishing proofs of loss, either as to the time or manner in which they were furnished, or the conduct of the defendant after they were received; and my conclusion is that the court committed no error in setting the verdict of the jury aside, and awarding the plaintiff a new trial. It is also assigned as error, and contended

in argument, that the court had no right at a subsequent term to set aside its order sustaining a demurrer. This order, however, was not a demurrer to the entire declaration, which, if sustained, might determine the plaintiff's right to recover. It was a demurrer to a statement in aid of the declaration, and the ruling upon it could only be regarded as an interlocutory order, and Black on Judgments (volume 2, § 509) says: "It is well settled that the doctrine of *res judicata* applies only to final judgments, not to interlocutory judgments or orders, which the court which rendered them has power to vacate or modify at any time,"—citing *Webb v. Buckelew*, 82 N. Y. 555, which announces the same doctrine. In view of these authorities, my conclusion is that the court committed no error in setting aside said order, and for these reasons the judgment of the circuit court must be affirmed, with costs and damages, and the case is remanded for further proceedings to be had therein.

(39 W. Va. 706)

## THORN v. SPROUSE et al.

(Supreme Court of Appeals of West Virginia. Dec. 18, 1894.)

SPECIFIC PERFORMANCE — SUIT BY VENDOR—SUFFICIENCY OF DEED — NONJOINDER OF WIFE—JUDGMENT AGAINST WIFE—ENFORCEMENT.

1. Where a vendor sells a tract of land to his vendee, and executes to such vendee a deed, in which his wife joins, but the certificate of acknowledgment is so defective in form as not to release the contingent dower of the wife, part of the purchase money having been paid in cash, and time having been given for the residue, specific performance of the contract will not be enforced by compelling the payment of the residue of the purchase money, unless such defendant is allowed to retain a sufficient amount of such purchase money to adequately indemnify him against such contingent right of dower.

2. Where a judgment in an action of ejectment is obtained against a married woman and her husband for costs, such judgment cannot be enforced by suit in equity against the separate estate of the wife. *Brannon, P., dissenting.*

(Syllabus by the Court.)

Appeal from circuit court, Wirt county.

Bill by Z. E. Thorn against Nicholas Sprouse, Louisiana Sprouse, and others. From a decree in favor of plaintiff, defendant Louisiana Sprouse appeals. Reversed.

J. G. Nigh, for appellant. Wm. Beard, for appellee.

ENGLISH, J. This was a suit in equity brought by Z. E. Thorn, in the circuit court of Wirt county, against Nicholas Sprouse and others, to the March rules, 1891, for the purpose of enforcing a vendor's lien reserved on the face of a deed from Samuel H. Smith and wife to Nicholas Sprouse, dated the 19th day of May, 1877, to secure a balance of purchase money, and to set aside as fraudulent a certain deed made by Nicholas Sprouse and wife to one Susan R. Dalrymple, and also a deed from said Susan R. Dalrymple



to Louisa Sprouse, wife of the said Nicholas Sprouse, and to subject the land so conveyed to the payment of a judgment obtained by said Z. E. Thorn against said Louisa Sprouse and Nicholas Sprouse in an action of ejectment in the circuit court of Wirt county on the 29th day of March, 1890. The material facts relied on by the plaintiff in his bill are that on the 19th day of May, 1877, said Samuel H. Smith was possessed of a tract of land containing 135 acres, situated in said county; and that in consideration of \$630, of which \$375 was in hand paid, and the residue of which was to be paid as follows: Said Nicholas Sprouse assumed to pay to E. C. McCutcheon \$155, which sum was then due, and executed his single bill for \$100, payable 12 months after date,—said Smith and wife, by deed of that date, sold and conveyed said tract of 135 acres of land to said N. Sprouse, and said deferred payments were secured by vendor's lien reserved on the face of said deed. Some time in the year 1891, the said Samuel H. Smith, for a valuable consideration, indorsed and delivered said single bill for \$100 to plaintiff, and thereby assigned and directed the balance remaining due and unpaid on said due bill to be paid to the plaintiff, which single bill yet remains unpaid, except as to certain credits indorsed thereon, which are set forth, and that the balance due on said single bill is a valid lien upon said 135 acres of land, which he has a right to have enforced. That the defendant has paid off said \$155 due to said E. C. McCutcheon. That on the 29th day of March, 1890, he recovered against the said Nicholas Sprouse and Louisa Sprouse a judgment for his costs in and about a certain ejectment suit prosecuted by him against them, amounting to the sum of \$138.21, as taxed by the clerk of said court. That the defendants Nicholas Sprouse and Louisa Sprouse, on the 3d day of March, 1881, with intent to hinder, delay, and defraud the creditors of the said Nicholas Sprouse then existing, as well as the subsequent creditors of the said Nicholas Sprouse, conveyed said tract of 135 acres of land to his sister-in-law Susan R. Conrad, who since married one William Dalrymple. That, while there is a consideration of \$300 recited in said deed, there was in fact not one cent consideration paid for said deed. That the same was voluntary and without consideration, deemed valid in law, and was made with intent to hinder, delay, and defraud the creditors of said Nicholas Sprouse, and is fraudulent and void as to said judgment of plaintiff. That the said Susan Conrad, in pursuance of said fraudulent intent, and to further carry the same into effect, did, on the 6th day of September, 1882, make and deliver a deed for the said 135 acres of land to her sister Louisa Sprouse, reciting the same consideration contained in the said Susan Conrad deed. That although more than one year and six months elapsed between the date of said deeds, and said 135-

acre tract was an improved farm, and attended in crops, said Nicholas Sprouse continued to occupy it, and exercise acts of ownership over it, and to cultivate, use, and enjoy the same as his own property, without hindrance from said Susan Conrad, and continues so to use the same. That said Susan Dalrymple and Louisa Sprouse, and each of them, had notice of said vendor's lien, and assumed the payment thereof. Plaintiff also alleges that he holds certain certificates for the attendance of witnesses on behalf of said defendants Louisa and Nicholas Sprouse in said ejectment cause, which he describes and gives the amount of, and charges that he has a right to charge the rents, issues, and profits of said land with his said judgment for costs and claims for witnesses' attendance against the said Louisa Sprouse, if the court is of opinion that said conveyance to her by Susan Conrad is not fraudulent, as charged. Plaintiff also gives the amount and dates of several judgments which had been recovered against said Nicholas Sprouse by different parties in the county of Wirt, which he alleges had been docketed in the judgment lien docket of said county, and which have never been released, and says he is not advised whether they have been paid or not; and he prays that the conveyances from Nicholas Sprouse to Susan Conrad, and from Susan Conrad to Louisa Sprouse, for said land, may be canceled, set aside, and annulled as fraudulent, and that said land may be decreed to be sold in satisfaction of said several sums of money due the plaintiff.

On the 17th day of June, 1891, the defendant Louisa Sprouse demurred to the plaintiff's bill, because the plaintiff had not made or stated such a cause of action in his bill as would entitle him to the relief sought. And, for special cause of demurrer, said defendant said (1) that, as will appear from the allegations in said bill, the note claimed by plaintiff to have been assigned by defendant S. H. Smith to plaintiff was barred by the statute of limitations prior to said assignment; (2) that said plaintiff shows by his said bill that his judgment of \$138.21, recovered against her and Nicholas Sprouse for \$138.21, was recovered in a court of law, and that, as shown by said bill, she is a married woman, the wife of her codefendant Nicholas Sprouse, and that said judgment is a nullity so far as she is concerned; (3) that said bill is multifarious, and for other causes, etc.; and she prays judgment, etc. This demurrer was set down for argument, and, having been argued and submitted, was overruled. The defendant Louisa Sprouse also filed an answer to plaintiff's bill, admitting the allegations of the bill with reference to the conveyance of said tract of land by S. H. Smith in the year 1877, and stating that all of the purchase money was paid about the same time, except the note for \$100; also admitting that the credits indorsed on said note for payments were made since by her codefendant Nicholas Sprouse, and that

there is a small balance due upon said note and unpaid, which is a lien upon said land owned by her. She, however, denies that said conveyances from N. Sprouse to Susan Conrad, and from her to respondent, were for the purpose of hindering, delaying, or defrauding his creditors in any way, and charges that all the creditors of said N. Sprouse to whom he was indebted at the time of the making of said conveyances, and before, have been fully and entirely paid off and satisfied, except the balance on said note, which she is ready to pay, and that, if the said Nicholas Sprouse has since contracted debts, the creditors could not in any way be prejudiced by the conveyances to her, as the same were on record, and they had fair and full notice that he was not the owner of said real estate. And she further says that the said Smith conveyed, by metes and bounds, the tract of 135 acres to her codefendant Nicholas Sprouse, and in the conveyance covenants to warrant generally said title; that the conveyance to her is made by the same calls and boundaries, and respondent is entitled to avail herself of the original covenants from the said Smith as to said warranty. She further says that six years prior to the sale and conveyance containing the lien to secure the aforesaid note held by the plaintiff, Thorn, said Smith has sold and deeded to H. B. Hylbert a part of the same land conveyed to said Nicholas Sprouse, and she charges that she is entitled, before she can be compelled to pay the balance of the purchase money, to wit, the balance of the note aforesaid, now held by plaintiff, to have from said S. H. Smith a clear and valid title, as well as the possession, of all the land described in said deed, including the land deeded to said Hylbert, and now in his possession; that she is ready and willing to pay off and discharge the small balance of said note whenever the said Smith shall assure to her all the land sold her and described in said conveyance made by him and his wife of the said tract of 135 acres. She further says that she is a married woman; that she is the owner and holder of the real estate in the bill mentioned as her sole and separate estate; and that the same is not liable under the law in any manner for the payment to plaintiff of his judgment for costs or fees, as charged in plaintiff's bill; and says that said judgment recovered by said Thorn, as set out therein, was recovered in a suit at law instituted by said Thorn against her, and is illegal and void, and cannot be enforced as against her.

D. H. Leonard also filed his petition, on the 23d day of June, 1892, in this cause, setting up a judgment against Nicholas Sprouse for \$32.08, rendered on the 18th day of March, 1888, with interest from that date and \$2.30 costs; alleging that the debt upon which said judgment was rendered was for legal services rendered years before the judgment was obtained, and charging that, at the time said debt was created, said N. Sprouse was the owner of the 135-acre tract of land in the bill

mentioned, and that it was conveyed by said N. Sprouse to Susan Dalrymple, and by Susan Dalrymple to Louisana Sprouse, with intent to hinder, delay, and defraud petitioner in the collection of his debt; that said conveyance was voluntary and without consideration, deemed valid in law; and he prays that he may be admitted as a party defendant, and that his petition may be considered as his answer in the cause.

Nicholas Sprouse also answered the plaintiff's bill, putting in issue the material allegations, and alleging the facts in regard to his exchange of lands with said Smith, and also that said Smith conveyed to him a portion of said tract which he had previously conveyed to one Hylbert, and that, after he had ascertained the fact that said portion of the land had been conveyed to Hylbert, he went to said Smith, and informed him that he had discovered his duplicity, and demanded that the matter be made right before he would pay anything further on said note, and said Smith agreed to make it right, and pay him the difference. He further says that said Smith did not have good title to the land conveyed by his deed to respondent, and, although he warranted said title, yet, in fact, some of said land had been previously conveyed by said Smith, and other portions were covered by superior titles; and that he had been put to great expense and trouble in defending said title, and endeavoring to hold the land conveyed to him by said Smith; and that the bill of costs included in the judgment against him is a part of the expense incurred by said defense on account of the defective title, and, in addition to said expense, he had been compelled to pay attorney's fees and costs not included in said bill, and be deprived of valuable land purchased of said Smith; that said sale to him was a sale in gross, and he is entitled to have all the land included in the boundary sold to him, and is entitled to an abatement of the price to the value of the land he does not get, and is entitled to be reimbursed for the expenses and costs he has incurred in defending said title. He prays that said Smith may be required to make a good and sufficient deed for the land sold to him, and to make good the costs and expenses incurred by him in defending said title; that, inasmuch as the deed from said Smith does not convey the dower right of his wife, and is otherwise defective, he may be required to execute another and good deed for said land; that he may have an abatement against the purchase money for the \$24, balance, and a decree against said Smith for the full price and value of the land which is lost to respondent; and that the plaintiff's bill be dismissed, etc. Said N. Sprouse also filed his answer to the petition of said D. H. Leonard, putting in issue its allegations, and praying that the same be dismissed.

The plaintiff replied specially to the answer of Louisana Sprouse, putting in issue the affirmative allegations therein contained. Numerous depositions were taken both by

plaintiff and defendants. A decree was rendered in the cause upon the pleadings and depositions, the court holding that the plaintiff was entitled to enforce the vendor's lien for the balance, if any remaining, unpaid on the \$100 note mentioned in the bill, and to subject the rents and profits of the tract of land mentioned in the bill, and conveyed by Susan Conrad to defendant Louisana Sprouse, by deed dated the 6th day of September, 1882, to the payment of the plaintiff's said judgment for costs in the said action of ejectment, but not for the witnesses' fee bills referred to in the plaintiff's bill; and found that the defendants Nicholas Sprouse and Louisana Sprouse are entitled to a credit and abatement of the purchase money on account of the 3 acres and 15 rods of land held by and in possession of Hylbert, and embraced in the deed executed by the defendant S. H. Smith to the defendant Nicholas Sprouse, for the value of the said 3 acres and 15 rods of land, at the time of said conveyance from S. H. Smith and wife to Nicholas Sprouse, to be credited as of the date of said conveyance on the said note of \$100, mentioned in the plaintiff's bill as part of his demand; and the court referred the cause to a commissioner, to ascertain the value of said land and the balance due on the purchase money note after allowing the credits to which the defendants were entitled, including the abatement from the purchase money as aforesaid. On the 25th day of June, 1893, the cause was again heard upon the papers, formerly read, and former orders made therein; and upon the report of the commissioner to whom the cause was referred, and upon the exceptions thereto filed by Nicholas Sprouse and Louisana Sprouse, and on consideration thereof, it was decreed that said exceptions be overruled, and said report be confirmed; and it appearing from said report that there was due the plaintiff, Z. E. Thorn, on the note for \$100, filed with his bill, the sum of \$16.25, after allowing the said Sprouse credit for the tract of land conveyed by the defendant S. H. Smith to H. B. Hylbert, prior to the conveyance by the defendant Smith to the defendant Nicholas Sprouse of the tract of 135 acres, in the bill and proceedings mentioned, including principal and interest on said note up to the 2d day of May, 1893, after deducting all credits to which the said Sprouse was entitled, held that the said sum of \$16.25 was a lien upon the tract of land therein mentioned, and had a right to a decree to sell the same to pay the said lien; decreed said sum of \$16.25, with interest thereon from the 2d day of May, 1893, until paid, and costs, against said Nicholas Sprouse; and also decreed that the plaintiff had a lien on said tract of land for the sum of \$138.21, being the amount of the judgment in favor of the plaintiff against the defendants for costs in the action of ejectment referred to in the plaintiff's bill, with interest from the

20th day of June, 1893, until paid. And, it appearing that there were no other liens against said land, it was decreed that unless the said Nicholas Sprouse or Louisana Sprouse, or some one for them, should, within 30 days from the rising of the court, pay said sums, with the interest and costs of suit, then a commissioner therein appointed should sell said tract of land upon the terms therein prescribed; and from this decree the said Louisana Sprouse obtained this appeal.

It is assigned as error by the petitioner that the court erred in overruling the demurrer of the defendants to the plaintiff's bill, by its decree of June 19, 1891. The third assignment of error is to the action of the court in decreeing a sale of petitioner's land before it had required a good and sufficient title to be executed to petitioner for said land, by releasing the dower interest of Mrs. Smith therein. The fifth assignment of error is to the action of the court in decreeing a sale of the real estate the separate estate of petitioner Louisana Sprouse for the judgment at law rendered by said court in the ejectment suit, and declaring it a lien on said land.

The questions raised by assignments numbers 3 and 5 are raised by the assignment of error as to the action of the court in overruling the demurrer, as the demurrer itself raises these questions, and the assignments may be considered together. Under our liberal practice, a demurrer to the bill admits the truth of the allegations of the bill or of the parts thereof to which the demurrer extends, and of all documents filed therewith. 1 Bart. Ch. Prac. p. 345. See, also, Sands, Suits in Eq. p. 181, § 145, where it is stated that, the whole facts of a case appearing from the records of other ended causes exhibited by plaintiff with his bill, the court may pass upon it upon a demurrer to the bill, without requiring the defendant to set out his defense in an answer. Now, in the case under consideration the plaintiff exhibits the deed from Samuel H. Smith and Annie E. Smith, his wife, to Nicholas Sprouse, with his bill, and makes it part thereof, as Exhibit A. When we look at the acknowledgment of said deed, it is at once apparent that the same is insufficient to release the contingent dower of said Annie E. Smith in said land. The certificate of acknowledgment as to her reads as follows: "I also certify that Annie E. Smith, whose name is signed to the foregoing deed, bearing date May 19, 1877, being separate and apart from her husband, came personally before me, in my county and state, aforesaid, this 19th day of May, 1877. After reading and explaining the same, she, the said Annie Smith, acknowledged the same to be her act and deed, and does not wish to retract it." It is not alleged in the bill that said Annie E. Smith is dead, and the presumption is that she is still in life. The question, then, is, whether, upon the statements contained in the bill,

and what appears upon the face of this exhibit, the plaintiff is in a situation to demand the payment of the balance of the purchase money for said tract of land, and whether the court did not commit an error in decreeing the payment of the same to the plaintiff until this incumbrance was removed. Scribner on Dower (volume 2, p. 5, § 4) says: "So, where a party has contracted to convey lands with covenants of general warranty or against incumbrances, an existing right of dower, although inchoate, will constitute a good defense to a proceeding on the part of the vendor for a specific performance of the contract, unless the vendee has waived his right to object to the title. The rule is the same where the vendor institutes an action at law against the purchaser to recover damages for nonperformance of the contract." Wat. Spec. Perf., on page 544, propounds the law as follows: "When a vendor agrees to convey land free of incumbrances, his inability to procure the release of an outstanding inchoate right of dower is a breach of the contract,"—citing numerous authorities. And in a note we find the following quotation from Rawle on Covenants: "It is one of the best-settled principles of the law of vendor and purchaser that, as a general rule, the right of the latter to a title clear of all claims whatsoever, present and future, fixed or contingent, is one of which he cannot be deprived but by his own acts. It is a right, as has been often observed by the greatest equity judges, given by the law, and not springing from the contract of the parties." It is well understood that no man of common prudence and ordinary business capacity would purchase a tract of land, and undertake to pay a fair and reasonable consideration for it, unless the wife should join with her husband in making the conveyance to him; for while it is true that, during the life of her husband, her dower does not attach, yet it is also equally true that wives often outlive their husbands; and, again, if a person should accept a deed in which the wife did not join or did not properly acknowledge, and such person should undertake to resell the land, he would find the want of a proper release of dower a serious obstacle in disposing of the land. We find it held in the case of *Shearer v. Ranger*, 22 Pick. 447, that "an inchoate right of dower is an existing incumbrance on land, within the meaning of the covenant against incumbrances"; and the same thing is held in the case of *Smith v. Cannell*, 32 Me. 126. So in *Hil. Vend.* p. 268, and note. Commenting upon the case of *Jones v. Gardner*, 10 Johns. 266, it says the case was as follows: "Covenant to give a good and sufficient deed, in law, to vest the purchaser with the title of the farm of land with the appurtenances. The vendor's wife did not duly execute the deed. Held, the deed was not a fulfillment of the contract, because the agreement bound the vendor to give a deed which should pass the

legal estate in fee, free and clear of all valid claims, liens, and incumbrances." Again, in the case of *Holmes v. Holmes*, 12 Barb. 138, it was held that "when the party contracting to convey has, at the time when the conveyance is to be made, either no title or a title which is defective, any condition precedent, such as tendering or paying or securing the purchase money, need not be fulfilled by the other party to the contract." The objection urged to the title in that case appears to have been that the title was not free from incumbrance, in this: that the property was subject to a lease made by the vendor to the trustees of a schoolhouse, and the inchoate right of dower of the wife of one Valentine Baker (who was then living, as well as his wife) in and to said premises. These authorities, as we think, clearly indicate the law bearing upon the question, and lead us to the conclusion that until the said Smith tendered a good and sufficient deed, which should be joined in by his wife, and properly acknowledged, so as to release her claim to contingent or prospective dower, neither said Smith nor his assignee of said note given for the purchase money had any right to subject the land to sale for the payment of the same. On this question, Tucker, in his Commentaries (volume 2, p. 459), says, under the head of "Specific Performance": "But, even where there are terms of incumbrance to be got in, the contract is enforced, and indemnity secured to the purchaser, by his retaining an adequate part of the purchase money until the incumbrance is removed; as where there is an outstanding dower right in a feme covert, which she will not relinquish." But no such indemnity was prayed for or secured in this case, the bill merely praying that the land be sold for balance of purchase money.

Now, as to the judgment for \$138.21, which the plaintiff alleges that he recovered in an action of ejectment against the said Nicholas Sprouse and Louisiana Sprouse for costs in said suit, while said judgment may be good against said Nicholas Sprouse, the authorities I have had access to lead me to a different conclusion as to the judgment against said Louisiana Sprouse. Black, Judgm. § 191, says: "In Alabama the judgment must specify the property to be bound. 'A general judgment, or a judgment which pretermits the ascertainment of the estate of the wife condemned to its satisfaction, cannot be rendered. \* \* \* There can be no personal judgment against the wife; the only judgment that can be rendered is a judgment in rem,—a judgment of condemnation of the statutory estate described in the complaint.' [Lee v. Ryall, 68 Ala. 354.] \* \* \* And, in an action against a married woman to dispossess her of lands, no personal judgment either for damages or costs, can be rendered against her." So in the case of *Sted v. Knowles*, 84 Ala. 206, 3 South. 897, it was held that in an action against husband and wife to recover an undivided half interest in

a tract of land claimed by the wife as belonging to her statutory estate, verdict being rendered for the plaintiff, it is proper to enter judgment of ouster against the wife, as well as the husband; but no judgment can be rendered against her or her property for either damages or costs." And in the case of *Johnson's Adm'r v. Ward*, 82 Ala. 486, 2 South. 524, it was held that, "while the notes and mortgages of a husband and wife given for the purchase money of property belonging to the wife's statutory estate bind the property, they impose no obligation on her personalty, and do not bind any other property belonging to her; and it is erroneous to render a personal decree against her under a bill to foreclose the mortgage." This court, in the case of *White v. Manufacturing Co.*, 29 W. Va. 385, 1 S. E. 572, has held that a judgment rendered by a court of common law against a married woman, either in her own name or in the name of a company under which she does business, upon a contract made during her coverture, is absolutely void; and an execution or suggestion sued out upon such judgment is invalid and ineffectual for any purpose. Now, while it is true that the judgment obtained against *Louisana Sprouse*, and which is sought to be enforced in this case, was not a judgment on any contract made by said *Louisana Sprouse*, who was a married woman, living with her husband, yet it was a judgment rendered in a court of law against a married woman; and, while we hold (as was decided in this case in the case of *Peck v. Marling's Adm'r*, 22 W. Va. 708) that such suit might be maintained against a married woman living separate from her husband, yet such suit cannot be maintained, or a valid judgment be maintained in a suit at law, against a married woman who is living with her husband.

My conclusion, therefore, is that the court erred in overruling the defendant's demurrer, and for that reason the decree complained of must be reversed, and the cause remanded for further proceedings to be had therein, with costs to the appellant.

BRANNON, P. (dissenting). I cannot concur in the unqualified conclusion of Judge ENGLISH that all judgments at law against a married woman are void. I think judgments for tort are valid, and bind her estate as if she were unmarried. I refer to the views on the subject of her liability and that of her estate for torts in the opinion given this term in the case of *Gill v. State*, 20 S. E. 568, and to the note at its close. A look at the cases in this court holding void judgments against married women will show that they are carefully confined to judgments on contracts. The reason why the judgment is void if rendered on a contract is that the married woman has no capacity to contract, except in the view of equity, and there only as to the thing, her separate estate, and could

not be sued at law on a contract. She is, however, liable to be sued at law for tort, because marriage does not disable her from committing a tort, except in cases where the act is chargeable to her husband's coercion. The validity of the judgment against her therefore depends on the question whether she was competent to incur the liability. Competency or incompetency is the test. 14 Am. & Eng. Enc. Law, 661. Then, how is it as to judgment for costs in litigation? She can lawfully be a party to litigation, since the adoption of the Code, c. 66, § 14, has allowed her to sue in her own name where the suit concerns her separate property, and some other cases. It would seem that a judgment for costs in those cases ought to bind her estate. If she were to sue for one house or tract of land, and fail, would not a judgment for costs be leviable out of another house or tract of her estate? It would since chapter 109, Acts 1891 (Code 1891, c. 66, § 15), as it provides that, in any action at law prosecuted by her in which she fails to recover, judgment may go against her for costs, and be enforced as if she were sole. The said Code section goes no further to render her estate liable to costs than as to cases in which she is plaintiff, not where she is defendant; and, as I now think, it touches only those suits brought in her name alone in those cases in which the section allows her to sue alone. It was passed to enable her to sue alone in certain cases, which she could not do before. It does not touch cases where she can sue with her husband; at least it does not touch other cases of joint suit than those mentioned in the section. The judgment involved here is for costs, not in a suit concerning her separate property prosecuted by her, and does not fall under the statute, but is in an action of ejectment against her and her husband. I confess I do not entertain a decided opinion as to whether it binds her separate estate. Ejectment is an action not *ex contractu*, and must therefore be classified as *ex delicto*,—an action of trespass for the tort of unlawful entry or claim; and, on the principle that a judgment for tort binds the wife's separate estate, this judgment would seem to bind it. The Illinois court, in *Musgrave v. Musgrave*, 54 Ill. 186, held a wife's separate estate liable to a judgment for costs in an unsuccessful suit by her for separate maintenance; and the opinion is expressed in *Wells, Mar. Wom.* § 621, that such is doubtless the rule in all other cases where she fails to maintain her suit.

(29 W. Va. 721)

#### DULIN v. McCAW.

(Supreme Court of Appeals of West Virginia.  
Dec. 18, 1894.)

ATTACHMENT AFFIDAVIT — SUFFICIENCY — CLAIM AGAINST WIFE'S PROPERTY — VENUE — CONFLICT OF LAWS — LIABILITY OF MARRIED WOMAN.

1. The phrase "in rem," in the sixteenth section of chapter 66 of the Code of 1891, means "quasi in rem," and the suit is *inter partes*.

2. An affidavit for an attachment under section 1 of chapter 106 of the Code, which omits the phrase "at the least," is not in substantial compliance with the terms of the statute, the phrase being neither superfluous nor insignificant. See *Altmeyer v. Caulfield*, 17 S. E. 409, 37 W. Va. 847.

3. The right to move to quash an attachment on the ground of an insufficient affidavit is not, under section 19 of chapter 106, waived by appearance and filing an answer.

4. The separate personal estate of a non-resident married woman may be proceeded against by suit in equity, with order of attachment, in the circuit court of the county in which her separate personal estate is found.

5. The law of the place where the suit is brought governs the remedy. This includes the mode of proceeding, the form of the judgment or decree, and the modes of carrying them into execution.

6. The extent to which a married woman may bind herself or her separate personal estate is prima facie determined by the law of the state in which the contract is made, it being also the place of her domicile.

(Syllabus by the Court.)

Appeal from circuit court, Wirt county.

Bill by B. S. Dulin against Mrs. M. G. McCaw. Decree for plaintiff, and defendant appeals. Modified.

Leonard & Archer, for appellant.

HOLT, J. This is a suit in equity, by foreign attachment, brought in the circuit court of Wirt county on the 26th day of March, 1892, by plaintiff, B. S. Dulin, against Mrs. M. G. McCaw, a married woman residing in the state of Pennsylvania, but as owning separate property situate in the county of Wirt. The attachment was issued, and levied on certain personal property, oil-boring tools, etc., and, plaintiff's bill being filed, defendant appeared and demurred thereto, which demurrer the court overruled, and on her motion, on 20th October, 1892, the cause was continued, and she was given 30 days in which to file her answer. On the 31st day of March, 1893, defendant moved to quash the order of attachment for insufficiency of the affidavit, and next filed her answer to plaintiff's bill, and plaintiff replied generally; and on the 7th day of April, 1893, the court entered a final decree, overruling the motion to dissolve the attachment, and entering a decree personal in form against defendant, from which this appeal is taken. Four errors are assigned: (1) Because it is a personal decree against a married woman. (2) It does not point out which part of her separate estate is sought to be subjected or charged with the payment of plaintiff's account. (3) Because it overrules defendant's demurrer. (4) Because it overrules defendant's motion to quash the attachment.

That the affidavit on which the attachment was sued out is insufficient, has been already decided in the cases of *Altmeyer v. Caulfield*, 37 W. Va. 847, 17 S. E. 409, and *Crim v. Harmon*, 38 W. Va. 596, 18 S. E. 753 (see, also, *Reed v. McCloud*, 38 W. Va. 701, 703, 18 S. E. 924), and the motion to quash it should have been sustained. The appearance of defendant, and passing by the attachment,

and entering her demurrer to the bill and filing her answer, had the effect of waiving any defect in the taking or execution of the order of publication, for she thereby submitted herself to the jurisdiction of the court; but it was not a waiver of her right to contest plaintiff's right to sue out the attachment, or to move to quash it for an insufficient affidavit, for the attachment is now used for other purposes of great importance to both parties and to others interested, besides that of mesne process, to institute the suit and give the court jurisdiction, to that extent, of the cause. And this, I think, is the fair construction of our statute. See section 19 and section 23 of chapter 106 of the Code. If defendant had first moved to quash the attachment, and stopped at that point, the court in no event would have had jurisdiction of her person, but the demurrer and answer put her personally within the power of the court to pronounce any proper decree. I think the bill does set out sufficiently a good cause of action, viz. a debt created by defendant for the wages of plaintiff, as a laborer, in drilling for a certain time on an oil well of defendant, etc., and that the circuit court was right in overruling the demurrer. The suit was instituted when chapter 60, as it is in the Code of 1891, was in force. The first part of section 16 is as follows: "A claim against the separate estate of a married woman for the payment of which she has charged the same shall be enforced only in a court of equity in rem and not in personam." By the custom of London, which can be continuously traced back beyond the Norman Conquest (1066), a wife might carry on a trade, and, in reference thereto, could sue and be sued as though she were a single woman. *Langham v. Bewett*, Cro. Car. 68; *Beard v. Webb*, 2 Bos. & P. 98; 1 Selw. N. P. 227; *Bing. Inf.* 260; *Schouler, Husb. & Wife*, § 89. Under the feudal system, her existence, as the owner in fee of real estate, was, in many important particulars, recognized and regarded; but, as a freeholder, she was, after the husband became tenant by the curtesy initiate, completely absorbed into the existence of her husband. About a century ago the court of chancery began to recognize her separate existence, as the owner of property, and regard her, in a way, as a feme sole, and as such the owner of her own property, with its incident of her right to dispose of it, when not expressly restrained; and because it was her property it was chargeable with her debts, as one of the incidents of property in general, and her creditors could make her pay them, in a court of equity, by a kind of equitable levy. By means of its exclusive power over trusts and the specific performance of contracts, it was supposed to need no statute to enable such court to put it out of reach of the husband's creditors, and beyond his control. To what end should she receive it if it is the property of the husband the next moment? *Tyrell v.*

hope, 2 Atk. 561. At this stage our court of chancery took up and applied the doctrine of a married woman's separate estate. See *Vest v. West* (1825) 3 Rand. (Va.) 373; *Wizonneau v. Pegram* (1830) 2 Leigh, 183; *Woodson v. Perkins* (1849) 5 Grat. 345; *Penn. v. Whitehead* (1867) 17 Grat. 503. See *Radford v. Carwile* (1879) 13 W. Va. 572, where there is a full review of the cases, and a learned discussion of the subject, by Judge Green. Thus, as to her separate property, she was regarded, *sub modo*, as a feme sole; that the *jus disponendi*, and the liability of her separate estate to pay all her debts incurred during coverture, both followed as incidents of such ownership, only to be restrained or taken away by express words, or intent made equally clear and manifest.

Our first statute dealing with the separate property and rights of married women was taken from the New York statutes, and is found as chapter 66 of the Code of West Virginia of 1868 (page 447), and became the law on and after the 1st day of April, 1869. The first and fourth sections dealt with the equitable separate estate as it then existed. It enacted that it should remain her sole and separate property, as if she were a single woman, and should in no way be subject to the control of her husband, or be liable for his debts. It evidently contemplated the speedy extinguishment of such equitable separate estates, and made all that came into existence after the 1st day of April, 1869, statutory; making it her sole and separate property, as if she were a single woman, subject to but one restraint,—that she could not sell and convey her real estate without her husband joining in the deed or writing, unless she was living separate and apart from her husband,—and applying it to women married after the 1st day of April, 1869, and to all property accruing after that date to women already married. If the action concerned her separate estate, she could sue and be sued as a feme sole, without joining her husband. In short, she owned with the powers of a feme sole, and could sue and be sued in relation thereto as a feme sole.

To this condition chapter 66 has substantially been brought by amendment and reenactment by the act taking effect on 10th February, 1893, and the act of 24th February, 1893 (see chapter 3, p. 6, and chapter 43, p. 157, Acts 1893), except that section 12, making her earnings her sole and separate property, is taken from section 14, c. 109, Acts 1891, now found in the present Code (Ed. 1891) as section 14 of chapter 66. But when this suit was brought, as we have seen, section 16, c. 66, Code 1891, was the law, which says that the claim against her separate estate shall be enforced only in a court of equity, in rem and not in personam. In what sense is the term "in rem" here used? We generally turn to courts of admiralty for examples of proceedings and judgments in rem, in the proper sense; for a suit in admi-

rality to enforce a maritime lien is not an action against any particular person, to compel him to do or forbear something, but a claim against all mankind, a suit in rem asserting the claim of the libellant to the thing as against all the world,—a method of procedure against the thing, resorted to in that court to enforce a right in the thing, called a "maritime lien." It constitutes no incumbrance on the vessel, but becomes one only by virtue of an actual attachment. See 2 Jones, Liens, § 1676 et seq. Whenever the debt for materials, etc., is by law—no matter what law, or by what contract—a lien on the vessel, then the vessel may be proceeded against in rem, and in all cases the contracting parties may also be proceeded against in personam. Ben. Adm. (3d Ed.) § 270. "A ship is, of necessity, a wanderer, visiting places where her owners are unknown. \* \* \* These and other kindred characteristics of maritime commerce have established the necessity of making the ship herself security, in many cases, to those who have demands against the master or owners. All these are maritime liens, whether created by actual hypothecation, by implication, or by operation of law. It is a right affecting the thing, and giving a sort of proprietary interest in it, and a right to proceed against it to recover that interest. \* \* \* Wherever there is a maritime lien upon property, it adheres to the proceeds of that property, into whose hands soever they may go, and those proceeds may be attached in admiralty." *Id.* § 290. "Suits and proceedings in admiralty are divided into two great classes,—suits and proceedings in rem, and suits and proceedings in personam. Suits in rem are against the thing itself, and the relief sought is confined to the thing itself, and does not extend to the person. Suits in personam, on the other hand, are against a person; and the relief is sought against him, without reference to any specific property or thing. In a suit in rem, unless some one intervenes and assumes the responsibilities of the controversy, the power and process of the court is confined to the thing itself, and does not reach either the person or other property of its owner. In a suit in personam, the court is confined to the rights and liabilities of the person, and, in its execution, proceeds against his property generally, without any regard to its relation to the matter in controversy." *Id.* § 359. In certain cases the proceedings in rem and the proceedings in personam may be united in the same suit, for the purpose of more complete justice. *Id.* § 361. In the proceeding in rem, the decree can only dispose of the thing, but all the world are bound by the decree, because all the world are parties to the suit, in the sense of being duly notified by the seizure, called "serving the notice on the thing itself." Where the proceedings are in personam, notice is served personally or by publication, and the decree binds only the parties, and those claiming



under them. See *Id.* § 304 et seq. It seems that a sale under a decree in admiralty discharges all prior liens under a state law, and the purchaser takes the property discharged of all incumbrances. 2 Jones, Liens, § 1811. This brings us to that large class of cases, so common in courts of equity, for enforcing liens and charges by the sale of the property, as liens by mortgages and deed of trust, vendors' liens, judgment liens, attachments against the property of nonresidents, etc. But they differ, among other things, from actions which are strictly in rem, in that the interest of the defendant is alone sought to be affected, that citation to him is required, and that judgment therein is only conclusive between the parties. These are called "proceedings quasi in rem," having certain marks of resemblance to proceedings in rem, which presuppose certain differences. See *Freeman v. Alderson*, 119 U. S. 187, 7 Sup. Ct. 165; *Bruff v. Thompson*, 31 W. Va. 16, 23, 6 S. E. 352; 2 Black, *Judgm.* § 793 et seq.; 2 *Freem. Judgm.* (4th Ed.) § 606 et seq.

What, then, is the class characteristic of judgments and decrees in rem proper, which differentiates them from the general class, which distinguishes them from other judgments? Mr. Freeman, in his work on Judgments, says (section 606): "It seems to us that the true definition of a 'judgment in rem' is that it is an adjudication against some person or thing, or upon the status of some subject-matter, which, wherever and whenever binding upon any person, is equally binding upon all persons." That is, it is a judgment which, being valid, binds all persons. A proceeding in rem is a judicial proceeding against the thing itself, which, terminating in a valid judgment, binds all the world. "It is a distinguishing peculiarity of a proceeding in rem that the jurisdiction of the court, in the particular case, rests merely upon the seizure or attachment of the property. No personal notice to any individual is required. The res, being brought within the jurisdiction of the court, becomes subject to its adjudication, and all parties interested are supposed to be duly apprised of the proceedings by the mere taking of the property, or by the usual proclamation or published notice. This jurisdiction empowers the court to adjudicate the status of the res, or to order it to be disposed of in a given way, according to the object of the action. Of course, it does not authorize the fastening of a personal liability upon any individual not personally served. A judgment in rem is conclusive and binding, not only upon parties (if there are any) and privies, but also upon strangers,—upon all persons interested. See *Freeman v. Alderson*, 119 U. S. 187, 7 Sup. Ct. 165; 2 Black, *Judgm.* §§ 793–795. Wherever there is a personal liability in a maritime cause of action, "personal actions and injuries which concern navigation, the right may be en-

forced by a suit in personam in the admiralty. Whenever there is a maritime lien on a thing, the lien may be enforced by a suit in rem in the admiralty." The rules of the supreme court (Nos. 12 to 19) specify certain cases in which the suit is to be brought in rem or in personam, or both. And in cases not specified in those rules, generally, the proceeding in rem may be joined with a suit in personam. *Ben. Adm. Pr.* (3d Ed.) §§ 361, 362. In a suit in rem, it is not usual to render a decree in personam, but it is usual to give a decree the same form as in personam; and also, if the property be still in custody, to decree a condemnation and sale of the property, and that the proceeds be brought into court, or, if the property have been delivered on stipulation, then that the stipulators cause the engagement of their stipulation to be fulfilled within a certain time after notice of the decree, or show cause why a summary judgment should not be entered against them on their stipulation, and execution issue thereon. *Ben. Adm. Pr.* § 547.

There is a large class of proceedings which have some of the marks of a proceeding and judgment in rem, yet lack the class characteristic, that may be called "judgments and proceedings quasi in rem,"—a term that marks resemblance, yet supposes difference (*And. Law Dict.*),—such as inquests of office, proceedings to determine forfeiture of land for nonpayment of taxes, to enforce liens, etc. An inquisition of lunacy, resulting in a finding of lunacy, is conceded to be no more than prima facie evidence against third persons. *Rogers v. Walker*, 6 Pa. St. 373; *Den v. Clark*, 10 N. J. Law, 217; *Freem. Judgm.* § 607. Therefore, it cannot be called strictly in rem. An action replevin-detinue, in this state, cannot be deemed in rem, for it is in personam, inter partes, and the judgment binds only the parties and their privies. In Maine, certain proceedings to secure liens on logs are both in rem and in personam, and the court cannot proceed until it takes the steps necessary to give it jurisdiction over the property as well as over the person of the alleged owners. Notice to the personal defendant (the debtor) is not sufficient, nor is an appearance by him, or by persons claiming to be the owners of the logs, sufficient. It cannot be known that there are not others still who have an interest in the property, and a right to be heard. Hence, as already stated, such notice of the pendency of the suit must be given as, in contemplation of law, is notice to all the world. *Sheridan v. Ireland*, 66 Me. 138. Whenever a proceeding, though formally in rem, is not such in fact, because it is directed against a particular claimant only, the judgment cannot affect the interests of third persons. *Dean v. Chapin*, 22 Mich. 275; *Windsor v. McVeigh*, 93 U. S. 274; *Risley v. Bank*, 83 N. Y. 318; *Day v. Micon*, 18 Wall. 156; *Conrad v. Waples*, 96 U. S. 279. A number of



actions and proceedings are sometimes spoken of as in the nature of proceedings in rem, which in truth are rather qualified proceedings in personam than proceedings in rem. *Freem. Judgm.* p. 1057, § 607; *Freeman v. Alderson*, 119 U. S. 187, 7 Sup. Ct. 165; *Black, Judgm.* § 793.

The proceeding in this case was by foreign attachment against the separate estate of a nonresident married woman. By the seizure of the property, the court acquired jurisdiction over it, which will bind the absent debtor; but the judgment or decree must, in its effect, be restricted to the property before the court, unless the defendant appears; and, even as to that property, it is not conclusive upon the title, except as between the parties to the action. It can have no binding effect upon strangers; and, no matter what the proceeding may be called, it is a proceeding quasi in rem, and not in rem pure and simple. Nor does the fact of its being against the separate estate of a married woman, under section 16 of chapter 66 of the Code, alter the nature of the proceeding in this respect. See *Freem. Judgm.* § 607a. The court could not have seized the property, and sold it under the attachment, without proceeding against her personally by order of publication, as a nonresident, for to that extent the suit was a proceeding in personam, though no personal judgment, we will say for the present, could have been rendered against her, and nobody's title but hers could have been affected by any sale or other proceeding on the attachment, nor could the court have proceeded against her or her estate without the attachment, for no other machinery had been provided for that purpose; and, that an attachment lies, see *Powers v. Totten*, 42 N. J. Law, 442. All that the statute meant was that it was a proceeding quasi in rem against her separate estate, and no personal judgment was to be rendered against her. Nor could any such judgment have been rendered against her on foreign attachment, even if she were feme sole, without her appearance in the suit. The sixteenth section of chapter 66 of the Code of 1891 is only declaratory. In *Stockton v. Farley*, 10 W. Va. 171, it had been held that the liability of her separate estate could only be enforced in a court of equity; and in *Hughes v. Hamilton*, 19 W. Va. 366, it had been held that the proceeding by bill in equity to subject her separate estate was in the nature of a proceeding in rem.

It appears by the affidavit of plaintiff, on which he sued on his attachment, that defendant is a nonresident of this state, and a resident of the state of Pennsylvania, and that the contract upon which he sues was made with her there, and her separate property was by her there charged with the payment of the liability incurred by her to plaintiff for drilling the well, etc., and, we may infer, was payable there. The general rule is that the validity of a contract is to

be determined by the law of the state in which it is made. If it is valid there, it is deemed valid everywhere, and will sustain an action in the courts of a state whose laws do not permit such a contract; being only invalid, and not in itself wrongful. *Scudder v. Bank*, 91 U. S. 406; *Milliken v. Pratt*, 125 Mass. 374; *Robinson v. Queen*, 87 Tenn. 445, 11 S. W. 38. The propriety of applying the law of the place where the contract must be taken to have been made is strengthened in this case, as it brings into operation the law of her domicile, to determine the nature and extent of the liability of her separate personal estate for the payment of her debts.

By the Pennsylvania married woman's act of 3d of June, 1887, so general is the married woman's power to contract that her inability is the exception, rather than the rule. Her power of acquiring, holding, and disposing of property seems to be just the same as if she were a feme sole. The only restriction placed upon this emancipation from her common-law disability is that she shall have no power to mortgage or convey her real estate unless her husband join in such mortgage or conveyance. See *Adams v. Gray*, 154 Pa. St. 258, 26 Atl. 423; *Abell v. Chaffee*, 154 Pa. St. 255, 26 Atl. 364; *Koechling v. Henkel*, 144 Pa. St. 215, 22 Atl. 808; *Association v. Fritz*, 152 Pa. St. 224, 25 Atl. 558. When a married woman has a separate estate, she may make any and all contracts that a party sui juris may make. *McCormick v. Bottorf*, 155 Pa. St. 331, 26 Atl. 545; *Campe v. Horne*, 158 Pa. St. 508, 511, 27 Atl. 1106; *Steffen v. Smith*, 159 Pa. St. 207, 210, 28 Atl. 295. From these cases, and the statute of Pennsylvania of 3d day of June, 1887, it appears that the old law as to the rights and liabilities of married women of that state has been abrogated, and a new condition thenceforward prevailed, with "new rights, new duties, new liabilities, new obligations, much more in accord with the teachings of common sense and practical justice than before." *Campe v. Horne*. And, so far as the point here involved is concerned, it is in accord with the law of this state, as appears by chapter 66 of the Code, as amended and re-enacted by the act of February 16, 1893, which went into operation 60 days before the decree here complained of was pronounced; so that, if either one of these two laws applied, the personal decree of the circuit court was right, for by both she may be sued and decreed to pay the same in all cases as if she were a feme sole, and of course a personal decree may be entered against a feme sole.

It is universally admitted and established that the forms of remedies and the modes of proceeding and the execution of judgments are to be regulated solely and exclusively by the law of the place where the action is instituted. See *Story, Conf. Law* (8th Ed.) § 556; *Whart. Conf. Law*, §§ 747, 749. What is remedy, see *Johnson v. Fletcher*, 54 Miss.

§31. And where there are conflicting local laws, more or less favorable, respecting capacity, that may be preferred by which the capacity is enlarged, see 3 Am. & Eng. Enc. Law, p. 519; Whart. Conf. Law, §§ 102, 104. It is also well settled that the law, as amended,—made better,—may govern the remedy in the further progress of the suit, so far as it does not affect the right. This change in the law of procedure was remedial, enlarging the plaintiff's remedy so as to allow a personal decree, which did not conflict with the defendant's right, according to the law of her domicile, and, as it has been held in a like case, did not conflict with her right, if it had been determined by the married woman's act (chapter 66, Code 1891) in force in this state when this suit was commenced. See *Van Metre v. Wolf*, 27 Iowa, 341. It relates to the form, but does not affect the substance, of the decree pronounced. *Morton v. Valentine*, 15 La. Ann. 153. See *Buckingham v. Moss* (1873) 40 Conn. 461. There is no injurious change in the time or manner of payment by the change in method of procedure.

Thus, we see that in her own state a personal decree could have been given against her; and, by the law of this state when the decree complained of was entered, the same thing could be done, but not by the law as it was when plaintiff's suit was instituted; and a majority of the court are of opinion that, under the circumstances, the law of the remedy when the suit was commenced ought to still govern when the decree is pronounced. In that view, the decree ought to have added, "to be levied of her separate personal property proceeded against and attached," or something equivalent thereto. The decree complained of must be amended, sustaining defendant's motion to quash the attachment, and adding to the decree the above qualification, and for that purpose the cause is remanded to be further proceeded in.

(39 W. Va. 658)

#### JOHNSON v. BURNS et al.

(Supreme Court of Appeals of West Virginia.  
Dec. 15, 1894.)

**SALE OF LOGS—MODE OF MEASUREMENT—"SCRIBNER'S RULE"—EVIDENCE OF CUSTOM—REVIEW ON APPEAL—SUFFICIENCY OF EVIDENCE.**

1. A written contract shows that logs are purchased at a given price per cubic foot, no mode of measurement being specified by it. Evidence is admissible to prove a contemporaneous oral agreement that a certain mode of measurement is to be applied.

2. Where such contract does not provide a mode of measurement, and there is no such special agreement to apply a particular mode of measurement, and such logs are purchased with the knowledge on the part of the seller that they are to be manufactured into sawed lumber, in ascertaining the cubical contents of the logs Scribner's rule, designated "cubic measurement," reducing the logs to square measure, is the rule applicable.

3. Where a contract does not provide in a given particular, particular local custom may be proven for its interpretation, so it be brought

home to the knowledge of the person to be affected by it, and so it do not violate fixed statute or common law.

4. In measurement of logs, lumber, and timber, where there is no contract provision as to mode of measurement, Scribner's rule applies, under section 17a, c. 59, Code 1891, and custom or usage has no application.

5. Under section 9, c. 181 (Ed. 1891), of the Code, when exception is taken to the action or opinion of the court upon a question involving evidence upon a motion for a new trial or otherwise, all the evidence, whether conflicting or not, must be certified, and this court must consider all such evidence on both sides, though conflicting, not rejecting any. If, upon such evidence, the finding of the jury plainly appears to be contrary to the evidence, or without sufficient evidence, or plainly against the decided and clear preponderance of evidence, it ought to be set aside, even though the evidence be conflicting.

6. While a verdict may, under the circumstances just stated, be set aside though the evidence conflict, yet the power to do so should be cautiously exercised.

7. Whether a party shall introduce further evidence after that of the adverse party has been heard is a matter within the discretion of the court, and its exercise will rarely, if ever, be the cause of reversal in an appellate court. Clearly he is entitled to introduce evidence to rebut that of the other party.

(Syllabus by the Court.)

Error to circuit court, Webster county.

Action by John N. Johnson against Burns Bros. & Hoffman. There was a judgment for plaintiff, and defendants bring error. Reversed.

W. E. Haymond, for plaintiffs in error. L. D. Strader and A. W. Corley, for defendant in error.

BRANNON, P. This is a writ of error taken by Burns Bros. & Hoffman to a judgment of the circuit court of Webster county, rendered in an action by John N. Johnson against them. The action was for the recovery of the price of timber sold Burns Bros. & Hoffman by Johnson by written contracts, to be paid for at so much per cubic foot, and controversy arises out of a difference as to the mode of measurement; Johnson contending that the logs must be measured solid, excluding nothing to square them, while Burns Bros. & Hoffman contend that the logs must be brought to the square. The contract being silent as to the guide or rule of measurement, under section 17a, c. 59, Code 1891, Scribner's rule must apply. Neither side denies this. But Scribner's rules contain two modes of measurement,—one for ascertaining the solid, cubical contents of spars or other round timber; the other for ascertaining cubical contents after bringing logs to the square. The question is, which of those rules shall be used in the case, round or square measure?

First Question. The plaintiff gave in evidence the written contract, and the rule of measurement, claimed by him as applicable, found on page 64 of Scribner's book for ascertaining solid cubical contents of round timber, and gave evidence of the number and contents of the logs he furnished; and

on, on cross-examination of G. M. Burns, witness for defense, and one of the defendants, counsel for plaintiff asked him if he agreed with plaintiff, at the time of making the written contract, that the timber should be measured giving the solid contents, no measurement having been made by Burns or any witness for defendants touching any mode of measurement, to which question the witness objected, but the court overruled the objection, and the witness answered that there was no agreement as to the mode of measurement at the time of the execution of the written contract, but that he had previously explained to Johnson the rule under which his firm ascertained the cubical contents of logs,—that is, the rule on page 58 of Scribner's book. After the defendant rested, plaintiff, in rebuttal, as a witness for himself, stated, against objection by defendants, that at the time of the execution of the contract there was an agreement as to the mode of measurement, and that Burns agreed with him that he should have round measure, and the solid contents of the timber sold. It is urged that the court committed error in compelling Burns to answer the question whether he had such agreement with plaintiff as to mode of measurement, and in allowing plaintiff to prove such agreement in two respects: First, that it allowed oral evidence to vary a written agreement; and, secondly, that it was in rebuttal of defendant's evidence and too late.

Was evidence of the oral agreement admissible? The cases are innumerable on the subject of when oral evidence does or does not vary or contradict writings, and the lines of distinction often so nice that best minds are taxed and become confused in seeing them; and it would be useless to attempt an enumeration of a subject which has been discussed through centuries in decisions and is found everywhere. All admit that oral evidence cannot be admitted to vary or contradict a writing. As stated in 1 Greenl. Ev. 75: "Parol contemporaneous evidence is admissible to contradict or vary the terms of a written instrument." This court, in *Kirkwood v. Holladay*, 16 W. Va. 651, held that "parol evidence, in the absence of fraud or mistake, will not be received to ingraft upon or incorporate with a valid written contract an incident occurring contemporaneously therewith, and inconsistent with its terms." This is in words a section of the syllabus in the well-considered case of *Towner v. Lucas*, 3 Grat. 705. In *Crawford v. Jarrett*, 2 W. Va. 630, Judge Green said: "Parol evidence cannot be admitted (unless in case of fraud or mistake) to vary, contradict, add to or explain the terms of the written agreement proving that the agreement of parties was different from what it appears by the writing to have been." I think this is a correct and apt statement. These authorities I see as apt for application to this case. Does oral evidence of an agreement to pay by a

measure giving solid cubical contents vary or contradict the terms of the contract, or add anything to or explain them by showing something in conflict with its terms? I think not. That contract says that so much per cubic foot is to be paid, but is silent as to the mode of measurement by which the number of cubic feet shall be ascertained. Scribner's book is applied by the law as the rule of measurement, but we find that it gives two modes of measurement for ascertainment of cubical contents,—one ascertaining the solid contents of spars or other round timber, the other the contents after bringing the logs to a square. Now, certainly the parties could apply either by incorporating it in the contract. They did not do so. Then which shall apply? Is it possible that an oral agreement that one of them shall be used cannot be shown? It does not contradict or vary the writing, for that contains in its terms not a syllable on the point. It affords explanation by showing the intention of the parties, but does not vary or contradict the writing. Oral evidence is admissible to apply the instrument to the subject-matter, to enable us to execute it. 1 Greenl. Ev. §§ 286, 288. Where a description in a deed or other document is applicable to two or more objects, parol evidence is admissible to distinguish between the objects, as well as to identify that intended by the parties. 2 Whart. Ev. § 944. The argument against the view just given would be, in effect, that in every case of such a contract, silent as to measurement, Scribner's rule is the law of the contract, and square measure the rule; and any oral evidence applying a different rule makes the contract have a different legal effect from that which its face imports in law, and therefore varies and contradicts it; adds to it something that varies its operation. Just here is the crucial point. It does not do so because the contract does not in itself call for the one, rather than the other, of Scribner's two modes of measurement. Both are applicable to round timber, and we cannot say, looking only at the contract, which it calls for. If it contained anything calling for the one method over the other, that would exclude oral evidence. If it had declared that the timber was to be sawed into lumber, I think this special oral contract evidence would not be admissible, because I think that the language of Scribner in connection with these two modes of measurement of round timber clearly shows that the one is applicable to timber sold for manufacture into lumber, while the other is for ascertainment of solid contents for tollage, or when the timber is to be used as spars or simply as round timber. We must construe Scribner as it is incorporated into statute. This writing contains no earmark of the intended use of the timber guiding us in the selection from Scribner of the mode of measurement, unless we say that, as it sells poplar timber, that is such earmark; but that would require us to take a judicial notice of the fact

as a fact that poplar is used only for conversion into sawed lumber, and such is not always the fact, though generally so, and we cannot carry the doctrine of judicial notice so far. We think oral evidence of special agreement to use a certain mode of measurement admissible, and find no error in the court's so ruling.

2. Was it too late to offer it in rebuttal? It was not offered until after the defendant had given evidence to show a custom there prevailing to apply the other, or square, measure. The plaintiff gave in evidence the mode of measuring round timber given on page 64 of Scribner, intending to rely on it. Then the defendant introduced, to repel this, a custom to show that the square measure was applicable. Why could not the plaintiff meet this custom evidence by showing an agreement to apply another mode? I think the evidence would have been admissible in connection with the writing in chief, and certainly, therefore, in rebuttal. Even if it ought to have been introduced in chief, we would not reverse for the departure from order, as the object is a fair trial, and the order of evidence is within the discretion of the trial court, and is rarely the ground of reversal. *Bowyer v. Knapp*, 15 W. Va. 277, point 7.

Second Question. Instructions. The court refused certain instructions asked by defendants.

"Defendants' instruction No. 1. The court instructs the jury that in the ascertainment of the contents of the logs and timber involved in this suit it must be by Scribner's rule, 'cubic measurement,' 'round timber reduced to square timber.'" This instruction ignores all evidence tending to prove an oral contract to apply the round timber measurement, and tied the jury to square measurement; and, according to what has been above said, and all the evidence being before the jury, was properly refused.

"Defendants' instruction No. 2. The court instructs the jury that if they believe from the evidence that there was no special contract between the parties as to the mode of measuring and ascertaining the cubic feet in the timber sold by plaintiff to the defendants, then, in the ascertainment of the contents of the logs and timber involved in this suit, it must be by Scribner's rule, 'cubic measurement,' 'round timber reduced to square timber.'" Around this instruction center principles important in the solution of the case, and on it I have had considerable perplexity of mind. Suppose there was no agreement to apply either one of the modes of measurement, what measurement should be applied,—which one of Scribner's modes? The statute makes his rules applicable. They are the law of the case. We pick out a particular section of the Code or any law book, and apply it to a certain case, because it is the law applicable to the facts; and so, as Scribner's rule is law, we apply that portion of his book—that process of measure-

ment—applicable to the particular facts of a particular transaction. But the trouble is to say which section of the law book fits the case, just as in this case the trouble is to say which measurement of the two given by Scribner fits this case. On the one hand, Johnson says that he sold timber to be cut and delivered by him in logs, round timber, at so much per cubic foot, and it must be paid for by solid contents, no matter to what use the buyers intended to apply it; while, on the other hand, Burns Bros. & Hoffman say they purchased the timber, not to be used as spars or as round timber, but to be sawed into lumber, as Johnson knew, and paid for it a price reasonable and fair on the basis of square measure, but too high, and which they could not pay, on the basis of round measure. Now, which shall we say was impliedly or presumably the intent of the parties? It is material to say that both of Scribner's methods or rules for measurement apply to round timber, but the one gives the solid contents, the other the square contents, making deductions to reach the square of the log for waste, which the other would include. Which party should have inserted in the contract the particular mode he had in mind, if he had one in mind,—the seller or purchaser? When Burns Bros. & Hoffman bought for lumber purposes, is it fair to suppose they intended, or that Johnson intended, they should pay for slabs necessarily wasted in the manufacture of the logs into lumber, paying a full price for timber to be brought to square, and a price which would be unreasonably high if measured solidly? We think not. We conclude that, if there was no special contract, the rule of Scribner's book (page 58) "cubic measurement," "round timber reduced to square measure," governed. It is claimed that any harm done the defendants by the refusal of this instruction was cured by an instruction given as follows in lieu of those asked by defendants: "Defendants' instruction No. 5. The court instructs the jury that if they believe from the evidence that the custom among buyers and sellers of round logs on the Little Kanawha river and its tributaries by cubic feet is to measure and ascertain cubic contents of logs by making the proper deduction to square the log, and that plaintiff had knowledge of that custom, and the contract between plaintiff and defendants is that stated in the writing dated 19th October, 1887, signed by them and sealed, in evidence, and that there was no contract between them as to the mode of measurement, then the rule laid down by Scribner for 'cubic measurement,' 'round timber reduced to square timber,' must be used in the ascertainment of cubic contents of logs in question in this action; and, if the jury further believe from the evidence that the plaintiff has been paid the whole sum to which the logs and timber furnished by him to defendants amounts by that rule, then the jury must find for the defendants." We do not think it cures the refusal of No. 2, because under No. 5 it requires the existence of a custom applying

square measure, and knowledge of it by the plaintiff, and the nonexistence of an agreement to apply solid measure before the square measure could apply; whereas we hold that, if there was no agreement to apply solid measure, then no custom was relevant, as the square measure would apply under the statute. This instruction is thus erroneous. Suppose no agreement and no custom proven as known to plaintiff, what rule then? It does not say. No instruction told the jury that in such case Scribner's square measure rule applied, though No. 2 asked it.

"Defendants' instruction No. 3. The court instructs the jury that Scribner's rule for measurement of timber is the rule which must be applied in this case; that such measurement must be by the rule of Scribner for cubic measurement customarily used among buyers and sellers of round logs on the Little Kanawha river and its tributaries; and, if plaintiff has received from defendants, by amounts paid before suit brought and amount paid with plea of tender in this case, all the timber branded by plaintiff amounted to by that rule, then the jury must find for the defendant." This was properly refused, because it would tell the jury to disregard all evidence touching a special agreement to apply the round timber measurement, and makes the custom of applying the square measurement all controlling and overriding any special agreement. It also omits all elements of knowledge of such custom by the plaintiff.

"Defendants' instruction No. 4. The court instructs the jury that if they believe from the evidence that the custom among buyers and sellers of round logs on the Little Kanawha river and its tributaries by cubic feet is to measure and ascertain cubic contents of logs by making the proper reduction to square the log, and that plaintiff had knowledge of that custom, then the rule laid down by Scribner for 'cubic measurement,' 'round reduced to square timber,' must be used in the ascertainment of cubic contents of logs in question in this action; and, if the jury further believes from the evidence that the plaintiff has been paid the whole sum to which the logs and timber furnished by him to defendants amounted by that rule, then the jury must find for the defendants." This is objectionable, since it ignores any special contract, and makes custom absolutely dominant over such special contract. If there was no special contract as to measure, Scribner's square measure would govern, not by custom, but by the imperative force of statute.

The court gave, at plaintiff's request, the three following instructions:

"Plaintiff's instruction No. 1. The jury are instructed that if they believe from the evidence that the plaintiff and the defendants agreed upon a rule of measurement by which the contents of the timber in the contract was to be ascertained, they should

adopt that rule in ascertaining the amount of cubic feet sold to defendants."

"Plaintiff's instruction No. 2. The jury are instructed that if they believe from the evidence that the plaintiff and defendants, at the time of the sale of the timber specified in the contracts offered in evidence to the jury, agreed that in the measurement of said timber the solid contents thereof should be estimated without reducing the logs to a square, then the rule given by Scribner, commencing on page 64 of his book, would be applicable in estimating the quantity of the timber sold."

"Plaintiff's instruction No. 3. The jury is instructed that if the defendants rely upon a custom to ascertain what mode should be adopted in ascertaining the quantity of timber sold by the plaintiff to the defendants, the burthen of proof is upon the defendants to establish the same, and to show that the plaintiff had knowledge of said custom at the times of the sale of the lumber mentioned in the contracts in writing between the plaintiff and defendants."

As to the first two, I refer to what is said above as to the admissibility of evidence of special agreement. It was competent to make it, and, if so, then to prove it; and, if made in fact, it governed.

As to the third instruction, if there was no special agreement as to the mode of measurement, then the statute (Code 1891, c. 59, § 17a) furnished the mode of measurement, as it declares that Scribner's rule for measurement of logs, lumber, and timber of all kinds is established as the lawful rule for their measurement unless some other rule be agreed to. Therefore, custom is irrelevant, as, if there is an agreement, that makes the rule, and, if there is not, Scribner makes the rule. There is no place for custom. Frequently, where contracts do not provide, local usage can be called upon as interpretative of the contract, if known to the parties, as it is presumed they contracted with the usage in mind; and he who asserts it must prove it, and show that it was known to the party to be affected by it. But it cannot apply in opposition to fixed common or statute law. The defendants introduced this evidence of custom, and, while we think it irrelevant, as it harmonized with the Scribner square measure rule, it is not important, and defendants cannot complain of the instruction. *Whart. Ev.* §§ 962, 965; *Foye v. Leighton*, 53 Am. Dec. 231; *Cotton Press Co. v. Stanard*, 100 Am. Dec. 255.

Third Question. Did the court err in refusing, on the evidence, to set aside the verdict and grant a new trial? It is clear that as the law was up to the enactment of chapter 100, Acts 1891 (Code 1891, c. 131, § 9), we could not set aside the verdict, for the reason that, as the law was prior to that act, where this court was asked to review the action of a circuit court overruling a motion to set aside a verdict on the ground of its

being unwarranted by the evidence, the facts, and not the evidence, ought to be certified by the circuit court where practicable; and where the evidence, and not facts, was certified, this court must reject all the conflicting oral evidence introduced by the exceptor, and give full faith and credit to that of the adverse party, and could not set aside the verdict, unless, after so doing, the verdict was manifestly against the evidence, or without sufficient evidence. *Black v. Thomas*, 21 W. Va. 709; *Baker's Case*, 83 W. Va. 320, and note page 373, 10 S. E. 639. The statute cited above provides that in a trial at law the party may except to any action or opinion of the court, and tender a bill of exceptions, "and, if the action or opinion of the court be upon any question involving the evidence, or any part thereof, either upon a motion for a new trial or otherwise, the court shall certify all the evidence touching such question, and the judge shall sign any such bill of exceptions (if the truth of the case be fairly stated therein), and it shall be made a part of the record in the case, and the whole of the evidence so certified shall be considered by the court of appeals, both upon the application for and hearing of the writ of error or supersedeas." This works change. The legislature knew of the old rule as above stated as held so long and by so many decisions, and by this sweeping, comprehensive language intended change. The act works two changes. One is that all the evidence, not the facts, must be certified; and the other is that all the evidence, though it be conflicting, on both sides, shall be considered in this court. What else does the act mean? It does not simply require that all the evidence shall be certified, but commands this court to consider it all. We did not do so before. I think the act goes no further than to bring to this court all the evidence, and require us to consider all. It does not say how we shall consider it, or what weight we shall give it, or what decision render upon it, as that is a judicial function vested by the constitution in the court, with which the legislature could not interfere, and has not interfered. The act, I repeat, made no further change than as above indicated. How, as a matter of practical effect, it may detract from the prerogative of a jury to judge of the truthfulness of witnesses, cannot be said. It may be that witnesses who, being seen face to face by jurors, and whose evidence was considered by them perjured, or for other cause worthless, will be accorded faith and weight in this court. The evidence, all of it, being thus before the court, we do but apply the old rule, often expressed, but in different ways; that is, that we must accord to the jury the function of judging of the credibility of evidence, and of drawing inferences and deductions therefrom, and we cannot set aside a verdict approved by the trial court, unless, on the whole evi-

dence, it be plainly contrary to the evidence, or plainly without evidence to sustain it, unless it manifestly appears that there is a clear and decided preponderance against the finding of the jury. Where the evidence on material points is conflicting, we must still remember the well-established rule that it is rarely the case that a court can set aside a verdict, because amid the conflict of oral evidence the jury is the judge of credibility of witnesses; while at the same time we must not say that without exception a court cannot interfere with a verdict where there is conflict of evidence, for it has been often held that a new trial may be granted, though the evidence be conflicting, if the verdict be against the decided weight of evidence, though the power should be cautiously exercised. *Grogan v. Railroad Co.*, 39 W. Va. 415, 19 S. E. 563, and citations; *Martin v. Thayer*, 37 W. Va. 38, 16 S. E. 489.

Let us now apply these principles to this case by considering all the evidence upon that material and controlling question whether there was or was not a special contract by which the measurement was to be solid contents by round timber measure, not reducing the logs to square; for, if there was such contract, the verdict, resting on that theory, is right, whereas, if there was not, the verdict is wrong. The plaintiff, as a witness, stated that Laughary, agent of Burns Bros. & Hoffman, made the bargain with him, and told him he should have round measure, nothing to be thrown off to square the log; that G. M. Burns came to him later, and drew up the written contract, and, when read over, plaintiff said it did not read just right about the measurement, and that Burns then said that that meant the measurement of all in the log, and in buying standing timber by the cube it always meant that; that trees growing, if you take timber out of its natural growth, you must so state; that he (plaintiff) told Burns that Laughary had agreed that he should have round measure, and Burns said, "Yes, he told me so." On the other side, Laughary testified that he explained the custom for ascertaining the cubic contents as claimed by defendants to the plaintiff before the contract, which plaintiff denied, and had not told Johnson he should have solid contents measurement. Powell testified that he explained to the plaintiff before the closing of the contract the said rule of cubic measurement as laid down by Scribner on page 58 of his book, and more than once talked to him about the custom in regard to it; that he was once with Burns, before the contract was made, when both Burns and he explained to Johnson the rule claimed by defendants. Burns testified that he had not given Johnson to understand that the timber should be measured solid contents, never agreed with nor intimated such a thing to him, but, to the contrary, had clearly informed him that it would be cubed, throwing off sufficient to square the log;

hat such was the universal practice of his company and lumber dealers; that the measurement was taken by Laughary, and the logs cubed up by said square measure rule, and Johnson knew of it, and knew the amount entered in the books of the company, and made no complaint until the last of the timber was to be measured. Several witnesses testified that the custom of the country was to measure logs for lumber purposes by reducing to the square. There was no evidence to deny the custom. Thus, only the plaintiff testified to this special contract, while Burns denied it, and two disinterested witnesses denied it. Now, add to this the facts that the timber was 30-inch poplar, used only for lumber, and was purchased to be made into lumber, and not for spars or other round timber uses, as plaintiff knew; that the price paid was fair and reasonable for timber measured under Scribner's square measure rule, and could not be paid for timber measured solid; and that round timber was only used for spars and piling, not lumber,—facts undisputed, which in themselves alone inspire an inherent improbability that there was a special contract to pay on the basis of solid measure. Then reflect that the jury overruled the evidence of three witnesses, two of them disinterested, and the weight of the facts above stated carrying an intrinsic weight of probability, and if this court performs any function on the evidence we must say the verdict is against the decided weight and preponderance of the evidence. Were the matter to be solved on the evidence of the witnesses alone, though the preponderance seems to be with the defense, yet the state of the case would be different; but those undisputed facts come in with telling weight to corroborate the version given by the defendants' witnesses. I have thus, unnecessarily as I think, given the evidence, and we conclude the verdict is plainly against the clear and decided preponderance of evidence, and we reverse the judgment, set the verdict aside, award a new trial, and demand the case.

39 W. Va. 689)

GERLING v. AGRICULTURAL INS. CO.

Supreme Court of Appeals of West Virginia.  
Dec. 15, 1894.)

JUDGMENT—MOTION IN ARREST—NEW TRIAL—INSURANCE POLICY—BREACH OF CONDITIONS—INCUMBRANCE—CHANGE OF TITLE—WAIVER OF PROOFS OF LOSS.

1. A motion in arrest of judgment, only for some error appearing on the face of the record which vitiates the proceedings.

2. Where a motion in arrest of judgment and a motion for a new trial are made at the same time, and are acted upon by the court at the same time, the order in which they may be considered by the court is not material; as under such circumstances the motion in arrest of judgment cannot be regarded as a waiver of objection to its verdict, or as an admission that the verdict is unobjectionable.

3. A policy of fire insurance has a clause which provides that, unless otherwise provided

by agreement indorsed thereon or added thereto, it shall be void if the subject of the insurance, whether real or personal property, or any part thereof, be or become incumbered by mortgage, trust deed, judgment, or otherwise. *Held*, judgments recovered in invitum against the insured during the life of the policy, and before the loss, are not incumbrances, within the meaning of the policy.

4. The policy has a clause which provides that, unless otherwise provided by agreement, etc. (as above), it shall be void if any change other than by the death of the insured take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by judgment, legal process, or by the voluntary act of the insured or otherwise. *Held*, a deed of conveyance made by the insured during the policy, and before the loss, but invalid by reason of the grantor's mental incompetency to make such deed, was not such a change or transfer of title as would forfeit the policy.

5. If an insurance company refuse to pay the loss or deny its liability upon independent grounds, before any proofs of loss are made, and before the expiration of the time within which such proofs are by the terms of the policy to be made, such denial and refusal constitute a waiver of the condition of the policy requiring such proofs.

(Syllabus by the Court.)

Error to circuit court, Berkeley county.

Suit by L. C. Gerling, administrator, against the Agricultural Insurance Company. There was a verdict for plaintiff, and to an order granting defendant a new trial plaintiff brings error. Order set aside.

Flick & Westenhaver and Faulkner & Walker, for plaintiff in error. H. H. Emmert, for defendant in error.

HOLT, J. This was a suit on a fire insurance policy, brought in the circuit court of Berkeley county, in which the jury on the 21st day of April, 1894, found for the plaintiff on the issues joined, and assessed his damages at \$1,665; but the court, on motion of defendant, set aside the verdict, and granted a new trial. To this action of the court plaintiff obtained this writ of error. It was an action of assumpsit for \$2,000, the declaration being in the brief form set out in section 61, c. 125, Code, and the plaintiff was required to file a more particular statement of the nature of his claim, and of the facts he expected to prove at the trial, which was done, as follows: That defendant wrote the policy after examination of the property and with full knowledge of the title; that the premium was paid and the policy delivered to run for three years; that the house was burned without fault of the insured, being a total loss, with damage to plaintiff of \$1,500 at least; and, on motion of plaintiff, defendant was required to file with its plea a more particular statement of the nature of its defense, or of the facts expected to be proved at the trial; and thereupon defendant filed the plea that it was not liable to plaintiff as in said declaration was alleged, and these defenses: (1) There was a provision in the policy against the property being or becoming incumbered by mort-

gage, deed of trust, judgment, or otherwise, and the defendant set forth a number of judgments recovered against Elizabeth A. Etchinson after the issuance of the policy, and before the loss, whereby the policy became forfeited and void. (2) There was a provision that the policy, without agreement indorsed, should be void, if any change, other than by death, took place in the interest, title, or possession of the property insured, whether by legal process or judgment, by voluntary act of insured or otherwise; and defendant set forth a deed bearing date on the 3d day of December, 1891, by which Mrs. Etchinson conveyed the property to Bessie E. Wood and others, her grandchildren, by reason whereof the policy became forfeited and void before the loss. (3) That the written proofs of loss required by the provisions of the policy were not furnished within 40 days, as required, after the fire, nor at any time. The plaintiff joined issue on the general plea, and also on the three special statements of defense, and also filed in writing three several matters, as in waiver and estoppel, on which he intended to rely: (1) That the judgments specified were not by confession, nor suffered by the procurement or connivance of plaintiff's intestate, but were recovered by due process of law against her in invitum, and while she was of unsound mind and memory, and therefore were not in avoidance of the policy. (2) That the deed to Bessie E. Wood and others was not a valid deed, because at the time it was made the grantor, Elizabeth A. Etchinson, was of unsound mind, which continued until after the loss, and therefore did not work a forfeiture of the policy. (3) That defendant had waived the proof of loss by having its adjuster investigate the loss, and then denying its liability to pay all within the 40 days after the fire. And on these three special replications defendant took issue. At the April term, 1894, a trial was had upon these issues, and the jury was directed to make a finding in writing. In answer to the following particular question of fact stated in writing, and submitted to them, "Was Mrs. E. A. Etchinson, on the 8d day of December, 1891, when she is alleged to have executed the deed in question, mentally incompetent to make a deed?" the jury returned the answer, "Yes"; together with a verdict for the plaintiff on the issues joined, and assessing his damages at \$1,665. And thereupon the defendant moved the court in arrest of judgment to set aside the verdict and grant it a new trial; and the court, having considered it, overruled the motion in arrest of judgment, but sustained the motion for a new trial, and set aside the verdict and granted a new trial. To this ruling setting aside the verdict and granting a new trial plaintiff took his bill of exceptions No. 6, in which the court certified all the evidence in the case touching that question, as required by section 9, c. 131, Code.

And this ruling of the court is assigned here as error, under clause 9, § 1, c. 135, Code, which allows the writ of error to an order granting new trial.

The grounds of error are as follows:

1. The court, having first overruled the motion in arrest of judgment, could not then go back to the motion for a new trial, but should have proceeded to judgment on the verdict. For this *Sims v. Alderson* (1836) 8 Leigh, 479, is cited, where it is said: "It is well settled that a party cannot move for a new trial after a motion in arrest (4 Barn. & C. 160); but the inference is that if the motions are simultaneous, and disposed of at the same time, in one judgment, no matter in what order, then the rule does not apply; as under such circumstances the motion in arrest of judgment cannot be regarded as an admission that the verdict is unobjectionable, and, the motions being made together, they are disposed of in one judgment. If the motion in arrest had been made and overruled, and then the motion made for a new trial, it might be said that the motion came too late; for the only action the court could then take would be to render judgment on the verdict." It will be noticed that in the case of *Sweeney v. Baker*, 13 W. Va. 158, 216, the two motions were made together, in the same order as in this case, and both were acted on at the same time, and both overruled, which was there held not to be improper. The motion in arrest of judgment is quite common in our practice; resorted to out of abundant caution, as there may be some serious defect appearing on the face of the record not cured by our statute of jeofails. Sections 9, 15, 29, c. 125; section 8, c. 131; chapter 135; 4 Minor, inst. pt. 1, p. 848 et seq., where the subject is discussed and the cases are considered.

2. The court erred in holding the policy of insurance to be forfeited by the recovery of judgments which became liens and incumbrances on the property insured. From the evidence admitted, and the instructions given and refused, the verdict of the jury was against the instruction of the court on this point, on which, I infer from the arguments here, the case mainly turned in the circuit court. The record shows that five or more judgments were rendered against the insured after the date of the policy, and before the fire, without the knowledge and consent of the insurance company. In that event, the jury was instructed by the court to find for the defendant. It also appeared that they were rendered against her in invitum, by due process of law. This provision of the policy reads as follows: "This policy (unless otherwise provided by agreement indorsed thereon or added thereto) shall be void if the subject of this insurance, whether real or personal property or any part thereof, be or become incumbered by a mortgage, deed of trust, judgment, or otherwise." By the de-



endant it is contended that the fact that these judgments were rendered in invitum makes no difference; that the provision itself, by expressly giving the exception and qualification, excludes these judgments, no matter how rendered, because not embraced in the exception. The reason for the provision is obvious. Property might be thus incumbered until it would cease to have any value to the insured, except what might result from its destruction by fire. But the answer to this is that the clause, "unless otherwise provided by agreement," refers to mortgages, deeds of trust, judgments confessed, and other voluntary incumbrances, and requires, to give it a sensible application, that it should be construed as if it read, "If

\* \* \* it be or become incumbered (by the insured) by judgment," etc. And in case of judgment in invitum, mechanics' liens, foreign attachments, tax liens, etc., the insured could not obtain such consent or agreement in advance; hence it must mean an incumbrance by voluntary act,—that is, when he shall incumber the property, or when the property shall be or become incumbered by him by deed of trust which is voluntary, or judgment confessed in person or by attorney, or by any other voluntary act. Section c. 31, reads as follows: "There shall be a lien on all real estate for the taxes assessed thereon from the day fixed by law for the commencement of the assessment of such taxes in each year" (1st day of April). Section 39, c. 29. Section 2, c. 75, says: "Every mechanic, builder, etc., who shall perform work, etc., shall have a lien upon such house, etc." The insurer may be a nonresident of this state, where the house insured is situated, and, being proceeded against by foreign attachment and order of publication, an order of attachment is sued out at the time of the institution of the suit, and levied on his house. Section 9, c. 106, says at the plaintiff shall have a lien \* \* \* on the real estate indorsed on the order of attachment from the suing out of the same. The insured may be sued for what he does not owe, yet on defense a judgment may be obtained against him. These examples tend to show how unreasonable such a construction of the policy would be, by the absurd results to which it would lead. The conclusion must be that the language of the condition in question, fairly interpreted, does not tend to incumbrances created by law; and

it was held in *Baley v. Insurance Co.* (1890) 80 N. Y. 21; *Green v. Insurance Co.*, N. Y. 517; *Richardson v. Insurance Co.*, U. C. C. P. 430. The general clause against the creation of incumbrances has often been held to refer to voluntary incumbrances, and not to include judgments in invitum or a mechanic's lien. 1 Biddle, Ins. 226. Incumbrances without the consent of the company do not include those liens and claims—such, for instance, as judgment liens—which are enforceable against the will

of the insured, but only such as may be created by his consent and on application to the company for its consent. *Steen v. Insurance Co.*, 61 How. Pr. 144, 148. See *Insurance Co. v. Pickel* (Ind.; 1889) 21 N. E. 546; 1 May, Ins. §§ 292, 292a. For clause in standard New York policy against increase of risk see *Richards, Ins.* §§ 141, 147, "or if the hazard be increased by any means within the control or knowledge of the insured."

I do not think the cases cited by the counsel for defendant support the contention that the policy is to be construed as comprehending judgments in invitum. *Seybert v. Insurance Co.* (1883) 103 Pa. St. 282, dealt with a policy which provided: "If after insurance the risk shall be increased by any means whatsoever, or if the property shall be incumbered by judgment, mortgage, or otherwise, \* \* \* and the assured shall neglect or fail to give written notice thereof, and pay such additional premium as the company shall determine, and obtain written consent of the company to the continuance of the policy, such insurance shall be void and of no effect." No notice was given of a judgment confessed. The court held there was a judgment and lien, within the meaning of the policy, and the condition was broken by the failure to give notice. This case does not apply, for here there is no question of notice involved. In *Hench v. Insurance Co.* (1888) 122 Pa. St. 128, 15 Atl. 671, notes were given containing warrants of attorney to enter judgment. The payee accepted them, fully satisfied with the personal security given, and informed the plaintiff that he would not enter judgment on the notes. But afterwards, during the life of the policy, but without plaintiff's knowledge or any intimation to him, the creditor caused judgment to be entered on both notes, which judgments were liens on plaintiff's farm. This, I take it, was tantamount to a confession of judgment. It was a case of increase of premium for increased risk provided for in the policy. Here it was a voluntary incumbrance. So, also, in *Insurance Co. v. Schmidt*, 119 Pa. St. 449, 13 Atl. 317, the incumbrance was voluntary, and the notice required was not given. In the case of *Bank v. Yerkes*, 86 Pa. St. 227, the "incumbrance fell" upon the property insured by judgment confessed, reducing the real interest of the insured in the same to a sum equal to or below the amount insured, and the policy was held to be thereby made void. *Redmon v. Insurance Co.*, 51 Wis. 293, 8 N. W. 226, held that a subsisting mechanic's lien was an incumbrance, within the meaning of a warranty against incumbrances, as of the time when the fire policy of insurance was taken. In *Hicks v. Insurance Co.* (1887) 71 Iowa, 119, 32 N. W. 201, there was a voluntary incumbrance by mortgage, and apparently an involuntary one by judgment rendered in invitum. It arose as a question of pleading. For further discussion of the subject, see

*Russell v. Insurance Co.* (Iowa, 1889) 4 L. R. A. 588, notes, 42 N. W. 654; *Walradt v. Insurance Co.* (N. Y. App.; 1893) 7 Am. Ry. & Corp. Rep. 444, and notes, 32 N. E. 1003; *Lane v. Insurance Co.* (1835) 12 Me. 44, 28 Am. Dec. 150, notes.

3. Plaintiff contends that the deed made by the insured E. A. Etchinson to Bessie E. Wood and others, on December 3, 1891, and therefore during the life of the policy, did not have the effect to make void the policy as provided in the condition against alienation, because it is shown by the evidence, and specially found by the jury, that she was at the time mentally incompetent to make a deed. The discussion of this question by counsel for defendant is made to turn on the point, is a deed thus made void or only voidable? So far as this question of mental incapacity affects the judgments already considered, the law seems to be settled that judgments against persons lunatics and persons of unsound mind are neither void nor voidable. *Allison v. Taylor*, 6 Dana, 87, 32 Am. Dec. 68, note, and cases. If an attempt were made to vacate or enjoin such judgment in chancery, doubtless the mere insanity of the judgment defendant would not be a guaranty of success. It would require the aid of other facts, from which the conclusion must follow that the judgment is inequitable and cannot be executed without injustice. Plaintiff's counsel, however, contends that the true rule in this case is that the transfer or conveyance must be an act valid as between the parties to the deed, in order to work a forfeiture of the policy under the conditional provision against alienation. For alienation clause in New York standard fire policy, see *Richards*, Ins. § 147. In *Insurance Co. v. Scammon* (1888) 126 Ill. 355, 18 N. E. 562, it was held that a voidable sale, afterwards set aside, did not avoid the policy; that conditions in policies of insurance against alienation must be construed strictly, the court having in view the object of the insurance company in inserting them; that is, when there has been such an alienation as that all interest or liability on the part of the assured has ceased or been changed, so that the insured shall have greater temptation or motive to burn the property, or less interest or watchfulness in guarding and protecting it from destruction by fire, the reason for the condition against alienation exists, and the forfeiture provided for in that event takes place, and renders the contract void; in other words, these conditions are inserted to guard against the moral hazard involved. In *Orrell v. Insurance Co.* (1859) 13 Gray, 431, it is said, as applicable to the facts of that case, that, to constitute a breach of the condition of insurance relative to a conveyance of the property, there must have been an actual sale or transfer of property, valid as between the parties; and in *Insurance Co. v. Kinnier*, 28 Grat. 88, 105, it is said by Judge Burke, quoting from May,

Ins. 182: "No rule in the interpretation of a policy is more fully established, or more imperative and controlling, than that which declares that in all cases it must be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim to indemnity, which it was his object to secure in making the insurance." So it seems that contracts of insurance can hardly be so drawn as to escape the application, to some limited extent, of the same principles as to forfeiture that are applied in courts of equity, not only because it is of long standing, but also because it is inherent in the nature of the subject. As to forfeiture clause to secure a collateral object, see *Klein v. Insurance Co.*, 104 U. S. 88, 90. But they should be fairly construed as contracts of indemnity against loss on certain terms and conditions, according to the equitable rules of construction applicable to such instruments,—that is, to look at the intent rather than at the form; that this clause of forfeiture relates to a collateral object, and was intended to apply in order to prevent increase of hazard, by a separation of the interest in the policy from the interest in the property, and to prevent taking away or diminishing the care of the one with whom the contract was made; and the mere letter of such contract, in total disregard of the reasons for its various clauses, would soon lead to palpable injustice. See *Moffitt v. Insurance Co.* (Ind. App.; 1894) 38 N. E. 835. In the case of *Insurance Co. v. Boykin* (1870) 12 Wall. 433, insanity was held to be sufficient excuse for failure to comply with the condition of the policy requiring an affidavit of the true amount and circumstances of the loss. "If he was so insane as to be incapable of making an intelligent statement, this would, of itself, excuse the condition of the policy." In *Insurance Co. v. Crandal*, 120 U. S. 527, 7 Sup. Ct. 685, it was held that a condition avoiding the life policy, where the insured shall die by suicide or self-inflicted injuries, does not include self-killing by an insane person, because it is not his act, in the legal sense. In *Autremont v. Association* (1892) 65 Hun, 475, 20 N. Y. Supp. 344, the insured took a policy on buildings owned by him, and subsequently becoming insane, set fire to the buildings while he was in that condition, and perished in the flames. Held, his executors were entitled to recover; for, being insane, the insured was incapable of forming a fraudulent design to destroy his own property, with the view of defrauding the insurer.

From these cases it would seem that the insured, Mrs. Etchinson, could not be regarded as having done anything to increase the hazard, or take away the personal confidence reposed in her by a deed made when she was mentally incompetent to make it, whether it be regarded as void or only voidable. See, also, *School Dist. No. 6 v. Aetna Ins. Co.*, 62 Me. 330, 339; *Orrell v. Insur*

ce Co., 13 Gray, 431, 434. See, also, 1 Ky. Ins. (3d Ed.) Append. p. 552, where a large number of cases on alienation are brought together and conveniently classified within a small compass. In *Richardson v. Insurance Co. (Ky.)* 13 S. W. 1, the policy is to become void if any change whatever could take place in the title of the property.

Death, of course, caused such change of title, put an end to the personal features of the contract, and thereby may have increased the hazard; but it was held that such change of ownership did not make void the policy. So, also, in *Pfister v. Gerwig*, 2 Ind. 567, 22 N. E. 1041, it was held that such transfer of ownership by operation of law, upon the death of the assured, did not void the policy, because the inhibition in the policy and by-laws did not cover such a transfer. See *Thompson v. Insurance Co.*, 136 S. 287, 10 Sup. Ct. 1019. In *Sheppard v. Insurance Co.*, 21 W. Va. 368, it is held that policy of insurance against fire is a contract of indemnity, and the assured must have an insurable interest in the property when it is insured and when the loss by fire occurs. The doctrine in this country seems, of great weight of authority, to prevail that the death of an insane person is voidable only, and not void; that is, it may be confirmed. See *Allis v. Billings* (1843) 6 Metc. (Mass.) 415, 10 Am. Dec. 744, notes; *Arnold v. Iron Works*, 1 Gray, 434; in *re Desilver* (1835) Rawle, 113; 2 Bl. Comm. (by Hammond) 11; *Jackson v. King* (1825) 4 Cow. 207, 15 N. Dec. 354, notes; *Bish. Cont.* § 975; *Riley v. Carter*, 76 Md. 581, 25 Atl. 667; *Ewall*, ad. Cas. 576, 588, notes to *Burke v. Allen*, N. H. 106.

We do not regard as here involved the strict technical distinction in practice so hard to draw between a contract void and one voidable only. We may say that the one is a mere nullity, void as against law, void for want of power, incapable of confirmation, of no effect whatever, of which any stranger might take advantage (see *And. Law Dict.*); while the other is capable of confirmation, might be good for some purpose, may be good as to some person, good against some, valid so long as not formally set aside, or valid as long as not in some way repudiated or disannulled,—according to the different circumstances under which they may be regarded. See *Ex parte Lange*, 18 Wall. 163, 174, as to legacies. In this case, when the loss occurred, the insured had such interest as the deed set aside gave her. There was, so to say, a debt outstanding in her to avoid it. Whether the deed be regarded, in the ordinary sense, as void or voidable, she still had the insurable interest resulting from the inability of not having mind and rational will enough to make it; and therefore it was made without her fault; and, not being her intentional, voluntary act, it worked no forfeiture of this policy, within the sound, just,

and equitable construction given it by the courts, according to the long and well-settled doctrine applicable to such cases. It does not fall within the clause of forfeiture, because it is not within the reason, according to the true intent and meaning of the parties. Having paid in advance the full contract price for this indemnity, when the loss comes the insurer cannot, in equity and good conscience, withdraw from his part of the contract on account of an innocent invalid act. And it is not sufficient to say, as has been so often said before: "Such is the letter of the contract. It may be hard, but we, too, are without blame. It is her misfortune, and should not be our loss; for such contingencies were contemplated. It was a part of her hazard, and influenced our price. To hold otherwise is to impair the obligation of her contract." But, in such cases of forfeiture, the courts, without claiming or exercising any power of dispensation over any rule of law, or the power to relax the obligation of the contract, give it an equitable, fair, and rational construction, in view of the nature of the act done, the character of the contract made, and the mischief intended to be guarded against by the clauses of forfeiture, on a matter not essential, but collateral; for although freedom of contract has kept pace with the growth of individual freedom, neither has ever outgrown subjection to law. The courts sometimes are disposed to show impatience with the carelessness with which the insured inconsiderately enter into contracts so important, and to hold them to the strict letter. Again, they may show some impatience with the multitude of conditions, exceptions, limitations, and restrictions which they generally contain, and are disposed to construe them quite liberally in favor of the insured, as contracts framed by the insurer too much for his own benefit, and accepted by the insured without examination, and with no comprehension of their full import. But in all cases the aim should be, and for the most part is, to construe them fairly, according to the rules and principles applicable to such instruments; that is, to look at the main object the forfeiture prescribed for is intended to accomplish,—go by the reasonable meaning, rather than by the literal form, so as to give it such effect as, according to its purpose and terms, in equity and good conscience it ought to have. The conditions of forfeiture are not to be disregarded; for the principal ones, such as are found in this case, have received the sanction of long and wide experience as being reasonable and well founded, and not to be dispensed with; for being a contract whereby one, for a consideration, undertakes to compensate another if he shall suffer loss by fire, where danger is apprehended or protection required it promises indemnity, but takes care to refuse and guard against the insured making his loss a source of profit. It is therefore strictly a contract of hazard and indemnity, personal to the insurer, for

an agreed price set against an honest loss, and upon certain terms and conditions, added to the policy in order to secure fair dealing in its making and its execution,—to its exclusion as a source of profit, and of all temptation to make it so. Hence, among others, the conditions against alienation, incumbrances, and the like. The personal care contracted for must be maintained, and interest in the policy should not be separated from interest in the property; and so common and so important have such contracts come to be that they have become a matter of great legislative concern, and are in many states regulated, even as to form (and this was needed), by statute. See *Richards on Insurance*, from page 133 to page 197, as to statutes governing the contract. See *Append. p. 569*.

4. Plaintiff claims that the failure to furnish proof of loss within the 40 days required by the terms of the policy was waived by the acts of the insurer. On this point the evidence introduced was all on the side of the plaintiff. As soon as the loss occurred the local agent was notified, who at once sent notice to the general agent of the company for that territory, with power to make contracts of insurance, appoint agents; all premiums are remitted to him; he adjusts and pays all losses; he was manager of the company's business for that section; and his name so appears on the back of the policy sued on. Within 10 days after the fire he came; offered \$250 as a compromise to save litigation. When that was refused, he objected to giving more, denying the company's liability, on the ground that Mrs. Etchinson had deeded the property away. It was therefore a case in which the defendant refused to pay on the ground stated that it was not liable for the reason given, and is governed by the case of *Sheppard v. Insurance Co.*, 21 W. Va. 368; *Deitz v. Insurance Co.*, 33 W. Va. 526, 11 S. E. 50. See *Weiss v. Insurance Co.*, 148 Pa. St. 349, 23 Atl. 991; *Insurance Co. v. Sheets*, 26 Grat. 854. Such a denial of responsibility, within the time for making preliminary proofs and before they are made, is the same as a notice to the assured that payment will not be made in any event. It is therefore a waiver of the condition of the policy requiring such proofs to be made, as the law does not require the insured to do an act which the insurer has rendered unnecessary; for the refusal to pay was express, and was put upon a ground which dispensed with the making and presentation of the preliminary proof of loss which was required for the purpose of making or refusing payment. In *Knudson v. Insurance Co.*, 75 Wis. 198, 43 N. W. 954, there was no denial by the general agent of the insurance company's liability on the policy, or anything said inconsistent with the theory that, if the matter was not then settled, the general agent would expect the plaintiff to make such proofs as are required by the policy. On waiver and estoppel, see *Wyman*

*v. Insurance Co.*, 119 N. Y. 274, 23 N. E. 907; *Messelback v. Norman*, 122 N. Y. 578, 26 N. E. 34. See *Richards, Ins.* §§ 80, 81. As to authority of agent to waive, see *Id.*, § 170.

There was no controversy about the facts; the only questions were those of law: (1) Was the policy made void by the judgments rendered in *Invitum* against the insured? (2) Was the deed, being invalid and voidable by reason of the mental incompetence of the grantor, such an alienation as to make void the policy? As we have already seen, both these questions must be answered in the negative, and therefore judgment should have been rendered for plaintiff on the verdict, and the order complained of is therefore set aside, and judgment on the verdict rendered.

(39 W. Va. 732)

### CLARKE v. OHIO RIVER R. CO.

(Supreme Court of Appeals of West Virginia.  
Dec. 18, 1894.)

RAILROAD COMPANY — CONSTRUCTION OF FARM CROSSING — AMENDMENT OF COMPLAINT — WHEN PROPER — INTERLOCUTORY ORDER — VACATION AT SUBSEQUENT TERM — BILL OF PARTICULARS.

1. An amended declaration is no departure from the original, unless it introduce into the case a new, substantive cause of action different from that declared upon, and different from that which the plaintiff intended to declare upon. It cannot be allowed if it be inconsistent with the nature of the original declaration, or change the cause of action. Allegations may be changed, and others added, but they must relate to the same cause of action.

2. An amended declaration in an action by a landowner against a railroad company for failure to build fences, farm crossings, and cattle guards may charge failures to build them at other points than those specified in original declaration without being in violation of the above rule.

3. A court can set aside at one term an order made in the progress of the cause at a former term, which is interlocutory, but not a final judgment. An order which merely sustains a demurrer to a declaration, or strikes out a count or item of claim, but followed by no judgment as to it, is interlocutory in nature, and the count or item of claim may be reinstated in the declaration at a subsequent term.

4. Section 46, c. 130, Code 1891, applies as well to actions for torts as actions on contracts. A statement of the particulars cannot be required where the declaration gives the grounds of action and particulars of claim with sufficient definiteness to give the defendant notice thereof. It can be demanded only where the declaration is allowably under the law so general as not to apprise the defendant of the real cause of action. If the declaration cannot be thus general consistently with law, demurrer is the remedy, not such statement of particulars.

5. Such statement of particulars should contain the grounds of action, not evidence.

6. A plea filed to the first declaration, and not withdrawn, will apply to an amended declaration.

7. When a railroad company has put in, when building its railroad, a sufficient number of suitable farm crossings and cattle guards, it cannot be required afterwards to build others at other places.

8. When a railroad company has made gates in fencing inclosing its track to afford access to a farm crossing, the mere presence of such crossing does not require cattle guards

the crossing, there being no fences there dividing fields.

9. Whether a plaintiff shall be allowed to re further evidence after defendant's evidence is closed is within the discretion of the trial court, and its exercise will rarely, if ever, be the ground of reversal by an appellate court. Clearly he is entitled to give evidence to rebut that of the defendant.

(Syllabus by the Court.)

Error to circuit court, Mason county.

Action of trespass by William H. Clarke against the Ohio River Railroad Company. Judgment for plaintiff. On an order overruling a motion to strike out the amended declaration of plaintiff, defendant brings error. Reversed.

Leonard & Archer, for plaintiff in error.

E. Hogg, John E. Beller, and Tomlinson & Wiley, for defendant in error.

BRANNON, P. This was an action of trespass on the case by William H. Clarke against the Ohio River Railroad Company in the Mason county circuit court to recover damages for the failure of the railroad company to build fences and put in cattle guards and farm crossings on lands of the plaintiff condemned by the company for use of track, resulting in the recovery of a judgment by the plaintiff of \$600, to which the defendant took the writ of error which we now decide. The case was once before in this court. 34 W. Va. 200, 12 S. E. 505.

The first and third assignments of error rest upon the action of the court overruling demurrer to the amended declaration, which was filed after the case was remanded by this court to the circuit court to meet effects in the original declaration pointed out by this court. The second assignment of error is upon the refusal of the court to sustain the defendant's motion to strike out the amended declaration. As I see nothing specified as error under the head of the demurrer that does not come up on the motion to strike out the amended declaration, they being in effect the same, I will consider the three together. The original declaration was for failure to make fences, guards, and crossings on four tracts of land. In the amended declaration the claim was as to five tracts, leaving out one included in the original, and thus the amended declaration included two tracts not counted upon in the original. The declaration specified divers failures to make fences, guards, and crossings, claiming as to each one a specific sum for damages. There were two demurrers to the amended declaration. The first was made at the same time with the motion to strike from the record the entire amended declaration, and the court, while overruling the demurrer, struck out certain assignments of breaches of duty on the part of the company, which took from the declaration all claim for damages as to the two tracts inserted for the first time in the amended declaration, leaving certain

breaches of duty or specifications of wrong yet standing in the declaration; and to the declaration thus purged the defendant entered a demurrer, which was overruled. I suppose a motion to strike out an amended declaration should precede a demurrer to it, but, as the ground for striking out relied upon in this case is that the amended declaration contains new causes of action, I suppose this point immaterial. The bane of the amended declaration is said to consist in the fact that it alleges omission by the company to make certain cattle guards, crossings, and fences not relied upon as causes of recovery in the original declaration. Does the amendment, therefore, violate the rules relative to amended declarations by the introduction of new causes of action? What shall be called the cause of action? It is the ground on which the action may be sustained. Black, Law Dict. 182. "It is the breach of duty by the defendant complained of." This definition by Judge Holt is very concise and exact. *Harvey v. Insurance Co.*, 37 W. Va. 272, 16 S. E. 580. This general rule may be easily stated, but sometimes not easily applied. What shall be regarded, for the purpose of determining the propriety of amendment, as the cause of action in this case? To constitute cause or right of action two elements must concur,—a duty and a breach of it. There can be no actionable wrong unless there is a duty resting upon a person, and he breaks it. If there is no duty, though the act of the defendant may work harm or damage, there is no right of action; it is a case of *damnum absque injuria*. But if there is a duty owing, and it is broken, it is a case of *damnum cum injuria*. Now, take a case. There is a farm, through which a railroad right of way is condemned. The company's legal duty is to put in two cattle guards. That is the whole duty to the owner as to this tract. If it puts neither, that duty is broken; so if it puts in only one. This might seem to imply that the failure to put in each cattle guard was in itself alone a cause of action, but I think not. The owner of this farm sues the company for breach of this duty. The duty includes two cattle guards. He specifies in his declaration, however, only the failure to build one, but he concludes later that the duty covers two. Can he not amend his declaration, and specify a second breach in the failure to make a cattle guard at another place? He does not introduce a new and different substantive cause of action, as he does not impute a new and different duty, but, still relying upon the same duty as giving birth to his right, he but calls in another breach of that duty. We must not forget to regard together both this duty and its breach or breaches in determining what is to be deemed the cause of action in deciding whether an amended declaration departs from the original, as it

will facilitate the solution. I think that where there is one duty, and it is of such nature as to allow several breaches, an amended declaration, based on that duty, may assign further breaches without infringing on the rule forbidding the introduction by amendment of a different substantive cause of action. The company owes an obligation as to each of the two cattle guards, but only because the one is included by the two,—the minor within the major duty. The sheriff or constable's bond imposes a general duty. He owes a separate duty as to each of two executions or claims in his hands. If sued for breach of duty as to one, could an amendment not assign another breach as to the other execution?

In this case, for the purpose in question, we consider the failure to comply with its duty by the company in making fences, guards, and crossings on the land as the cause of action, and not the failure as to each crossing separately and distinctly. I think he is bound to amend, or else ever lose damages for failures not included in the declaration; for a person cannot split one cause of action into several suits. When there are several breaches of one contract or duty, he must in one action sue for all. The landowner cannot sue now for failure to build one crossing here, and recover, and then bring another suit for the failure to build another there, on the same land. 7 Rob. Pr. p. 175, § 7. This is a good reason for allowing such amendment. It is not necessary to say whether we may separate fencing, guards, and crossings, making each a separate ground of action, so far as to say that where the original declaration is based on failure to fence an amended declaration may or may not proceed for failure to make crossings or cattle guards. Amendments are allowed with liberality, because we do not always grasp a case correctly at first, for one reason or another, and they tend to promote fair trial and end litigation. Any amendment is allowable so it do not bring in a substantive cause of action foreign to the case as made by the original declaration,—one having in itself a separate existence from that named in the original declaration. The cases in this court uphold this view. *Snyder v. Harper*, 24 W. Va. 206; *Kuhn v. Brownfield*, 34 W. Va. 252, 12 S. E. 519; *Lamb v. Cecil*, 28 W. Va. 653. I think there is no doubt but in amendment the damages may be increased under the specifications of damages. So the court did not err in overruling the demurrer and motion to discard the amended declaration, or in refusing to strike it out of the case.

The fourth assignment of error is that the court erred in allowing plaintiff to amend his declaration by inserting again therein a claim of \$1,000 damages, marked "No. 1." This claim had been by the court stricken from the declaration, and it was afterwards reinserted. It was only an amendment. It was properly in the declaration, and the court erroneously

—it is said inadvertently—struck it out. But it is said its addition made the damages claimed sum up beyond the amount claimed in the ad damnum clause at the close of the declaration. I think this made no difference. The amount recovered was less than the amount claimed by writ or declaration. The specification of items of damages may exceed the sum named in the conclusion of the declaration. *Tassey v. Church*, 39 Am. Dec. 65; *Merrill v. Curtis*, 57 Me. 152; *Palmer v. Mill*, 3 Hen. & M. 502; 1 Bart. Law Pr. 328; 4 Minor, Inst. 1158. It is contended that the order striking this item from the declaration was final, and could not be recalled at a subsequent term and the claim or specification re-admitted to the case, as a final judgment made at one term cannot be set aside at another. But that order was merely interlocutory, and could be changed at any time before final judgment. Cannot a plea be rejected at one term and afterwards allowed? or admitted and afterwards rejected? or a count in a declaration be stricken out, and at a later term restored? or a demurrer to the count be sustained, and later overruled? Certainly so, if the point is merely decided, not carried into judgment, as it is but an opinion till then. If there were a judgment that the plaintiff take nothing by that particular count,—if in this case the court had entered judgment that the plaintiff take nothing on account of this item No. 1,—there would be more strength in the claim that it was beyond amendment; but even then would be doubtful. Ever so many points may be decided during the course of the suit, but if the decision on them pass not into final judgment on them,—a judgment ending them,—there is no *res judicata*. Surely the plaintiff could not have taken a writ of error to the order striking this item from his declaration. This order striking out this item was an order sustaining a demurrer to a small part of the declaration, an item of its claim; and I understand that it is everywhere admitted that an order merely sustaining a demurrer, without more,—is a merely interlocutory order, not final. The case is in court till a final judgment ends it, and before that the order may be reviewed and recalled. It is contended that, after demurrer sustained, the same declaration cannot be again filed. If there was final judgment, it could not; if not, there need be no further declaration, as the old one is yet alive. It is urged that a judgment sustaining a demurrer to a declaration has been held to be *res judicata*, and we are referred for authority to *Poole v. Dilworth*, 26 W. Va. 583, and *Corrothers v. Sargent*, 20 W. Va. 356, holding that a judgment upon a demurrer going to the merits is an effectual bar to further litigation as to every matter, whether specially stated in the pleading or not, provided it be clear it was necessarily decided in the suit. So it is when the adjudication is final, but everywhere we are told that to have such effect it must be final; technically final,

merely interlocutory. 5 Rob. Pr. 9; *Bur-*  
*v. Hevener*, 34 W. Va. 775, 12 S. E. 861.  
Sustaining a demurrer is not final, but revoca-  
ble, unless carried into judgment, even where  
the demurrer goes to the whole case. 1 Black,  
1gm. § 29.

The fifth assignment of error is in refusing  
to require plaintiff to file a statement of the  
particulars of his claim, as required by chap-  
ter 130, § 46, Code. In the first place, the de-  
claration gives a minute clear statement of the  
grounds of plaintiff's action, and descends to  
particulars by particularizing the cattle  
guards, crossings, and fencing not made, lo-  
cating the points of omission, and averring,  
in relation to crossings, that for want of them plain-  
tiff was damaged in the farming and tillage  
of the land, and, as to cattle guards, that he  
lost the pasturage of the land for certain  
periods; as to fencing, he lost the pasturage  
for a time, and was compelled to build fences  
himself, at a specified expenditure; specify-  
ing the amount of damage claimed on ac-  
count of each crossing, guard, or fence omit-  
ted, which specification of each item of dam-  
age seems unnecessary, the claim of a sum of  
money at the close being all necessary. *Com-*  
*mon v. Adams*, 16 W. Va. 257. The claim  
being a claim by an owner of cleared land  
of damage for refusal to fence off the track  
and put in crossings and guards, necessarily  
it is that the damage is from inconvenience,  
injury, and loss in the use of the land for  
farming and agriculture from the absence of  
these conveniences or necessities, without  
specifying killing of cattle, delay or obstruc-  
tion in passing over the track with vehicles  
carrying farm products, or carriages of  
any kind, or any of the multitudinous instances  
in which inconvenience, obstruction, delay,  
increased labor, and loss might flow from the  
absence of such fences, guards, and crossings.  
It is contended broadly by counsel for ap-  
pellee that section 46, c. 130, Code, providing  
that "in any action or motion the court may  
order a statement to be filed of the particu-  
lars of the claim or ground of defense," does  
not at all apply to cases of tort; citing *City*  
*Plymouth v. Fields*, 125 Ind. 323, 25 N. E.  
7, and other cases. But I think the propo-  
sition that in no case of tort can this state-  
ment apply is entirely too broad. The power  
vested at common law in a court to require  
a bill or statement of the particulars of the  
claim or defense, because the court has in-  
herent power to direct the conduct of a trial,  
and do those things incidental in nature  
necessary to advance justice and prevent  
surprise. The statute is but declaratory of  
common law. But by no means can it be  
strictly asked in every case. It can be  
demanded only in those cases where the de-  
claration or plea is allowably of so general  
nature as not to apprise the party of the  
real cause of action or defense which he is  
to meet. I say allowably, for if the declara-  
tion or plea is more general or indefinite than  
allowed by law, a demurrer or objection

should be interposed, and a demand for par-  
ticulars cannot take the place of a demurrer.  
*Shaddock v. Plank-Road Co.*, 79 Mich. 7, 44  
N. W. 158; *Railroad Co. v. Payne*, 86 Va.  
481, 10 S. E. 749; opinion in *People v. Mon-*  
*roe*, 4 Wend. 200. Its application is not so  
frequent in actions of tort as in actions based  
on contract; not because damages are un-  
liquidated in tort, but because the declaration  
must in such cases have the requisite definite-  
ness to inform the defendant of the nature  
of the cause of action, and the particular act  
or omission constituting the tort, else a de-  
murrer will lie. But it has often been re-  
quired in actions for torts, and even in  
criminal cases. It is only applicable where  
it appears that the party, from any cause, is  
placed in a situation such that justice cannot  
be done without information to be obtained  
by specification or bill of particulars. *Com-*  
*v. Snelling*, 15 Pick. 321. The subject is  
elaborately discussed in *Tilton v. Beecher*,  
59 N. Y. 178. Our Code is the same on this  
point as the Virginia Code, and in *Asylum*  
*v. Flanagan*, 80 Va. 110, the applicability of  
the statute to torts is substantially recogniz-  
ed. Some of the authorities hold that the  
requirement of such specification of particu-  
lars is only discretionary, and the improper  
exercise of the power to require not a subject  
of review in the appellate court (*Com. v.*  
*Giles*, 1 Gray, 466-469), but I would think  
that the refusal to require it in a proper case  
would be reviewable. It is important to  
discriminate as to what such specification  
must contain. It is to contain only grounds  
or particulars of cause of suit or defense;  
not evidence, not matter merely evidential.  
A party is not entitled to call for a specifica-  
tion of evidence. *Garfield v. Paris*, 96 U. S.  
557. Its office is to inform the party of the  
causes of action to be relied on at the trial  
not specifically set out in the declaration.  
*Bowman v. Earle*, 8 Duer, 694; *Davis v.*  
*Freeman*, 10 Mich. 188. It is not a part of  
pleading so as to be demurrable. Defects  
in it cannot be reached by demurrer. So  
decided in *Abell v. Insurance Co.*, 18 W. Va.  
400, and Judge Green refers to the section of  
Code I am now considering; but I think that  
case involved not that section, but section 11,  
c. 125, but it is good law as to section 46  
also. *Abb. Tr. Brief*, 137. But the party  
will be restricted in proof on the trial to the  
particulars it specifies as strictly as if it were  
a pleading. *Com. v. Snelling*, 15 Pick. 321;  
*Com. v. Giles*, 1 Gray, 469.

The sixth assignment of error is that the  
court refused to set aside the verdict. Under  
this head it is argued that there was no plea  
to the amended declaration. This goes on  
the theory that after the plea of not guilty  
had been entered to the amended declaration  
as to the item No. 1, claim for \$1,000 for fail-  
ure to construct a crossing on farm No. 1,  
which had been stricken out of the record,  
as stated above, the court allowed it to be  
reinstated in the declaration, and there was

after this no plea, and thus to a part of the declaration there was no plea. In *Power v. Ivie*, 7 W. Va. 54, it is held that where there is a plea to a declaration, and it is not withdrawn, it shall be regarded as applicable to an amended declaration. Why not? The amended declaration is still on the same cause of action as that counted upon in the original. The plea is "not guilty" to the cause of action. Here the amended declaration still remained, and only an item of specification of a ground of claim is inserted. If it were a new count on same cause of action, I think the old plea would be applicable to it.

Assignments of error 7, 8, and 9. Refusals of instructions asked by defendant.

Instruction No. 2. "The jury are instructed that if they believe from the evidence that the railroad company did construct convenient crossings on the plaintiff's lands at the time the road was opened for business, then the plaintiff cannot now complain of the failure to construct other crossings at other points on his lands, provided they believe from the evidence that the crossings so constructed were convenient." The statute (section 14, c. 42, Code 1891) provides that where land is condemned to the use of a railroad, and is cleared and fenced, the company shall construct and ever maintain suitable farm crossings, cattle guards, and fences on both sides of the land taken. When once the company has put in suitable crossings, can it be required later to put in additional ones? No authority has been cited to the exact point, and I have found none. In *Wademan v. Railroad Co.*, 51 N. Y. 568, under such a statute, it was held that if the statute give no election in terms to the landowner, it is the right of the company to say where the crossings shall be; but in the exercise of this right regard must be had to the convenience of both parties, and such a location must be made as will not subject the owner to needless and unreasonable injury. 1 Ror. R. R. 494. Must the company change the crossings in place, or add new ones, with the changing caprices, or even needs, of the owner? If the owner sell part of his land, must the company then make a crossing on the part sold, and must it keep on adding crossings as further sales of parts are made? I think not. Therefore the instruction was proper, and it was error to refuse it.

Instruction No. 3. "The jury are instructed that they have the right to consider the construction of the gates by the defendant at the crossings, in connection with the other evidence in the case, in arriving at a conclusion whether or not the defendant has failed to construct suitable cattle guards, and that, if they believe from the evidence that the construction of the gates by the defendant was sufficient to prevent cattle and other stock from going upon the railroad, then they have a right to consider this in arriving

at a conclusion as to the necessity of construction of cattle guards." It was error to refuse this instruction. Where the company fences on both sides of its right of way, and puts in a farm crossing, and puts in gates to allow access to the crossing, it need not make cattle guards at the farm crossing, it being a merely private crossing, not a highway. The gates are not expected to remain open, and, when stock is crossing, it is expected to be in charge. The cases requiring such guards at crossings refer to crossings of public highways. 7 Am. & Eng. Enc. Law, 915; *Railroad Co. v. Barton*, 80 Ill. 72; *Cook v. Railroad Co.*, 36 Wis. 45; *Bartlett v. Railroad Co.*, 20 Iowa, 188; *Pennsylvania Co. v. Spaulding* (Ind.) 13 N. E. 268; *Dent v. Railroad Co.*, 83 Mo. 496; *Sather v. Railroad Co.*, 40 Minn. 91, 41 N. W. 458; *Railroad Co. v. Severin* (Neb.) 46 N. W. 842; *Fitterling v. Railroad Co.*, 79 Mo. 504; *Brooks v. Railroad Co.*, 13 Barb. 594. It is argued as if the company, by putting up gates, not mentioned in the statute, had done away with its mandate, and substituted for guards, called for by it, gates. It is not so. The gate is only part of the fence required to be built. 3 Wood, Ry. Law, § 420. The gate is only a means of access to the crossing, and, there being no fence there dividing fields, the mere presence of the crossing does not call for guards. Gates or bars are all that are required. A cattle guard is defined to be an appliance to prevent animals from going on land adjoining the right of way, to prevent their passing along a right of way into an improved and fenced field. 7 Am. & Eng. Enc. Law, 912; *Hurd v. Railroad Co.*, 25 Vt. 116; *Railroad Co. v. Cunningham*, 13 Am. & Eng. R. Cas. 529.

Instruction No. 4. "The jury are instructed that they have the right to take into consideration the uses to which the plaintiff put his lands, and the crops that the plaintiff raised on his lands, in arriving at a conclusion as to the plaintiff's claim for damages in this case; and that, if they believe from the evidence that he has had the free use and benefit of his lands for the purpose of farming the same during the time from January 1, 1887, to March 15, 1890, then he cannot recover in this case." All said in the brief of appellant's counsel as to this instruction is that the declaration states the injury to the plaintiff to be in the use of his land for farming and tillage, whereas the evidence is largely based on loss and injury to stock. I should think that raising stock was a part of the business of farming and tilling soil. I think this instruction was properly refused. What does it mean? Does it mean that if he had the use of the land in such way that in fact he suffered no loss, he could not recover? It does not say so. Does it mean that if he had full use of his land he therefore suffered no assessable damage from want of fences, guards, and cross



ngs? If so, it would be wrong. It is vague, indefinite, and misleading, and it would be hard for a jury to say just what it was intended to say, and is therefore objectionable. *Carrico v. Railroad Co.*, 85 W. Va. 391, 4 S. E. 12; *Levasser v. Washburn*, 11 Grat. 72.

The tenth assignment of error relates to an objection to evidence to sustain item No. 1 of claim, for \$1,000 for omission of farm crossing on tract No. 1, on the theory that his claim, not being in original declaration, could not be inserted in the amended one as if it were a new cause of action. I have already discussed this subject.

The eleventh assignment of error is to the admission of certain evidence. In reference to a failure to construct a crossing on tract No. 1, 1,120 feet above and southeast of West creek and 407 feet above it, the line of tract No. 1, the plaintiff, in answer to a question as to why there should be a crossing there, said that without it it was too far to haul fodder or corn to one place, and another crossing would shorten distance, and enable him to farm properly; and this evidence is said not to be sheltered under anything in the declaration, when in regard to this very omission the declaration alleges a crossing there to be necessary to enable the plaintiff to properly use and farm tract No. 1, and that by the omission to put in the crossing he had been damaged \$250 in the farming and tilling of the tract. The brief of counsel contends that evidence of plaintiff that Flickenger and Fleming, while the road was building, agreed to build this particular crossing, is inadmissible, since there is no evidence of their agency or authority to bind the company. An agent must have authority to do an act to bind his principal, and one claiming under his act or contract must show his authority to do the particular act. *Curry v. Hale*, 15 W. Va. 167. To bind the company by admissions of agent, he must have authority as to the subject. *Coyle v. Railroad Co.*, 11 W. Va. 94; *Mechem, Ag.* § 714; *Armil v. Railroad Co.* (Iowa) 30 N. W. 42; *Drake v. Railroad Co.* (Iowa) 29 N. W. 804. I do not think that because Fleming was acting as road master it hence follows without proof that he had right to make this contract, or that it was within the scope of his authority. It will not do to say that this evidence is immaterial, and ought not to set aside a verdict. It was strong evidence to fix a duty on the company to build this crossing. In *Taylor v. Railroad Co.*, 33 W. Va. 39, 10 S. E. 29, it was held that, if illegal evidence is admitted against objection, it will be presumed that it prejudiced the party; and, if it may have done so, though it be doubtful whether it did or not, it will be cause for reversal.

Assignments of error from 12 to 22, inclusive. These relate to objections to evidence relative to said item 1 of \$1,000, reinstated in the declaration as above mentioned, and objections to evidence to sustain claims for

damages for failure to make crossings, guards, and fences in the absence of a bill of particulars of claims, and objections to evidence to items of claim based on the theory that these claims were not in the original, but were for the first time inserted in the amended declaration, and were new causes of action foreign to the cause of action in the original declaration declared upon. These points have been already discussed. In so far as these assignments of error relate to evidence under claims for damages for failure to put in cattle guards at crossings made or omitted to be made, I have above said enough thereon.

Twenty-third assignment of error. A claim for damage on account of failure to fence land. In the evidence objected to, witness said the land would pasture a given number of cattle a month, worth a certain price. Why is this not an item or element in the assessment of damage?

Twenty-fourth assignment of error. I see no objection to the McDonald evidence. The witness, knowing the land, having viewed it, said there ought to be a crossing at a certain place. The evidence should have relation in time to the opening of the road for use.

Twenty-fifth assignment of error not insisted on.

Twenty-sixth assignment of error. The witness said, as to a crossing not built, that it was the only natural way to get to the river, the only way to get there, and also that there ought to be a guard there, and that the land was worth so much per acre for pasture. This evidence is said to be mere guesswork. I think it admissible. It bears on inconvenience of use of land for farm purposes, and is an element in the process of estimation of damages.

Twenty-seventh assignment of error. The witness gave his opinion as to the rental of the land, saying it was worth nothing without cattle guards and crossing, there being no way to get to it; and that it was shut off from the river. This seems admissible.

Twenty-eighth assignment of error. The witness said a crossing at a point would be convenient to get to the river, of value to the farm, and would make it sell better. I cannot see why this is not admissible. It bears on the convenience and facility and use of the farm for tillage and general purposes for which land is used.

Twenty-ninth assignment of error. A deposition was given in evidence to prove that Fleming, a road master of the defendant company, agreed with plaintiff in regard to the places to locate and build farm crossings and cattle guards, and that four crossings, with cattle guards, should be built at certain points. There was no evidence of the authority of Fleming to bind the company by this act. Was the agreement within the scope of his authority? We are not informed. I have above cited authority, if any were needed on so plain a proposition, to show the requirement of power of the assumed agent. He bound the company to build guards at

farm crossings which it was not bound to do, as stated above. He could not impose on them, by his authority as agent, a burden to do what the law did not require. This evidence was not admissible. It is argued for the defendant in error that it is not attempted to impose the duty by contract, but by force of law. Then why introduce the evidence of contract? And it goes to make a duty to put in guards at places not required by law, and it tends to make necessary and requisite crossings at places where perhaps they were not required, if the question of their propriety there were left free from the contract.

Thirtieth assignment of error. The plaintiff was recalled to prove that Fickinger and Fleming agreed to put crossings at particular places. This evidence is objectionable for reasons stated under assignments of error.

The point that it ought to have been given in chief, and was too late after the plaintiff rested his case. This was to corroborate another witness, and ought to have been in chief, but it is not ground for reversal. "Whether a plaintiff shall be allowed to give further evidence after the defendant's evidence is introduced is a matter within the discretion of the court trying the case, and its exercise will rarely, if ever, be controlled by an appellate court." Clearly, he is entitled to introduce evidence to rebut that of the defendant. *Brooks v. Wilcox*, 11 Grat. 411; *Robinson v. Pitzer*, 3 W. Va. 335; *Bowyer v. Knapp*, 15 W. Va. 277. Judgment reversed, verdict set aside, new trial awarded, and remanded.

(39 W. Va. 749)

# OSBORN v. GLASSCOCK et al.

## Appeal of HYRE.

(Supreme Court of Appeals of West Virginia.  
Dec. 18, 1894.)

### PROPERTY OF MARRIED WOMAN — LIABILITY FOR DEBTS—SALE UNDER DEED OF TRUST—INJUNCTION—EFFECT—LIS PENDENS.

1. Section 13 of chapter 139 of the Code, requiring a memorandum of a lis pendens to be filed for record before it can bind or affect a purchaser of real estate for valuable consideration, without notice, has no application to personal property, and therefore none to a portable steam sawmill.

2. Where a party has actual notice of an order of injunction, although it may not have been yet served, or be defectively served, upon him, the order becomes operative on him from that time.

3. Such an order is a sufficient incipient sequestration of the visible personal separate estate of a married woman, such estate then being specifically proceeded against by her creditor by bill in equity.

4. A purchaser of such property at a sale made under a deed of trust, with knowledge of the order of injunction, acquires thereby only such right, as against the plaintiff in the suit, as the equity of the trust creditor may, on hearing the cause, be held to confer.

5. A married woman may sell, grant, and transfer her separate personal property as if she were a single woman, without her husband joining in such deed or other writing.

6. The court, having taken control of such specific personal estate of the married woman

for the purpose of subjecting it to the payment of the claims of her creditors who had brought suits for that purpose, should, as the law then was, have ascertained and determined their respective priorities, and then applied the proceeds of sale had under the direction and control of the court to the satisfaction of these claims, in the order in which they have been ascertained to be entitled.

(Syllabus by the Court.)

Appeal from circuit court, Tucker county.

Suit by A. H. Osborn against Martha A. Glasscock and her husband, and separate suits by H. H. Taylor and by W. T. Stout against the same defendants, to subject the separate estate of defendant Martha A. Glasscock to the payment of debts due the several plaintiffs. L. J. Hyre filed a bill against Taylor and the defendants, in the nature of a petition to try the right of property in the estate involved. Plaintiffs Osborn, Taylor, and Stout had judgment for their claims; and, from a judgment dismissing his bill, Hyre appeals. Reversed.

A. J. Valentine, for appellant. W. B. Maxwell and A. B. Parsons, for appellees.

HOLT, J. These were three separate suits in equity brought in the circuit court of Tucker county—one by Osborn, one by H. H. Taylor, and the other by W. T. Stout—against Mrs. M. A. Glasscock, to subject to the payment of their several debts certain property named and described as her separate estate, namely, one portable steam sawmill, and its accompaniments, and a tract of land of 98 acres, alleged to have been conveyed by her to her sister-in-law with intent to defraud her creditors. Such proceedings were had that by decree entered in the suit of Taylor on the 15th day of March, 1892, plaintiff abandoned his claim and all right to further proceed against the tract of land of 98 acres, and the court ascertained and fixed the amount that plaintiff Taylor was entitled to recover against the separate estate of defendant Mrs. M. A. Glasscock at \$532.27, with interest from that date, and decreed that, unless it was paid within 10 days after the adjournment of the court, plaintiff could sue out execution therefor, to be levied upon her separate personal estate, consisting of one steam sawmill and fixtures, complete, as agreed by the parties in open court, to be sold for one-third cash, and for residue upon a credit of 6 and 12 months, etc. Thereupon the court, on the application of L. J. Hyre, who claimed the sawmill, and asked to be made a party defendant, gave him leave to suspend the sale by delivering to the officer a proper suspending bond, in penalty equal to double the value of the sawmill, according to section 4 of chapter 107 of the Code. This bond, in the penalty of \$1,000, Hyre, with his sureties, executed and delivered to the officer on the 15th day of April, 1892. An injunction had been granted, restraining Coberly, the trustee, from selling the sawmill, on 16th September, 1891. On 22d September.

91, the injunction bond was given; and a summons, with the restraining order inserted, was served on Coberly, the trustee, on the 5th day of October, 1891. On the 1st Monday in April, 1892, L. J. Hyre filed his petition against W. H. Taylor, M. A. Glasscock, and V. A. Glasscock, as defendants, saying that it might be filed in the chancery cause of Taylor, and treated and read as a petition for the purposes of trying the right of property to the steam sawmill, and a cross bill and answer to plaintiff Taylor's bill; that Taylor and the other defendants should be required to answer; that the title to the sawmill be declared to be in petitioner, and said sawmill be released from the levy of the execution; and for general relief, alleging that the suspending bond had been given as required. In this petition he sets up that Mrs. Glasscock, by her husband, W. M. Glasscock, acting as her agent, by deed of trust dated 28th February, 1890, conveyed or transferred the mill, then in Randolph county, to D. E. Coberly, trustee, to secure to A. J. Elton the payment of the sum of \$785, in various payments; that the mill was removed to Tucker county on the — day of February, 1891, where it was on the 5th day of October, 1891, sold by the trustee to petitioner Hyre for the sum of \$250; that he paid the same, and the mill was then and there delivered to him, with absolute and full control, which he has since so held up to that time; and that, of all these transactions, H. H. Taylor and M. A. Glasscock had full notice. He further alleges that the demand of plaintiff Taylor, on which his judgment was based, had been fully paid off and satisfied long before the institution of Taylor's suit; that the suit was brought in pursuance of a fraudulent combination on the part of Taylor and Mrs. Glasscock, aided by her husband, to sell the sawmill of petitioner, and turn over, through Taylor, the proceeds to Mrs. Glasscock, for the express purpose of defrauding petitioner out of his property.

The parties appeared and answered, denying the fraud alleged, and the various issues were made up. Many depositions were taken, and other evidence put in. And, neither party requiring a jury, the four cases (Hyre's petition being treated as one) came on to be heard together on the 14th day of March, 1893, all on various papers formerly filed and read, including a lis pendens in each of the three causes, recorded in the clerk's office of the county court of Tucker county on the 6th day of April, 1891, and embracing a description of the steam sawmill, etc., mentioned in the bills. The bill of injunction of Osborn set out the sawmill as the separate property of Mrs. Glasscock, the deed of trust thereon to Coberly, trustee, and alleges that the deed of trust was given on the 28th day of February, 1890, while it was in Randolph county; that it was removed to Tucker county in February, 1891; that it was not admitted to record, if at all, legally and proper-

ly, until the 22d day of August, 1891. See section 5 of chapter 74 of the Code, on which plaintiffs rely. The court, on full hearing, decided against the claimant Hyre, dismissing his petition, with costs; also ascertained the respective amount Stout and Osborn were entitled to recover, respectively, against said mill, as the separate estate of Mrs. Glasscock; entered its final decree for the sale of the mill under execution, etc. From these decrees, Hyre obtained this appeal, claiming that his title to the mill, as a purchaser thereof at the sale made by trustee, Coberly, under the deed of trust, was good and valid, as against the claims of these three plaintiffs as creditor of Mrs. Martha A. Glasscock, the grantor in the deed of trust, and that the court erred in holding otherwise.

The material facts seem to be as follows: Bernard W. Fisher and wife, by deed dated and acknowledged on the 5th day of March, 1891, conveyed to the defendant Martha A. Glasscock a certain tract of land situate in Randolph county, containing 98 acres. This deed was admitted to record on the 3d day of August, 1891. By deed dated 1st day of August, 1891, Martha A. Glasscock and her husband, W. M. Glasscock, sold and conveyed the tract of 98 acres to her sister-in-law, V. A. Glasscock, of Reno county, state of Kansas, in consideration of the recited sum of \$1,000 cash in hand paid. This deed also was admitted to record on the 3d day of August, 1891. On the 28th day of February, 1890, A. J. Elton sold to Martha A. Glasscock a portable sawmill then located in Randolph county; and by deed of trust purporting to be made by W. M. Glasscock, agent for Martha A. Glasscock, but signed, sealed, and acknowledged by W. M. Glasscock, on the 1st day of March, 1890, this mill was conveyed to D. E. Coberly, trustee, to secure to Elton the payment of \$785, to be paid as follows: \$115 on April 15th; \$125, April 25th; \$115, July 15th; \$125, August 15th; \$115, October 15th; \$95, November 15th; and \$95 to be paid December 15th,—all in the year 1890; all evidenced by notes, and providing, if any of said notes were not paid when due, the trustee was to sell the mill, on 30 days' notice, at public auction, for cash, to the highest bidder, after having been requested so to do by A. J. Elton, the creditor. This deed of trust was admitted to record in Randolph county on the 1st day of May, 1890. The mill was removed to Hulings, in the county of Tucker, on the — day of February, 1891, but the trust deed was not admitted to record in Tucker county until the 22d day of August, 1891.

As the pleadings and proceedings in the four cases determine some of the important questions presented in this record, it becomes necessary to refer to them with some particularity of detail:

On the 6th day of August, 1891, the appellee H. H. Taylor sued out his summons to answer a bill in equity against Martha A.

Glasscock, returnable to 1st Monday in September, 1891, which was returned "Executed" on 17th August, 1891. On 1st Monday in October, 1891, plaintiff Taylor filed his bill in equity against defendants Martha A. Glasscock and V. A. Glasscock. In this bill he alleges that on the 3d day of January, 1890, defendant M. A. Glasscock and her husband, W. M. Glasscock, gave their certain single bill, whereby they jointly and severally promised to pay plaintiff the sum of \$470 one day after date, on which a suit at law was pending against W. M. Glasscock; that Martha A. Glasscock was the owner of a large amount of personal property, consisting of a steam engine and sawmill, with all appliances, complete, then situated in the town of Hulings, in Tucker county, also the owner of cows, horses, household, and kitchen furniture, and probably other property; that she was the owner of 98 acres of land situate in Tucker county; that the purchase money for which Fisher had, in his deed of conveyance, retained a vendor's lien, had been fully satisfied; that plaintiff's debt is due, and remains wholly unpaid; that the sale and conveyance made by Martha A. Glasscock to her sister-in-law, V. A. Glasscock, of the state of Kansas, was made with the intent to defraud, hinder, and delay her creditors, especially the plaintiff; that no money was paid,—and setting out various facts supposed and alleged to be evidence of such fraudulent intent, and exhibits with his bill a lis pendens, recorded on the 6th day of August, 1891, in which are described the 98 acres of land, also her personal property, mentioned and described as in her bill, describing and designating particularly and definitely only the steam portable sawmill and its appliances, on the line of the Hulings Railroad, in Black Fork district, in Tucker county. Plaintiff prayed that the amount of his debt might be ascertained and decreed him; that the personal property might be sold, and the real estate rented, and proceeds be applied in satisfaction of his debt; and for general relief. Some time before the 5th day of October, 1891 (I infer, about the 22d day of August, 1891), E. E. Coberly, as trustee, took possession of the steam sawmill near the town of Hulings, where the mill was located, and, by written notice, advertised that in pursuance of the deed of trust he would on the 5th day of October, 1891, on the premises, proceed to sell the mill at public auction for cash.

On the 17th day of September, 1891, appellee W. F. Stout instituted his suit in equity in Tucker circuit court against Martha A. Glasscock, W. M. Glasscock, A. J. Elton, H. H. Taylor, B. W. Fisher, A. H. Osborn, E. D. Talbott, and W. B. Maxwell, trustee, and on the 1st Monday in October, 1891, filed his bill seeking to enforce payment out of the separate estate of Martha A. Glasscock of a note executed to plaintiff by her and her husband for \$135, dated on August 9, 1890, due in 30 days; also that one of the notes for \$115,

due July 15, 1890, which was executed by Mrs. Glasscock to A. J. Elton for the sawmill, and one of those secured by the deed of trust, which note had been assigned to plaintiff Stout by Elton, credited by \$10. Charges that she owned the 98 acres of land; that all the purchase money had been paid to defendant B. W. Fisher, but the lien retained in the conveyance had not yet been released; that on the 6th day of March, 1891, the defendants W. M. and Martha A. Glasscock had conveyed the 98 acres to defendant W. B. Maxwell, trustee, to secure to defendant E. D. Talbott the payment of a note for \$300 executed by them to Talbott,—alleging that the plaintiff was not informed whether it had been paid or not, and that the defendant Martha A. Glasscock was indebted to various other creditors. The plaintiff makes the same allegations as plaintiff Taylor as to Mrs. Glasscock's ownership of the steam sawmill, located then at the town of Hulings, but no mention is made of the deed of trust; but he attacks, as fraudulent and void, the conveyance made by Martha A. Glasscock of the 98 acres to her sister-in-law, V. A. Glasscock, and praying that it might be set aside, his debts decreed him as a lien on her personal property and her land; that the one might be sold, the other rented, and his claims paid out of the proceeds, and for general relief. He also had recorded a lis pendens on the 17th day of September, 1891, but no mention is made of it in his bill.

On the 16th day of September plaintiff A. H. Osborn presented to the circuit court judge, in vacation, his bill of complaint against M. A. Glasscock, W. M. Glasscock, A. J. Elton, and D. E. Coberly, trustee, alleging that Martha A. Glasscock and her husband had on April 22, 1891, executed to plaintiff their note for \$184.80, due day after date. He makes the same charges as to the conveyance of 98 acres to V. A. Glasscock being made with intent to defraud, hinder, and delay plaintiffs and other creditors. He says that he instituted his suit on the 10th day of August, 1891, and on that day filed his notice of lis pendens, which is exhibited with his bill. But that suit was against Martha A. Glasscock alone. He charges the giving of the deed of trust on the steam sawmill; that the deed of trust was given on the mill when in Randolph county, where it was recorded; that it had been removed into Tucker county more than six months before the 10th day of August, 1891; that the deed of trust was not recorded in Tucker county until the 22d day of August, 1891; that it was void upon its face, and that he had no actual knowledge of it before that time. He alleges that D. E. Coberly, as trustee, has advertised the mill for sale at the town of Hulings, where it is situated, to satisfy the debt of A. J. Elton, the trust creditor, and exhibits with his bill a copy of the advertisement of sale to be made on October 5, 1891, by Coberly, trustee. He prays for an

injunction to restrain the trustee and others from selling the mill; that the deed to A. Glasscock for the 98 acres may be set aside, his debt paid, etc., and for general relief. The injunction was on the 16th day of September, 1891, awarded by the judge vacation, to take effect on giving bond.

The bond was given on the 30th day of September, 1891, and the summons issued that day, with the injunction order indorsed thereon. It was served on M. A. Glasscock and W. A. Glasscock on the 5th day of October, 1891, and on D. E. Coberly, trustee, on the same day, but not in person, but by leaving a copy for him, with a member of his family, etc., D. E. Coberly being found there. It turns out that he had made the sale of the mill on that day to J. Hyre, and did not receive the summons till he returned home from the sale, in the evening of that day.

On the 14th day of March, 1893, the following decree, dismissing the petition of L. J. Hyre, from which he obtained this appeal, is entered: The decree dismisses the petition of L. J. Hyre, with costs, and decrees against defendant Mrs. M. A. Glasscock, in favor of plaintiff W. F. Stout and plaintiff H. E. Osborn, for their claims, awarding executions against her separate estate, having already decreed against her, in favor of plaintiff Taylor, but does not specify in what order they are entitled to be paid out of the proceeds of the sale of the mill.

The main ground of error assigned by appellant, Hyre, is that the court decided that he had no claim or right to the mill, good and valid as against the execution levied thereon in favor of plaintiff H. H. Taylor. The first objection made to the bill of appellant, Hyre, is that the deed of trust attempted to be given is invalid. It is as follows: This deed, made this 28th day of Feb., in the year 1890, between W. M. Glasscock, agent for M. A. Glasscock, his wife, of the one part, and D. E. Coberly, the trustee, of the other part, witnesseth, that the said W. A. Glasscock, agent for M. A. Glasscock, doth grant unto the said D. E. Coberly, the trustee, the following property [describing the steam sawmill], to secure to A. J. Elton the purchase money, viz. \$785, in various payments, the last one, of \$95, to be paid Dec. 15, 1890; and, if any of said notes be not paid when due, the trustee shall sell said mill in 30 days, by being notified by the said A. J. Elton, at public auction, to the highest bidder for cash. Witness the following signatures and seals: Signed and sealed by M. A. Glasscock and by W. M. Glasscock, and duly and formally acknowledged by Mrs. Glasscock, as her act and deed, after having it fully explained to her, and also by the husband, on the 1st day of March, 1890, in Randolph county, and there admitted to record on the 1st day of May, 1890, and in Tucker county, to which the mill had been removed in Feb., 1891, on

the 22nd day of Aug., 1891." The deed of trust, though informal, is certainly valid as the deed of Mrs. Glasscock. The most informal instrument will be regarded, in law, as mortgage, if it shows a sale was made as security, and here this clearly appears on the face of this instrument. See Jones, Chat. Mortg. § 34; Comron v. Standland, 103 N. C. 207, 9 S. E. 317; Merrill v. Ressler, 37 Minn. 82, 33 N. W. 117. Here Mrs. Glasscock signed, sealed, delivered, and duly acknowledged this instrument as her own proper act and deed, in which she was named as grantor, but by an agent. If this deed of trust of Mrs. Martha A. Glasscock, had been a conveyance of real estate, it would have passed nothing, for the certificate of acknowledgment is wholly wanting in what was then an essential part, viz. that she had willingly executed the same, and does not wish to retract it; but the counsel seem to overlook the fact that the only property thereby attempted to be conveyed was the separate personal estate of Mrs. Glasscock, while section 4 of chapter 73, as it then was (see Code, Ed. 1887), relates only to a writing purporting to convey real estate, and moreover, by section 3 of chapter 66 of the Code (see Ed. 1891), she could convey this portable sawmill in the same manner and with like effect as if she were unmarried; and, not being real estate, it was not necessary for her husband to join therein. Therefore, it was duly admitted to record in Tucker county, where the mill then was, on the 22d day of August, 1891.

The second objection made to the title of Hyre is that the steam mill was removed to Tucker county in February, 1891, and the deed of trust was not, within three months after such removal, admitted to record in Tucker county,—not until the 22d day of August, 1891, after the expiration of six months, instead of three; and therefore, by section 7 of chapter 74 of the Code, the deed of trust, for so long as it was not admitted to record in Tucker county, was void as to plaintiff Taylor, and the other creditors of Mrs. Glasscock; and by section 9 of chapter 74 the word "creditors" extends to and embraces all creditors who, but for the deed or writing, would have had a right to subject the property conveyed to their debts. Taylor's suit was instituted against Mrs. M. A. Glasscock by issuing summons on the 6th day of August, 1891, which was served on the 17th day of August, 1891, and his *lis pendens*, in which he specifically sets forth and describes the steam sawmill, was admitted to record on the 6th day of August, 1891. The bill was filed on the first Monday in October, 1891; summons returned, "Executed on Mrs. M. A. Glasscock," the debtor; and order of publication taken against Miss V. A. Glasscock, the grantee of the 98 acres. The law requiring a memorandum of the *lis pendens* to be recorded was introduced as part of the Code of 1849, without the recommendation of the revisors

(see section 5, c. 186, Code 1849. See Code, Ed. 1860, c. 186, § 5), attachment having been added by Act 1850-51; section 13, c. 139, present law (Code, Ed. 1891). It is seen that it is confined to real estate; that it never had, and does not now have, any application to personal property, and therefore has no bearing whatever in the case, on the only point now involved.

Our first case on the subject of *lis pendens* is *Lyne v. Jackson*, 1 Rand. (Va. 1822) 114, soon followed by *Newman v. Chapman* (1823) 2 Rand. (Va.) 93, which has remained a leading case on the subject, and, together with *Murray v. Ballou*, 1 Johns. Ch. 566, is very frequently cited. In *Newman v. Chapman* it is said that the rule of *lis pendens* is founded upon its necessity to give effect to the judgments and proceedings of a court of justice; that without such a rule they would be rendered abortive, where the recovery of specific property is the object. The reason and necessity of the application of the rule of *lis pendens* to personal property, with certain exceptions, such as negotiable securities, would seem to be at least as great as its application to real property. See *Freem. Judgm.* § 194, and note; *Newman v. Chapman*, 14 Am. Dec. 766, 779. Yet quite a number of authorities deny its application to personal property. In *Benn. Lis Pend.* c. 5, p. 126 et seq., there is quite a full citation and review of authorities on this point; the author reaching the conclusion that the weight of authority is in favor of the application of the rule to personal property, with certain exceptions, such as negotiable securities, etc. *French v. Loyal Co.*, 5 Leigh, 627, was decided in 1834, and held, among other things, (1) that the *lis pendens* could only affect a purchaser of the subject in controversy, who purchased from a party to the suit; (2) that the *lis pendens* must be judiciously and diligently prosecuted. In *Bank v. Craig* (1835) 6 Leigh, 399, it was held that the effect of the rule is to subject the pendente lite purchaser of the subject of the suit to a decree only in that suit, not in another. In *Smith v. Browne* (1838), 9 Leigh, 293, the inference is that in a proper case it applied to personal property. In *Stout v. Vause* (1842) 1 Rob. (Va.) 169, an amended bill was filed; but before that was done the absent defendant, whose land was sought to be subjected to sale, returned, and, for a valuable consideration, sold and conveyed the land. It was held the rule did not affect such a purchaser, because he had purchased before the proceedings were had. The case of *Phillips v. Williams* (1848) 5 Grat. 259, was a case of long standing, and, no doubt, of hardship on the pendente lite purchaser, in which the land was charged with an annuity, and was directed to be sold, without noticing such purchaser. This case, no doubt, had something to do with the act requiring the recordation of a memorandum of the *lis pendens*. From the case of *Carrington v. Didier* (1851) 8 Grat. 260, the inference might be drawn that

the rule was regarded as applying to personal property, and there is no doubt that it was held applicable to slaves. See *Smith v. Browne* (1838) 9 Leigh, 293. I do not regard this point in the case as important, so far as appellant L. J. Hyre is concerned, for his attempted purchase was at a sale which the trustee, Coberly, had been enjoined from making.

The order of injunction was served on Coberly, the trustee, on the evening of the day on which he made the sale, but after it had been made; but the evidence shows that after he had taken possession for the purpose of selling, and had advertised the sale, but before the sale, he was told of the bill of injunction, and that the order of injunction restraining the sale under the deed of trust had been granted. That such actual notice of the restraining order is of binding force, though not served, is well settled, though not for proceeding against him for contempt. See 2 *Daniell*, Ch. Pr. (6th Am. Ed.) 1684, note a. It is sufficient for the court to know that the person enjoined had actual knowledge of the order. 2 *High*, *Inj.* §§ 1422, 1444; *Mead v. Norris*, 21 Wils. 310. The sale made by Trustee Coberly was therefore made in violation of the order of injunction entered and perfected on the 30th day of September, 1891. See *Turner v. Gatewood*, 8 B. Mon. 613; *Byne v. Byne*, 54 Ga. 257. So that the sale or attempted sale by the trustee should have been held for nought, as made or attempted to be made in violation of the injunction; and the mill should be sold, under the direction of the court, and the proceeds paid over to those entitled.

Is there enough in this record by which to determine who is entitled? Is the trustee, Coberly, to be treated as a pendente lite purchaser, as though his purchase was made on the 22d day of August, 1891, when it was first recorded in Tucker county, where the mill then was? In the case of *W. F. Stout*, the summons was issued on the 17th day of September, 1891, and served on Mrs. Glasscock on the 5th day of October, 1891, when the bill was filed, and this was after the deed of trust had been recorded. In the case of *H. H. Taylor*, it was issued on the 6th day of August, 1891, served on the 17th day of August, 1891, and bill filed — day of September. In the case of *A. H. Osborn* the summons was issued on the 10th day of August, 1891, served on the 17th day of August, and the bill of injunction was filed and an order of injunction entered on the 30th day of September, 1891. Section 7 of chapter 74 of the Code provides that the writing shall not be void, in respect to the interests of any married woman, \* \* \* if, before the end of three months after the disability shall cease, the writing be recorded in the county to which the property has been removed. This saving can have no application to this case, for the reason that she is the grantor in the deed of trust, not the beneficiary, and it relates to her separate estate. When the trust deed was admitted to record

in Tucker county, on the 22d day of August, 1891, Taylor and Osborn were creditors with pending suits, who, but for the deed of trust, would have a right to subject the sawmill to their debts; and the statute makes it voidable as to such creditors, not having been recorded in Tucker county within three months after the removal of the sawmill thereto. They had commenced the only legal proceedings the law gave them to subject the mill to the satisfaction of their debts. It was then in the possession of Hyre and Constable, who had rented it of their debtor, Mrs. Glasscock; and it so remained until after the injunction against the sale under the deeds of trust was served and became effective. The subject of the suit was a specific thing, necessarily to be affected by decrees in their suits; and the mill was, in their bills, so particularly described and pointed out that any one, by reading the bills, would know what steam sawmill was sought to be subjected to sale. And the trustee, Coberly, knew before the 22d day of August, 1891, that these two suits had been instituted for that purpose. For a discussion of this point, see *Norton v. Birge* (1868) 35 Conn. 250, 257; *Hoyt v. Jones* (1872) 31 Wis. 389. See *Grant v. Bennett* (1880) 96 Ill. 513, 529; *Benn. Lis Pend. § 299 et seq.*; *Freem. Judgm. § 201*, and cases cited. *Radford v. Carville* (1879) 13 W. Va. 572, and *Hughes v. Hamilton* (1882) 19 W. Va. 366, and *Bruff v. Thompson* (1888) 31 W. Va. 16, 6 S. E. 352, were decided under chapter 66 of the Code, as it is in the edition of 1887, which left the right to subject a married woman's separate estate to the payment of her charges thereon, as a purely equitable one, enforceable only in a court of equity. In *Hughes v. Hamilton* it was held that such proceeding is in the nature of a proceeding in rem. By this the court did not mean to say that it was a technical proceeding to determine the liability of a specific thing to the payment of plaintiff's charge or claim, no matter who might be the owner, and having jurisdiction binding all the world by the decree; but they used it in a common, secondary sense,—that it was a direct proceeding, inter partes, to subject a particular thing, as the defendant's separate estate, to the payment of plaintiff's charge thereon. Payment out of the particular thing was all he could ask, as he could get no personal decree against her; but such decree would not be binding, in any sense, on all the world. See 2 *Freem. Judgm. §§ 606, 607*. The court also held in that case that a general creditor of a married woman has no lien or charge upon the separate estate prior to the institution of his suit in equity to subject such separate estate to the payment of his debt, but that such debt, after suit brought, becomes a quasi lien, at least, upon such estate, and for the satisfaction thereof, and that such creditors are allowed priority in the order of time in which they bring their suits. What the court means, I infer, is that it is an incipient or inchoate lien or charge, which becomes fixed

and determined by final decree, and that the rule of *lis pendens*, while it applies, keeps it from being rendered abortive by intermeddlers. In *Bruff v. Thompson* there is an interesting discussion of the subject. If it is regarded as in the nature of an equitable lien, then the general rule is that it does not create a lien upon tangible personal property, unless the creditor procures the appointment of a receiver, or in some way causes the sequestration of the property. See 2 *Beach, Mod. Eq. Jur. § 927*. That, as we have seen, was done in this case, so far as it could, in any view, be regarded as necessary. On the 12th day of June, 1891, as the day on which it took effect, chapter 66 was re-enacted so as to read as now found in the Code (Ed. 1891), and section 16, for the first time introduced, reads as follows: "A claim against the separate estate of a married woman for the payment of which she has charged the same shall be enforced only in a court of equity in rem and not in personam." Under this law these suits were brought. I take for granted that this was only declaratory, and that the term "in rem" was used in its secondary sense, already commented upon. And, apart from this case, the character of such quasi lien, if it means anything more than a *lis pendens*, taken in connection with the peculiarity of the rent, need not be further discussed, for by an act taking effect on the 16th day of February, 1893, chapter 66 of the Code was again amended and re-enacted. See chapters 3, 43, Acts 1893. These important amendments, in manifest advancement of the property rights of married women, remove several defects in the law, as heretofore construed; bringing her nearer, in her rights and liabilities, and in the remedies and methods of procedure of her creditors, to the condition of a *feme sole*. They took effect some 26 days before the entering of the decree here complained of, but have no bearing on this case, as far as I can see.

What may still be due on the deed of trust does not appear to have been ascertained. That should be done, and the mill should be sold, under the direction of the court, and the proceeds applied to the debts of Taylor, Osborn, those claiming as beneficiaries under the deed of trust, and of plaintiff Stout, in the order and according to the principles herein stated. For the reasons given, the decree of the 14th day of March is reversed, and the cause remanded for further proceedings.

(115 N. C. 590)

COMMISSIONERS OF BURKE COUNTY  
v. CATAWBA LUMBER CO. et al.<sup>1</sup>

(Supreme Court of North Carolina. Dec. 27,  
1894.)

FLOATABLE STREAM—WHAT CONSTITUTES—INJURY  
TO COUNTY BRIDGE—INJUNCTION—SUIT  
BY COMMISSIONERS.

1. Where a nonnavigable river is suitable for floating logs only during freshets occurring 8 to 10 times each year, which last from 24

<sup>1</sup> For concurring opinion of Avery, J., see 20 S. E. 847.

to 48 hours, the public has no easement therein for the floatage of logs.

2. Code, § 704, authorizes counties to sue in the name of the county commissioners. Section 2055 provides that actions for damages for injuries to public bridges shall be brought in the name of the state. *Held*, that the county commissioners may sue in their name to "enjoin" an injury to a county bridge.

Appeal from superior court, Burke county; Allen, Judge.

Suit by the board of commissioners of Burke county against the Catawba Lumber Company and others for an injunction. From a decree dissolving a temporary injunction, plaintiffs appeal. Reversed.

S. J. Ervin and J. T. Perkins, for appellants. Chas. A. Moore and I. T. Avery, for appellees.

MacRAE, J. In *Gwaltney v. Land Co.* (decided at this term [20 S. E. 465], and previously in 111 N. C. 547, 18 S. E. 692), we carefully examined the subject involved in this controversy, and approved the issue framed by his honor establishing that which is necessary to create an easement for the purposes of floatage in the nonnavigable streams of this state. We repeat: "It is not necessary, in order to establish the easement in a river, to show that it is susceptible of use continuously during the whole year for the purpose of floatage, but it is sufficient if it appear that business men may calculate with tolerable regularity as to the seasons the water will rise to and remain at such a height as will enable them to make it profitable to use it as a highway for transporting logs to market or mills lower down." We approved the instruction: "If the freshet should arise from natural rainfall for a sufficient period to make it useful to the public, it would be considered a floatable stream. Temporary rise, passing quickly down, is not sufficient to make a stream floatable, and would not be sufficient if the freshet should continue up for even two or three days, and be reasonably expected every year." To apply these principles to the present case, his honor has carefully found the facts as to the manner of floating logs down these streams on ordinary water by a kind of improvised slack-water navigation, and by rolling the logs over the shoals. He has also found the manner adopted by the defendant of banking large numbers of logs along the streams, that they may be carried down at the will of the current in times of freshet, and without further assistance or direction; and that these rivers are wide and shallow streams, with frequent shoals, and it fully appears that they are useless for floatage purposes in ordinary water. While the water is higher in the winter than in the summer, the increase in the depth of the streams occasioned by the rainfall, and sufficient to float logs, occurs eight or ten times

each year, and the water subsides in 24 or 48 hours. We do not concur in the conclusion of law reached by his honor on the facts found. It is manifest that this method of transportation is confined to the occasions of rapid rise and fall of the streams, advantage of which must be taken by previous preparation for freshets, and without power to control the timber when carried off by the current. We are of the opinion that this floatability on the occasional and tolerably regular rises of the river must depend on more than a rapid freshet, subsiding as rapidly. These streams "are entirely the subject of private ownership, and are generally included in the grants of the soil, and the owners may make what use of them they think proper, whether it be for fishing, milling, or other lawful trade or business. The only restriction upon this right of ownership arises, ex necessitate, from the nature of running water, and it is that the owner shall so use the water as not to interfere with the similar rights of other proprietors above or below him on the same stream." *State v. Glen*, 7 Jones (N. C.) 321. Even if the streams were of such character as to give the public an easement for floatage upon them, we should not hold that this right could be exercised without due care for the avoidance of injury to the interests of the riparian proprietors and the owners of the soil beneath the bed of the stream. And, on the other hand, it would seem that if these were floatable streams, in which the public had an easement for transportation, it would be the duty of the county commissioners, certainly in the absence of express authority to the contrary, to so construct the bridges on their highways as to permit the use of the rivers for the purposes of floatage. Being of the opinion that upon the facts found *Catawba* and *Johns* rivers, in Burke county, at the points where the said bridges are situate, are not subject to an easement in the public for the floatage of logs, we declare that there is error in the dissolution of the restraining order. The injunction should have been made perpetual. We think also that under the general powers granted by section 704 of the Code to the county commissioners "to sue and be sued in the name of the board of commissioners" they had the power to bring this action for an injunction. For the recovery of damages for injury to the bridges, the statute (section 2055,<sup>1</sup> Code) provides the remedy. If the public interest shall at any time require the opening of these streams for floatage, and the raising of the county bridges, the matter is entirely in the hands of the legislature, subject to prudent constitutional restrictions as to vested rights. Reversed.

<sup>1</sup> Code, § 2055, provides that actions for damages for injuries to county bridges shall be brought in the name of the state.



(115 N. C. 530)

## SPRAGUE v. BOND et al.

(Supreme Court of North Carolina. Dec. 27, 1894.)

## ABSOLUTE DEED AS MORTGAGE—PLEADING AND PROOF.

Equity will not declare a deed absolute on its face to be a mortgage, in the absence of allegations and proof that it was procured through ignorance of the grantor, or through mistake, undue influence, or fraud.

Appeal from superior court, Caldwell county; Winston, Judge.

Action by W. D. Sprague against L. N. Bond and others. There was a judgment for plaintiff, and defendants appeal. Reversed.

S. J. Ervin, for appellants. M. Silver and L. T. Avery, for appellee.

SHEPHERD, C. J. Several exceptions are presented in the record, but in order to dispose of the appeal it is only necessary to consider the ruling of his honor in reference to the deed executed by the plaintiff to the defendant Rebecca B. Adams. This deed is absolute in its terms, and recites that it was made in consideration of \$2,000 paid by the grantee. The plaintiff contends that this deed was intended as a security for certain indebtedness, but there is no allegation that the clause of defeasance was omitted by reason of a mistake of the draughtsman. Indeed, it appears that the instrument was prepared by counsel learned in the law, and the plaintiff himself testifies that he cannot say that anything was omitted which was intended to be inserted in the same. Neither is there any allegation or proof that the deed was procured by reason of undue advantage, or ignorance of the plaintiff, or that it was executed under circumstances of oppression, growing out of the relation of debtor and creditor, or of any other species of fraud whatsoever. The case is simply one where an absolute deed is delivered to the grantee through her agent, and the question is whether, under the circumstances above mentioned, it can, under our decisions, be converted into a mortgage upon the bare allegation and proof that it was so intended by the parties. There is a practical uniformity of judicial decision that an absolute deed may be shown to be a mortgage, but there is a great diversity of opinion as to the grounds upon which this well-known equitable jurisdiction is exercised. Perhaps a majority of the cases hold that fraud or mistake in the preparation or as to the form of the instrument is not an essential element in an action for relief; and in others it is held that it is deemed a fraud on the part of the grantee to deny that the instrument was intended as a security, and that equity takes jurisdiction on this ground. In Georgia it is enacted that fraud in the procurement of the instrument is the issue to be tried; and in Pennsylvania, for the purpose of upholding titles, a statute has been passed de-

claring that an absolute deed cannot be shown to be a mortgage except by a written defeasance, signed, sealed, acknowledged, and recorded. 1 Beach, Mod. Eq. Jur. 407. In other states, says Mr. Beach, the relief is based "upon some ordinary ground of equitable jurisdiction, such as fraud, accident, or mistake"; and this is the rule, he remarks, in North Carolina, Alabama, Connecticut, Florida, Kentucky, Rhode Island, South Carolina, and perhaps Michigan. See, also, 1 Jones, Mortg. 310. That these authors are correct in their classification as to North Carolina is abundantly manifest from our decided cases. The decisions are so numerous, and the doctrine is so well established, that we need refer to only a few of our authorities: In *Brown v. Carson*, Busb. Eq. 272, the court said: "The bill in effect seeks to correct a deed absolute on its face, and to hold it as a security for a debt. To do this it must be alleged, and of course proved, that the clause of redemption was omitted by reason of ignorance, mistake, fraud, or undue advantage." In *Briant v. Corpening*, Phil. Eq. 325, the court said: "The bill is filed for the purpose of converting a deed absolute on its face into a mortgage. To accomplish this, it must be alleged and proved that the clause of redemption was omitted by reason of ignorance, mistake, fraud, or undue advantage taken of the bargainor. There is no such allegation in the present bill. In one place it is stated that the plaintiff 'executed a deed of conveyance for the above-described land to defendant Corpening, absolute upon its face, but intended simply as a mortgage, as will more fully appear by the proofs.' To this is added that: 'Plaintiffs show that it was the contract and agreement of the parties that defendant Corpening, having paid the debt to Harper, took the deed absolute on its face, but agreed to make a title bond at a subsequent day to the plaintiffs, conditioned to reconvey on the payment of the debt, interest, etc., on the judgment in favor of Harper.' These are all of the allegations on the subject, and not one of them amounts to a statement that the clause of redemption was omitted by reason of ignorance, mistake, fraud, or undue advantage. The necessity of such an allegation is shown by the case of *Brown v. Carson*, Busb. Eq. 272, and by several other cases contained in 3 Battle, Dig. tit. Mortgages."

We have thus quoted at length from the opinion of the careful and accurate Justice Battle because the allegations in the case then before the court are as strong, if not stronger, than the one now under consideration. Whatever may be the language of some of the early cases, the doctrine laid down in those we have cited has been consistently adhered to ever since. See *Link v. Link*, 90 N. C. 238, in which a number of cases decided before and since *Corpening's Case* are cited in support of the principle therein stat-

ed. See, also, *Egerton v. Jones*, 102 N. C. 278, 9 S. E. 2; *Norris v. McLam*, 104 N. C. 159, 10 S. E. 140; and *Green v. Sherrod*, 105 N. C. 197, 10 S. E. 986. The allegations in the *McLam* Case were much stronger than in this, and the court held that the complaint did not set forth a cause of action. The court said, "It is well settled that, in order to convert a deed absolute on its face into a mortgage, it must be alleged, and of course proved, that the clause of redemption was omitted by reason of ignorance, mistake, fraud, or undue advantage. *Streator v. Jones*, 1 Murph. 449; *Bonham v. Craig*, 80 N. C. 224." It was only after a long struggle that the English courts of chancery entertained a bill to convert an absolute deed into a mortgage, it being stoutly contended that it would partially abrogate the statute of frauds. The jurisdiction was finally exercised both in England and America, but, as we have seen, there is much conflict as to the principle, as well as the conditions under which the relief is granted. We see no reason to depart from the conservative view taken by this court, and especially in consideration of the fact that such questions—seriously involving, as they do, the stability of titles—are no longer tried by learned chancellors, whose training and experience better enable them to detect the falsity of claims of this character, and to guard against which the statute of frauds was wisely enacted.

The existence of a debt, the inadequacy of price, the retention of possession may, in connection with other circumstances, be evidence of fraud, undue advantage, or oppression, where proper allegations are made; but, as we have said, we can find nothing in this case which brings it within the principle upon which relief may be given. Neither can we see how the principle that parol evidence may be admitted to rebut an equity applies, as the case is now presented. The defendant Rebecca, under the terms of her deed, was the equitable owner of the lands for which the grants have been issued. The land has been sold, and the controversy relates only to the proceeds of the sale. Under her deed she is entitled to those proceeds, and it is unnecessary—nor does she seek a specific performance, so as—to acquire the legal title to the land. Being the equitable owner of the proceeds, under the deed, it may be shown that she has conveyed or abandoned the same, or that she is estopped from claiming them; but, for the reasons we have given, the terms of the deed under which she claims cannot be contradicted, as the case now appears before us. We think there was error in the ruling in question, and that there should be a new trial. As the issues as to abandonment were not passed upon by the jury, we forbear a discussion of the exceptions relating to them. New trial.

AVERY and CLARK, JJ., did not sit on the hearing of this case.

(115 N. C. 526)

### PROBST v. MATHIS.

(Supreme Court of North Carolina. Dec. 27, 1894.)

#### ABATEMENT—ANOTHER ACTION PENDING—HEARSAY EVIDENCE.

1. An action to recover possession of land is not barred by another already pending, brought by a number of plaintiffs, of whom the present is one, against the same defendant, concerning a tract of land of which that here in disputed possession is but a part, and merely to establish the will of a former owner, alleged to have been destroyed.

2. Evidence of a destroyed record cannot be admitted in the shape of testimony by one that he went to the clerk's office, and asked to be shown a certain document, and that the clerk then took a book, read to him from it, and said that was the document.

Appeal from superior court, Catawba county; W. R. Allen, Judge.

Action by J. M. Propst against Julius Mathis to recover possession of land. There was a judgment for plaintiff, and defendant appeals. Reversed.

The defendant, among other defenses, relied upon the pendency of a former action at the commencement of this action, and one issue submitted to the jury by consent of the parties was as follows: "Was there another action pending between the plaintiff and defendant at the commencement of this action, involving the controversy in this action?" The record in said former action was introduced in support of said plea, and a copy of the summons, complaint, answer, and judgment therein are herewith filed as a part of this case. It was admitted that Joseph Propst, who was a party to said former action, died before the commencement of this action, and that the land described in the complaint in this action is a part of the land described in said former action. The court was of opinion that said former action did not involve the controversy in this action, and was no bar, and instructed the jury to answer said issue, "No," to which defendant excepted. The plaintiff, J. M. Propst, was examined as a witness in his own behalf, and testified as follows: "I came to Morganton in 1853, to the clerk's office. W. S. Suderth was then clerk of superior court. I asked him to show me the will of Adam Overwinters. He took a book then in his office, and read it to me, and said it was the will of said Adam. It was a large bound book he read from." And witness was here shown a will book from clerk's office, of date since 1868, and he said the book read from was like that. The will devised the land to the wife of Adam Overwinters for life, and then to two daughters. Evidence was offered to show that the records of wills in Burke county were destroyed in 1805-66; that the record and original of the will of Adam Overwinters could not be found. The plaintiff relied upon the will of Adam Overwinters in deducing his title. The defendant excepted to the admission of the evidence as to the contents of said will. There was oth-

er evidence to which no exception was taken, and no exception has been taken to the instruction given to the jury. Verdict and judgment for plaintiff. Appeal by defendant. Notice of appeal waived. Upon affidavit and certificate, defendant allowed to appeal without bond. Case settled upon disagreement of counsel.

S. J. Ervin and I. T. Avery, for appellant.  
J. T. Perkins, for appellee.

**BURWELL, J.** The record which was introduced in evidence to sustain the plea of the pendency of another action does not effect that object. In that action there are a number of plaintiffs, of which the plaintiff J. M. Propst is one. That controversy is concerning a tract of land of which the land in dispute here is only a part. The rule is that the same plaintiff shall not sue the same defendant twice for the same thing; and when the parties are the same, and the thing sued for is the same, the right shown in both actions must be identical. *Casey v. Harrison*, 2 Dev. 244. The pendency of that action did not render the bringing of this one unnecessary and vexatious. The parties are not the same, and the purposes of the actions also differ. In that suit the object which those plaintiffs principally sought to accomplish was the establishing of the will of Adam Overwaters, the record of which had been destroyed, as they alleged. They did not seek to recover possession of the tract of land. In this action one of those plaintiffs demands the possession of 24 acres (which he alleges that the defendant wrongfully withholds from him), and damages for its detention.

We think that the evidence which the plaintiff was allowed to introduce in order to establish the fact that Adam Overwaters' will was probated, and also its contents, should have been excluded. It seems to us to have been mere hearsay. He was allowed to tell what the clerk told him. The fact that the one whose unsworn statement was thus allowed to go to the jury as evidence was the keeper of the record, the contents of which it is proposed to establish, does not afford a sufficient reason for the violation in this instance of the well-settled rules governing the admission of testimony. No witness, so far as this record shows, was produced who could say, upon oath and subject to cross-examination, that the will of Adam Overwaters was ever recorded in Burke county. Indeed, so far as appears, no witness was called who testified that any such will ever existed. We do not think that the plaintiff should have been permitted to prove the existence of this will, its probate, and its contents by the mere statements of the clerk. To allow this would be to give to his oral communications the effect which is given by law to his solemn certificate, for the use of which as evidence the statute provides. Nel-

son v. Whitfield, 82 N. C. 46, seems to sustain the ruling of his honor. In that case, however, the fact that the will which was there in controversy had been probated was proved by the testimony of one who had himself read it on the records. Its contents were proved by the oath of other witnesses, who could only testify that they had heard others read what was said to be the will, or a copy of it. The learned justice who delivered the opinion of the court in that case says that "the evidence offered on the part of the defendants relating to the contents of the paper purporting to be the will was slight, and, taken by itself, might not have been sufficient to satisfy the jury of the contents; but it was some evidence, and, when taken in connection with the facts proved, the long possession of the defendants and their ancestor in conformity with the alleged provisions of the will, and the long acquiescence of the plaintiffs in the exclusive possession of the land by the defendants, it makes a very strong case for them." While it may have been allowable in that particular case, in connection with the facts proved, to permit evidence of what a person read as the will, we do not think in this case any sufficient reason exists for allowing the plaintiff to tell what the clerk told him. We are not able to see how the fact that he whose words are to be repeated was the keeper of the record that he professed to be reading can alter the wholesome rule that forbids the admission of such evidence because it is mere hearsay,—a statement made neither under oath, nor subject to cross-examination. There is, as it seems to us, no greater presumption that the clerk would read correctly than that he would speak truthfully about the contents of the will. The same sound reason that would require us to exclude what he said, if it was offered, compels us to exclude what he read. New trial.

(115 N. C. 773)

#### STATE v. SHERMAN.

(Supreme Court of North Carolina. Dec. 27, 1894.)

#### JURY—QUALIFICATIONS OF TALESMAN—PAYMENT OF TAXES.

Under Act 1889, c. 559, requiring the county commissioners to select as jurors, on the first Monday of September, 1892, and every four years thereafter, such persons as have paid their taxes for the preceding year, a person so selected, who had paid his land tax for the year preceding the first Monday of September, 1892, is competent as a talesman in a trial in April, 1894, though he has not paid his taxes for 1893.

Appeal from criminal court, Buncombe county; Jones, Judge.

M. Sherman, a negro, was convicted of living in adultery with a white woman as his wife, and appeals. Affirmed.

H. B. Carter, for appellant. The Attorney General, for the State.

**MacRAE, J.** This case was tried at April term, 1894. The talls juror who was challenged for failure to pay his taxes for the previous year had paid his taxes for 1892. By the provisions of section 1722 of the Code as amended by Act 1889, c. 559, the county commissioners were required on the first Monday of September, 1892, to select from the tax returns of the preceding year the names of such persons only as had paid tax for the preceding year, and are of good moral character and of sufficient intelligence. Previous to the amendment, this duty was to be performed on the first Monday in September in each year; now it is to be done on the first Monday in September, 1892, and every four years thereafter. The qualification of a regular juror then was that his name should have been on the tax return for the year preceding the first Monday in September, 1892, and that he should be of good character, etc. A talls juror is required to possess the same qualifications as one of the regular panel, with the additional one of being a freeholder. *State v. Carland*, 90 N. C. 668; *State v. Whitley*, 88 N. C. 691. So it was not necessary that the tallsman should have paid his tax for 1893.

We can see no merit in the second exception. The case does not purport to set out all of the testimony. The one circumstance that Hill had associated with white men, offered to prove that he himself was a white man, while standing alone, might have little weight, but was competent either as corroborative of other evidence, or as substantive evidence in itself, to be submitted to the jury. *Hopkins v. Bowers*, 111 N. C. 175, 18 S. E. 1.

No error.

(115 N. C. 789)

#### STATE v. NORWOOD.

(Supreme Court of North Carolina. Dec. 27, 1894.)

##### HOMICIDE—DEADLY WEAPON—MURDER IN THE FIRST DEGREE.

1. The pushing of a pin down an infant's throat, producing its death thereby, is killing it with a deadly weapon.

2. One is presumed sane.

3. One deliberately determining to take a child's life by putting pins down its throat, who carries his purpose into execution, producing the child's death, is guilty of murder in the first degree.

Appeal from superior court, Durham county; Shuford, Judge.

Ella Norwood was convicted of murder, and appeals. Affirmed.

C. E. Turner and F. A. Green, for appellant. The Attorney General, for the State.

**AVERY, J.** If the prisoner did not put the pins in the child's mouth, or if, though she placed them there, they were not the instrumental cause of its death, she was not guilty, and so the court told the jury. If the jury found—as they must have done, un-

der the instructions of the court—that she brought about its death, it was a killing with a deadly weapon. The question whether an instrument with which a personal injury has been inflicted is a deadly weapon depends, not infrequently, more upon the manner of its use than upon the intrinsic character of the instrument itself. *State v. Huntley*, 91 N. C. 620. We may expect death to ensue from pushing such a pin down the throat of an infant, just as we may look for death or serious bodily harm as a consequence of firing a pistol into a crowd of human beings, or at a particular person. The intentional killing with a deadly weapon, when proved or admitted, raises a presumption of malice; and such evidence would, before the enactment of the recent statute establishing and defining the two grades of that crime, have amounted to prima facie proof of murder. But now, though the fact of such killing still gives rise to the presumption of malice, and is prima facie evidence of murder in the second degree, it does not show that the act was done deliberately or after premeditation. *State v. Fuller*, 114 N. C. 899, 19 S. E. 797; 2 Bish. Cr. Law, § 703; *Com. v. Drum*, 58 Pa. St. 9; *People v. Cox*, 76 Cal. 235, 18 Pac. 332. In order to conviction of murder in the first degree, as the judge below properly instructed the jury, it was necessary that the state should show that the prisoner deliberately determined to take the child's life by putting the pin or pins into its mouth, and thereupon (it being immaterial how soon after resolving to do so) carried her purpose into execution, and thereby caused its death. As to the quantum of proof necessary to conviction of murder in the first degree, the court adopted the language of the prayer submitted for the prisoner, and of course left no ground for objection.

We cannot conceive how the jury were misled by the failure of the court to state in terms that the pins, used in the manner described by the witnesses, would be deadly weapons, or by the general instruction that the unlawful killing, if done, would in this case have raised a presumption of malice, since the jury were explicitly made to understand that the prisoner was not guilty of any offense unless the death of the infant was caused by her pushing the pins into its mouth. So it was impossible, under the instructions given, and upon the evidence, to find that there was an unlawful killing, unless it was effected by such use by her of the pin or pins.

"By our decisions," said the court in *State v. Vann*, 82 N. C. 636, "matters of extenuation and excuse, or discharge by reason of insanity, must be shown by him who sets it up." The prisoner offered no testimony tending to show insanity, and the presumption in favor of sanity was therefore un rebutted.

We concur with the judge below in the view that there was no aspect of the evidence in which the offense of killing, if done

by the prisoner in the manner described by the witnesses (and so it must have been done, if at all), could be mitigated to manslaughter. It is possible that in such a case there might have been testimony tending to show that the killing was done by putting pins into the mouth of an infant carelessly, not purposely; and, if any such evidence had been offered, it would have been proper to have submitted to the jury, with suitable instructions, the question whether the mitigating circumstances relied on were proved. After considering the carefully prepared arguments of counsel upon the assignments of error, we feel constrained to hold that the judgment should be affirmed.

(115 N. C. 467)

**BLACK v. ABERDEEN & W. E. R. CO.**  
(Supreme Court of North Carolina. Dec. 4, 1894.)

**ACTION AGAINST RAILROAD COMPANY — FIRES — COMBUSTIBLE MATERIAL ON RIGHT OF WAY.**

1. A railroad company permitting dried grass and straw, etc., to collect on its roadbed is liable for damages caused by a fire communicated thereto by sparks from an engine, and spreading therefrom to adjoining land.

2. A complaint alleging that defendant negligently permitted fire to be communicated from its engines or property to the lands adjoining its railroad and right of way, by which fire plaintiff's property was destroyed, sufficiently alleges negligence on the part of the company in allowing dried grass on its right of way.

Appeal from superior court, Moore county; Brown, Judge.

Action by A. M. Black against the Aberdeen & West End Railroad Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

The charge of the trial court was as follows: "It is admitted by the plaintiff that the engine was in good condition, and had a proper spark arrester. It is useless to consider all the evidence relating to that. The only claim of negligence made by the plaintiff is upon the ground of rubbish on the right of way or upon or near the roadbed. The law does not require a railroad company to clear up all of its right of way or cut down all the trees, except so far as to render its track and roadbed entirely safe. That is a duty it owes to the passengers, and not the public. Nor does the law require that the company shall cut down all the growing shrubbery on its right of way, and it is not obliged to plow up or shrub off its right of way. But there is a duty a railroad company owes to the public and the neighboring landowners, and that is this: The railroad company must keep its track and roadbed clear of all such substances as are liable to be ignited by sparks or cinders from its engines. A railroad company is required not only to keep its track and roadbed free from such inflammable substances, but it must go to the extent of keeping a reasonable distance on its right of way beyond its track and roadbed free from such substances. Whatever

distance from its track on its right of way that may be reasonable in the exercise of ordinary care to prevent such inflammable and combustible substances being ignited by its engines must be kept free from them. If the company fails in this duty to the public it is liable in damages to those who are directly injured thereby. If it is necessary to keep its entire right of way free from combustible substances to prevent ignition from engine sparks, then its whole right of way must be kept clear of those inflammable and combustible substances. You must first ascertain whether or not the fire was occasioned by sparks or fire from the engine. The burden of proof is on the plaintiff to show this. If plaintiff has not shown it, that ends the case, and you should answer first issue, 'No,' and find for defendant. If you find that the fire was occasioned by the fire or sparks from the engine, then you must go on further, and inquire whether or not the defendant company has been negligent, and whether or not the damage to plaintiff has been proximately caused by such negligence. If so, you should answer first issue, 'Yes.' If the jury find from the evidence that the defendant company permitted dead grass and straw, dried-up leaves, and an accumulation of combustible matter to exist on its right of way so near the track as to collect fire from the engine, and it did collect fire from the engine, and the fire spread across the lands of the right of way and across the lands of another person to plaintiff's land, defendant company would be liable to plaintiff for damages sustained."

Black & Adams and W. C. Douglass, for appellant. J. W. Hinsdale, for appellee.

BURWELL, J. The control which railroad companies have over the land covered by their rights of way is given to them that they may properly perform their quasi public duties. They have the authority to keep the land thus subjected to their use in such condition that their use of it will not endanger the property of others. Having this authority, they must exercise it, or else pay for such damage as comes to one who, himself being free from fault, suffers injury from a neglect to keep it in the required condition. We think the charge of his honor very properly presented the matters to the jury. The concluding sentence of this charge as set out in the record was itself a sufficient statement of the law applicable to the facts of this case. There was a motion made before us to dismiss the action because the complaint did not state facts sufficient to constitute a cause of action. The allegation of the complaint is that the defendant "negligently permitted fire to be communicated from their engines or property to the lands adjoining their railroad and right of way, by which said fire, the spread and extension thereof, plaintiff's said turpentine was burned and destroyed." This was a sufficient allegation of negligence on the part of defendant, resulting in damage to

1 For opinion on rehearing, see 20 S. E. 909.

the plaintiff, and it was supported on the trial by evidence sufficient, if believed by the jury, to establish those facts upon which the liability of the defendant to the plaintiff depended, which are succinctly stated in the closing portion of the charge. No error.

(115 N. C. 700)

**SUMMERS v. MOORE et al.**

(Supreme Court of North Carolina. Dec. 27, 1894.)

**ACTION TO ESTABLISH TRUST—PARTIES—OBJECTION.**

In an action to establish a trust in land against a surviving wife, as executrix of her husband's estate, and his heirs, such heirs cannot complain, on the death of the wife, that the wife's heirs, who should be parties, in order to bind them, are not parties, whether the heirs of the wife and the heirs of the husband are the same or different persons.

On rehearing. Dismissed.

For prior opinion, see 18 S. E. 712.

The defendants in this action were Eliza Moore, executrix of the estate of her deceased husband, George J. Moore, and his heirs. Pending the action, Eliza Moore died. It appeared that part of the land in dispute, and embraced in the judgment in favor of plaintiff, was conveyed by Austin Conley to George J. Moore and wife, Eliza Moore, jointly. Neither Eliza Moore, individually, nor her heirs, were made parties defendant.

Justice & Justice and J. L. O. Bird, for petitioners. Armfield & Turner and P. J. Sinclair, for defendant.

**OLARK, J.** It is true, as contended, that, as to the substituted 10 acres, the heirs of the wife should be parties defendant, to bind them. If these same defendants, heirs of the husband, are, as is probable, the heirs of the wife also, they have no cause to complain. If, on the contrary, the heirs of the wife are not the same persons as the heirs of the husband, the latter cannot complain. The heirs of the wife, if not parties, are not bound by the judgment. They can still institute independent proceedings, if they desire. Petition dismissed.

(115 N. C. 676)

**FLEMING v. WILMINGTON & W. R. CO.**

(Supreme Court of North Carolina. Nov. 27, 1894.)

**TRIAL—SUBMISSION OF ISSUES—OBSTRUCTION OF WATER COURSE BY RAILROAD—STIPULATIONS.**

1. One who claims that he was not allowed to submit an issue to a jury must show that the issue could not, by proper instructions, have been included in the issues submitted.

2. In an action against a railroad company for damages for diverting a water course so as to overflow plaintiff's land, evidence of the principle on which the commissioners estimated damages in condemning the railroad company's right of way is not admissible, the law determining what rights pass to the company.

3. Stipulations by counsel in open court are conclusive against his client.

4. In an action against a railroad company for diverting a water course so as to overflow plaintiff's land, defendant is not prejudiced by a refusal to charge that it was its duty to provide ditches affording "sufficient drainage," where a charge had been given that it was defendant's duty to provide "equally as good drains" as had been dug by plaintiff.

5. It is a trespass for a railroad company to divert the course of a natural stream, unless such diversion is necessary for the proper construction of its road.

6. Damages for the diversion of surface water are included in the amount paid by a railroad company for its right of way.

7. Where the evidence is conflicting, it is error to charge that a stream is not a natural water course.

8. A railway company, as an incident to its right of way, may divert, along its ditches, surface water collected above its embankment, from the course through which it formerly flowed, if the new course is amply sufficient to receive the water, and direct it to its natural outlet.

Appeal from superior court, Pitt county; Hoke, Judge.

Action by S. J. Fleming against Wilmington & Weldon Railroad Company for damages for diverting a stream. Judgment was rendered for plaintiff, and defendant appeals. Reversed.

J. B. Batchelor, for plaintiff. John L. Bridgers, for defendant.

**EVERY, J.** The rule adopted by this court restricts the trial judge, in settling the issues, to those raised by the pleadings, but does not require him to frame an issue involving the truth of every fact alleged on the one side and denied on the other. When those submitted are raised by the pleadings, and, with the findings upon them, form a sufficient basis for the court to proceed to judgment, no exception to them is available to either of the parties, unless it can be made to appear that there was some view of the law, arising out of the testimony, which the party appealing was precluded from presenting for the consideration of the jury, for want of a pertinent issue. The question whether the culverts constructed were sufficient to carry off the water was involved in the broader and more general inquiry suggested by the third issue submitted. If the defendant negligently constructed the culvert so as to cause the water to be ponded on plaintiff's land, then it was insufficient for the purpose, and the defendant was liable. It would seem impossible to conceive of any legal proposition growing out of the testimony, in reference to the culvert, that could not have been considered in passing upon the third issue, if it had been presented by the defendant in the shape of a prayer for instruction. To build a culvert that is insufficient to carry off the water, whereby water is ponded on a complainant's land, is a wrongful and negligent construction. The gist of the controversy on that point was involved in the inquiry whether the plaintiff had been damaged by the negligent ponding of water

the defendant in constructing its road. The building of an insufficient culvert is one species of carelessness that might have been an immediate cause of such an injury. Indeed, all three of the specific allegations contained in the three separate causes of action, and constituting the grounds of complaint, wit: First, the insufficiency of the culvert; second, the filling up of the ditches; and, third, the diversion of water from its natural course so as to cause plaintiff's land to be overflowed, might have been comprehended under one general issue, as to negligent construction; and the judge might, in his discretion, have dispensed with the fourth and fifth issues, which involved the specific allegations of negligence in the other cause of action, to wit, the filling of the ditches, and the diversion of the creek. The finding upon one general issue, involving every species of carelessness mentioned in all of the three causes of action, and the judgment thereon, would necessarily have been conclusive upon the parties as to all matters in controversy, and to the right to recover upon any of the causes of action. Whatever might have been proved in evidence and passed upon, the law generally presume was presented to the jury. It being incumbent on the defendant to show that it was deprived of the opportunity to present some material view of the case, arising out of the evidence, and its counsel having failed to point out any pertinent principle of law that could not have been proved, through the medium of instruction, on the issues submitted, there is no abuse of discretionary power of the judge shown in finding them as he did.

The contention that the fifth issue is not ed by the pleadings is not tenable. The question in the third cause of action was: "In the construction of said road the defendant caused to be dug on each side of the of the road a ditch, whereby a large and usual volume of water is diverted from its natural course, and turned upon the land into the ditches of plaintiff," etc. There is evidence that the natural course of the creek alleged to have been diverted was through Barnfield branch. It would be stick-in-the-bark to say the issue was not raised, on hearing the proof that water was diverted from its course, the natural course was shown to be a certain branch; and the defendant specified such alleged natural outlet as a matter in the issue, in order more clearly to direct attention to the real subject of inquiry raised by the pleadings. The question ed upon was whether the water of Barnfield branch was wrongfully and negligently diverted from its natural course, not simply whether it was diverted. There being "evidence tending to show that the branch was a natural water way, and evidence to the contrary," as defendant's counsel states in his argument, he had the opportunity to request the jury to tell the jury that, if they found that the branch was not a natural channel, it was

not negligent or wrongful on the part of the company to divert it from the ravine down which it previously ran. The question might have been raised by such a prayer for instruction, but not by objecting to the issue before or after failing to do so. We shall have occasion, upon the consideration of another branch of this controversy, to discuss the bearing of the question whether that branch was a natural outlet. "Such damage as is due to the erection of a water way over a running stream at the point of its intersection with the line of a railway is considered, when the work is skillfully done, as included in the cost and valuation of the easement, or to have passed as incident to a grant of it; and the fact that it was so constructed as to pass the water, even in time of ordinary freshet, being admitted, neither the owner of the servient tenement nor the proprietor of a tract above can maintain an action for damages caused by placing the structure across the stream." *Adams v. Railroad Co.*, 110 N. C. 329, 14 S. E. 857. It was not competent, then, to prove upon what principle the commissioners estimated damages in the condemnation proceeding. The law determines what rights and privileges pass to the dominant owner, upon proof that the right of way was lawfully condemned for public use. One uniform rule applies, in ascertaining what has passed as incidental to the acquisition of the right of way. The dominion and privileges of a corporation have the same limit, and are subject to the same restrictions, on every part of its line, except when the right of way is granted by the owner with reservations presumably allowed by reason of the exaction of a smaller consideration than would otherwise have been charged, as where the width of the way granted is to be narrower, or the company agrees to construct crossings or cattle guards at a designated point or in a particular manner, not otherwise required. The testimony was not competent, in any point of view, but, if the undisputed evidence showed that the trestle over the Great Swamp was a sufficient water way to discharge the water that flowed through it, except when there was an extraordinary rainfall, then it was immaterial, even if competent. *Emery v. Railroad Co.*, 102 N. C. 209, 9 S. E. 139.

When two of the counsel for the defendant admitted in the progress of the trial, on behalf of their client, that the plaintiff owned and was possessed of the land, it was not error in the court to instruct the jury to respond in the affirmative to the first issue, involving the question of title and possession. In the same way, counsel were bound by their admission that "the Great Swamp was a natural water course and drain for said land," and were not at liberty, after the trial, to except to the instruction to the jury to write the response in accordance with their express agreement. The same principle applies to the consent of counsel, given "in open court, at the close of the charge, that the jury need not re-

spond to each amount of damage separately, if more than one cause of damage were found to exist, but that they might find the aggregate amount for all causes, and respond only to the ninth issue on that question." We need do nothing more than to quote the language used by the judge in stating this exception: "The court told the jury, in substance, that the response to the fourth issue should be 'Yes,' if the defendant filled up the plaintiff's drain ditches when it was not necessary to the proper construction of the road to do so, but if the defendant had not damaged plaintiff's land, or filled up the ditches, or, in obstructing the ditches, had done no injury that was not necessarily incident to a skillful construction of the road, and had provided other drains in connection with their side ditches, affording equally good drainage, the answer should be 'No.'"

We fail to comprehend how the defendant was prejudiced, as is contended in the fourth assignment of error, by the refusal of the court to tell the jury that it was defendant's duty to provide ditches affording "sufficient drainage," and instructing them, in lieu, that it was required only to provide ditches affording equally as good drainage. It may have been possible to provide equally as good drains as had been dug by the plaintiff at much less cost than to construct such as would have afforded "sufficient drainage," or such as would have thoroughly prepared the land for farming. The defendant cannot justly complain because the court held that, while it was liable for injury to the land, it was not bound to improve its condition after paying for the privilege of passing through it.

The fifth issue, arising out of the third cause of action, involved the question of the unlawful diversion of water (which, the evidence showed, referred to Barnfield branch) from its natural course. The instructions asked, and those substituted in lieu, gave rise to several assignments of error, which may be summarized as follows: That the court erred in instructing the jury (1) that it was not necessary for them to decide whether Barnfield branch was a natural water course or not, because the result would be the same if it was a mere depression or ravine, if it carried off a considerable amount of water from a considerable area of land, and yet expressed the opinion, founded upon the testimony, that Barnfield branch did not fall within the definition given by the court of a "natural water course"; (2) that the water of Barnfield branch, according to the description incorporated into the charge, and purporting to embody testimony of witnesses relating to that subject, could not be lawfully diverted from the channel, and, if the defendant had diverted it when the proper construction of the road did not require it to be done, it was guilty of a trespass; (3) that it was the duty of the defendant to have constructed a culvert at the point of intersection of said branch.

The consideration of the questions thus

raised necessarily leads to the discussion of the rights of owners of land to divert a natural stream, flowing over it, from its channel, or to collect surface water falling or flowing thereon, and discharge it by means of an artificial drain. It must be remembered at the outset of this discussion that "a railroad company enjoys the same privilege as any other landowner, but no greater, to be exercised under the same restrictions and qualifications." *Staton v. Railroad Co.*, 111 N. C. 278, 16 S. E. 181; *Jenkins v. Railroad Co.*, 110 N. C. 443, 15 S. E. 193. This principle is subject to the qualifications that necessarily arise out of the fact that such companies usually acquire, not the absolute ownership, but a dominion for corporate purposes, conferred with the paramount object of benefit to the public. One of the privileges passing as an incident is, of course, that of constructing such embankments as may be needed to insure the safety of transportation. The principle is stated by Gould, in his work on Waters (section 273), as follows: "Damages caused by the displacement or obstruction of surface water may be included in the assessment of damages, under the statute, caused by the original construction of the road." But the author adds, in the same section: "A railroad corporation has no right, by the erection of embankments, the construction of culverts, or the digging of ditches, to collect and discharge unusual quantities of surface water upon adjoining lands." In *Staton v. Railroad Co.*, 109 N. C. 840, 13 S. E. 933, the late Chief Justice Merrimon said: "Unquestionably, the defendant had the right to cut through and along its right of way, and keep in repair such appropriate ditches and culverts as were necessary to carry off the surface water to a natural drain or outlet adequate to receive it." In *Porter v. Durham*, 74 N. C., at page 779, the court said: "It has been held that an owner of lower land is obliged to receive the surface water which falls on adjoining higher land, and which naturally flows on the lower land. Of course, when the water reaches his land, the lower owner can collect it in a ditch, and carry it off to a proper outlet, so that it will not damage him. He cannot, however, raise any dike or barrier, by which it will be interrupted and thrown back on the land of the higher owner. While the higher owner is entitled to this service, he cannot artificially increase the natural quantity of flow by collecting it in a ditch, and discharging it upon the servient land at a different place or in a different manner from its natural discharge." The counsel for appellant insists that the court erred in instructing the jury that it was the duty of the defendant to provide a separate culvert to carry off the water of Barnfield branch, whether it was a natural water course, or a ravine or depression, through which the surface water falling upon any considerable area of land



was drained. If it was a natural water course, then, by diverting it from its channel above the railroad, unless it was necessary to do so in order to make the best provision for the safety of passengers and property to be transported over the road, the defendant company incurred liability for at least nominal damages, and for such actual damage for overflow as was caused to the plaintiff's land above the railroad, or below it. *Adams v. Railroad Co.*, 110 N. C., at page 332, 14 S. E. 857. But, leaving the question—whether what was called "Barnfield Branch" was only a ravine, which served the purpose of discharging the surface water from a large area or a natural outlet—an open one, the court charged the jury, among other things, as follows: "If the safety of the roadbed permits, and within reasonable limits as to costs, the defendant should make a way for water to pass in its natural way or outlet; and in the present case, if such safety and expense permitted, the defendant should have placed a culvert at the point where this branch crosses the road, and so permitted the water to take its natural way; and failing to do so, if damage is thereby caused to plaintiff's land, the jury should answer the fifth issue [which involved the question of the wrongful diversion of Barnfield branch, etc.] 'Yes.'" The jury therefore acted upon the idea that if the construction of the culvert would not imperil the safety of passengers and freight transported over the line, and the cost would be, in the opinion of the jury, reasonable, they must find that the company was negligent in failing to provide the culvert, even though Barnfield branch was not a natural water course, but only a depression extending across the line of railroad, and well defined, both where it entered, and where, in high water, it emerged on the other side from, the Great Swamp. It is difficult to obtain from the evidence and charge a very clear idea of the topography, but the charge, in its application to the testimony, must be construed to mean what we have stated. The general rule clearly deducible from the authorities cited is that the diversion of a natural stream from its channel by a railroad company is always deemed a trespass, when it is not necessary to the skillful construction of its road to change its course. *Adams v. Railroad Co.*, *supra*. But it is equally well settled that generally the lawful authority to divert surface water accumulating at a proper embankment, the building of which was necessarily within the contemplation of those who assessed or agreed upon the cost of the right of way, and to carry it, in side ditches constructed on the right of way, to its natural outlet, or to some natural "outlet adequate to receive it," is included in the estimate of such cost. *Staton v. Railroad Co.*, *supra*; *Gould, Waters*, *supra*. We are not prepared to hold, upon any view of this testimony, that the channel of

Barnfield branch was a depression of such a character that, though it discharged only surface water, it nevertheless came within the reason which induced the courts to hold it an actionable injury to close a ravine, and pond back on the abutting owners of land, or carry to a suitable outlet by side ditches, the water that usually escapes through it, though some of the courts of this country, with the approval of respectable text writers, have held that deep depressions in a hilly region, through which the water from large areas is discharged, sometimes fall within the reason of the rule, and that in such cases the duty, when railroads cross them, is the same as if the crossing were over a branch flowing from a perennial spring. *Gould, Waters*, § 273. But, after the judge had told them that in no view of the testimony did the Barnfield branch fall within the abstract definition of a "water course" previously given, he further instructed them that it was the duty of the company to have put in the culvert, unless the cost would have proved unreasonable, or its construction would have made the road unsafe. Some of the witnesses had testified without objection that the branch was a natural water course. Others had stated facts which, if believed, would lead to the inference that it was not. Though it may not have been material, in discussing the question to which the court had previously adverted, to adapt the instruction as to the nature of natural water courses to the evidence, it was manifestly erroneous, in view of the conflicting testimony on which the defendant's liability depended, to express the opinion that the branch was not a natural water course. Code, § 413, and cases cited on page 339 of Clark's Code. This error was covered by the exception to the instruction asked, and to that given in lieu. But we see nothing in the testimony to take this case out of the general rule which permitted the defendant to divert the surface water collected above an embankment constructed skillfully, and in the exercise of authority acquired as an incident to the right of way, along its ditches, to its natural outlet, at a different place from its previous entrance through a depression, but at a point where it was amply sufficient to receive such water. In giving the instruction that it was the duty of the defendant to build a culvert over what was known as "Barnfield Branch," as well as in expressing the opinion, where the evidence was conflicting upon the question, that it was not a natural stream, there was error, for which a new trial must be granted. It would seem also that, in response to the prayers, more specific instructions, adapted to the testimony, should have been given as to the character of the branch. We have discussed the main questions, as to which we approve of the rulings of the court, because it may be important to do so in order to aid the court in the next trial. New trial.

(115 N. C. 648)

**WATERS v. GREENLEAF JOHNSON  
LUMBER CO.**

(Supreme Court of North Carolina. Dec. 11, 1894.)

**INDEPENDENT CONTRACTOR—WHEAT CONSTITUTES—  
CONSTRUCTION OF LUMBER ROAD—NEGLIGENCE—  
INJURY TO LAND—MALICIOUS TRESPASS—RIGHT  
OF WAY AGREEMENT—INTERPRETATION.**

1. Where one was engaged in the construction of a railroad for a lumber company under contract, and it does not appear how he was paid, or whether it devolved on him exclusively to furnish material for the work, and pay the hands in its accomplishment, or whether the company exercised control over it, the fact that it supervised the cutting of timber by him on the land through which the road was to pass renders him its servant in law.

2. In a contract of sale of standing timber to a person, "with the right for his train, tramroad, wagons, and employes to enter on said land and remove said timber," the word "train" must be deemed to refer to a railroad train.

3. The contract right to enter on land to remove certain timber by a railroad necessarily implies the right to build the railroad on the land, and to cut and remove such timber as is reasonably necessary in clearing a right of way.

4. Whether a way 21 feet wide is necessary to the construction of a road on which to operate lumber trains is a question for the jury, under proper instructions.

5. The grant of a right to construct a railway through timber land does not authorize the cutting of cross-ties elsewhere than on the right of way.

6. In the construction of roads for the transportation of timber purchased from plaintiff by defendant, it is negligence for the latter to fill in drain ditches maintained by plaintiff, instead of bridging over them.

7. In an action to recover damages resulting from negligence in the construction of defendant's railroad, in obstructing ditches and destroying fences, the measure of damages is the cost of removing those obstructions and replacing the fences.

8. Evidence that the contractor engaged to construct defendant's railway, and its agent to locate the right of way through timber land belonging to plaintiff, while engaged in its location, made inquiries as to plaintiff's means, and ability to fight a lawsuit, and that, during the construction of the road, plaintiff forbade such contractor to cut certain timber, and was told by him that he was working for defendant, that it had a charter, and that he must have cross-ties, and that plaintiff ought to see defendant as to cutting the timber, does not show such malice or wantonness in the construction of its road by defendant as to make it liable to plaintiff in punitive damages.

9. In an action for malicious trespass, the question whether there is sufficient evidence to entitle plaintiff to punitive damages is one for the court, and not the jury.

Appeal from superior court, Martin county; Bynum, Judge.

Action by D. T. Waters against the Greenleaf Johnson Lumber Company to recover damages for breach of a contract of sale of timber, and for defendant's negligence and malicious trespass in the construction of its railroad under a right of way granted in such contract. Defendant's relation to the contract in question was that of assignee of one Dennis Simmons, an original party thereto with plaintiff. There was judgment for plaintiff, and defendant appeals. Reversed.

Moore & Stubbs, for appellant. W. B. Rodman, for appellee.

AVERY, J. Whatever authority may have been given the defendant by the legislature, in its charter, it was not acting or purporting to act under the right of condemnation for public purposes, but by virtue of a contract between the plaintiff and Dennis Simmons, the benefit of which had been assigned by Simmons to the defendant, in which the plaintiff had sold and conveyed all of the "pine and poplar timber on said land, which would measure 12 inches in diameter 16 feet from the ground, with the right for his train, tramroad, wagons, and employes to enter on said land and remove said timber." No copy of the contract was sent up, and we must therefore construe the foregoing portion of it, embodied in the statement of the case on appeal, and purporting to be its only material provision.

Claiming authority to do so under this contract, the defendant company entered into an agreement with one Parker, whereby Parker was to construct a railroad, "cut the timber on the land through which said road, if extended for ten miles, would run, and deliver the said timber to said company at the railroad." During the months of November and December, 1891, and January and February, 1892, Parker accordingly built a railroad over plaintiff's said land for a distance of 1,952 yards, and cleared and occupied a roadbed 21 feet wide along the whole line, which passed through uninclosed woodland, except at one point, where the fence or inclosed woodland was set back by defendant to clear the way for the track. The other material testimony sent up as a part of the statement is as follows: "It was in evidence that the timber on plaintiff's land was cut by Roberson under contract with Parker, and was paid for at so much per thousand feet, Roberson employing and paying his hands. There was evidence tending to show that Parker was instructed by defendant company to cut the timber as they had bought it, and that they had informed him what they had bought; that plaintiff had rented the cleared land on said tract to a tenant, and made advances to the tenant to enable him to cultivate the land, which were, according to said rental contract, to be paid out of the crop raised thereon; that at the time of building the road there had been enough cotton gathered on the land to pay the rent, but not enough to pay rent and advances; but there was enough in the field, together with what had been gathered, to pay both rent and advances."

The first contention of the defendant company was that Parker was an independent contractor, and that the corporation could not be made to respond in damages for any unlawful act of his, committed in carrying out his contract. A person may become a trespasser by doing, himself, a lawful act in an unlawful manner, to the injury of another, because the

restriction upon his right to exercise dominion over his own property is that he is not allowed to so use it as to injure another. Where he employs another to do what is unlawful, or to act or work for or serve him in the performance of a lawful act in an unlawful manner, in either case such employer is liable for resulting injury to third persons, whether such employes or servants "are paid by the job, or by the year or the day," and whether the master "be present, or absent." *Wiswall v. Brinson*, 10 Ired. 554. Where the relation of servant or agent is once shown to exist, the master or principal becomes, ipso facto, liable for any trespass committed in the course of his employment or the scope of his agency by the person acting for him, to the same extent that he would have been answerable, had the wrong been done by him in his own proper person. Does the testimony, in any phase of it, tend to show that Parker, who committed the trespass, was not the servant or agent of the defendant company, but an independent contractor? If so, it was error to instruct the jury that, if they believed the evidence, he was the agent of the company. Had the entry upon the land been made in the exercise of the right of eminent domain, the company would have been answerable, not only for the unlawful acts of its servants, done in the course of their employment or by its consent, but for injuries done by such contractor, when exercising for the company some chartered privilege or power with its assent, since, when so acting, the contractor would be deemed a servant, as between himself and his employer, upon the principle that a corporation which owes a duty to the public cannot rid itself of responsibility by delegating it to another. *West v. Railroad Co.*, 63 Ill. 545; 14 Am. & Eng. Enc. Law, p. 840, and note 2; *Wood, Mast. & Serv.* § 316. In such cases, however, the corporation is not held liable, where the contractor commits a trespass upon uncondemned land, unless it authorizes or assents to the unlawful act. *Wattmeyer v. Railroad Co.* (Iowa) 33 N. W. 140. The liability of the superior, as master, depends upon his right to control the conduct of the person with whom he contracts, in the prosecution of the work. 14 Am. & Eng. Enc. Law, 830; *Railroad Co. v. Hanning*, 15 Wall. 649; *Railroad Co. v. Reese*, 61 Miss. 581. It does not appear how Parker was paid for the construction of the road,—whether he was the mere instrument of the company, which directed the work, furnished the material necessary to prosecute it, and paid the hands, or whether it devolved on him exclusively, under his contract, to attend to all of these matters,—though it would seem that the burden was upon the company, for whom the work was done, to show that it exercised no control, and was not interested, except in results. But the fact that the corporation supervised the cutting of the timber, and issued orders that Parker was bound to obey, shows affirmatively, of itself, a state of subjection on his part that made

him, in law, its servant. 14 Am. & Eng. Enc. Law, supra; *Wood, Mast. & Serv.* p. 603, § 312.

Conceding, then, that Parker was the servant of the company, it remains for us to determine whether he was shown to have subjected his superior to liability for any trespass committed while acting in that capacity, and, if so, by what rule the measure of damage is to be ascertained. The contract, as set forth in the statement of the case, gives to Dennis Simmons the same right for "his train," his tramroad, and his wagons, and employes to enter. We think that the word "trains," as distinguished from wagons to be drawn on the ways that were to be constructed, must be interpreted as referring to railroad trains, which Simmons had under the contract, and the defendant has as his assignee, the right to take with him on the land for the purpose of removing the timber conveyed. The right to enter with such trains involved the authority to construct a railway, upon which alone a train of cars could enter, as necessarily as the right to take wagons on the land for the same purpose carried with it the implied agreement to permit the clearing out of such roads as would enable Simmons to make reasonable use of them in hauling. In so interpreting the language of the contract between plaintiff and Simmons, we have not overlooked the fact that the judge makes no allusion, in charging the jury, to any contention that the word was used in the sense of "railway trains." It may be that there was something in the context of the agreement which showed that the word was used in some peculiar sense, or that there was proof of some custom among lumber dealers to give to it a particular meaning, or counsel below may have agreed upon the proper interpretation. In the absence of such explanation, we must follow the rule (1 Greenl. Ev. §§ 278, 295) which requires that we shall give the word its ordinary and popular meaning. Resorting to the lexicons for light, we find (*Webster's* and *Century Dictionaries*) that there is no popular or ordinary definition, but that of a "railway train," that we can adopt. It is clear that there would be no reason for providing especially for the right of ingress with a string of loose and unattached animals,—the only other meaning that would be in the least consonant with the context. It may be that when the case is again tried the court will have the benefit of some competent testimony, either in the context or dehors the instrument, that will justify a different interpretation. But, in the light of the meager statement before us, we must hold that the court erred in instructing the jury that the plaintiff was entitled to compensatory damages for the injury done to the land in cutting and removing so much timber as it was reasonably necessary to remove in order to construct a way for the passage of lumber trains. Whether a way 21 feet wide

was necessary for the purpose was a question for the jury, under proper instructions.

Construing the contract as we do, we conclude that, with the right to build a road sufficient for the passage of trains, the plaintiff, by necessary implication, agreed to surrender his claim to such damage to his land as might be incident to the skillful construction of what he had empowered Simmons to build. The same implication must grow out of a grant of the right to construct a private railway as is held to arise in case of a grant or condemnation for the use of a common carrier. *Fleming v. Railroad Co.* (decided at this term) 20 S. E. 714; *Adams v. Railroad Co.*, 110 N. C. 325, 14 S. E. 857.

Upon the same principle, the right to enter with trains carried with it immunity for such injury to the drainage to the land as was necessarily incident to its skillful construction. But, granting that the defendant had the right to construct a railway, it was not authorized, either by the express terms of the contract, or by reason of any implication arising out of it, to cut cross-ties off the right of way, or to destroy fences in getting them. It was negligence in the defendant to fill up plaintiff's ditches, instead of building bridges over them, in constructing the wagon roads necessary to remove the timber. The plaintiff was entitled to compensation for any reduction in the value of the land, either by cutting timber below the stipulated size for sawing, or cross-ties outside of a reasonable right of way for trains, tramways, and wagonways. He could recover, for unlawful obstruction of the ditches, the cost of removing the obstruction; and, for destroying fences, the cost of replacing them.

Exemplary damages are not recoverable in every action of tort, but only in those where a bad motive is shown,—*Hansley v. Railroad Co.* (decided at this term) 20 S. E. 528,—and not for every trespass on land of which a defendant is guilty, but only where it is committed through malice, or accompanied by threats, oppression, or rudeness to the owner or occupant,—1 *Suth. Dam.* § 392; 1 *Sedg. Dam.* § 362; *Wood's Mayne, Dam.* § 579; *Merest v. Harvey*, 5 *Taunt.* 442. By reference to the authorities, it will appear that punitive damages have not been allowed where the testimony tended to show good faith, and only a mistake as to authority (*Beveridge v. Welch*, 7 *Wis.* 465), or even where the trespasser had good reason to believe he was in the wrong (*Inman v. Ball*, 65 *Iowa*, 543, 22 *N. W.* 666). In the case of *Merest v. Harvey*, *supra*, which is cited by plaintiff's counsel, there was evidence of threats and rudeness, if not violence, and in that it is distinguishable from the case at bar. Where the trespasser's conduct is shown to be prompted by malice, or amounts to rudeness or insult, exemplary damages are always recoverable; and such, in substance, we understand to be the rule laid down in the cases cited by plaintiff's counsel from our

own Reports. *Wylie v. Smitherman*, 8 *Ired.* 236; *Duncan v. Stallcup*, 1 *Dev. & B.* 440. The testimony relied upon as tending to show malice, wantonness, or rudeness is: (1) That while Parker, the contractor, and Mobley, who was the agent of the defendant, were engaged in locating the right of way, Parker called the tenant of plaintiff to him, and said: "What kind of a man is Waters? Is he a man of means, and could he fight a lawsuit?" Whereupon Mobley, defendant's agent, said, "He is only a halfway man." (2) That plaintiff, while Parker was building the railroad, forbade him from persisting in the work, and from cutting any trees under the size mentioned in the Simmons deed, whereupon Parker replied that he was working under the Greenleaf Johnson Lumber Company; that they had a charter for the road, and he (Parker) must have cross-ties to build it, and for Waters to go to Norfolk and see Johnson. The natural inference from the conversation between Waters and Parker was that the latter, in good faith, believed that he was constructing the road on a condemned right of way, and had the right to appropriate the necessary cross-ties, the question of damage being one to be adjusted between the officers of defendant company and Waters. The language is neither rude nor indicative of malice. The language used by Parker to the tenant of Waters is, at most, equivocal, not necessarily evidence of malice, wantonness, or insult, the burden being upon one demanding punitive damages to bring the case within the rule by showing the bad motive. It is questionable whether such language, used by a servant, could be imputed to the master, if it did in reality tend to show malice on the part of the servant. Indeed, a similar declaration of a servant, where the trespass consisted in removing certain poles, that "he would obey the orders [to remove the poles] if it broke the owners," was not evidence of bad motive on the part of the employer. *International & G. N. R. Co. v. Telephone & Tel. Co.*, 69 *Tex.* 281, 5 *S. W.* 517. The question whether there was sufficient evidence to entitle the plaintiff to recover punitive damages was one for the court, not for the jury.

For the reasons given, we think that there was not such evidence as warranted the assessment of more than compensatory damages, and the court therefore erred in leaving it to the jury, if they saw fit, to allow vindictive damages; and for this and other erroneous rulings mentioned we must grant a new trial.

(115 N. C. 806)

STATE v. SCRUGGS et al.  
(Supreme Court of North Carolina. Dec. 27, 1894.)

#### TRIAL FOR MURDER—ILLNESS OF JUROR.

On a trial for murder, it is the duty of the court, when one of the jurors is unable from illness to continue with the case, to direct a mistrial, and hold the prisoner.

Appeal from superior court, Rutherford county; Boykin, Judge.

Prosecution of Bird Scruggs and others for murder. From an order overruling defendants' motion for their discharge, they appeal. Dismissed.

A special venire was returned by order of the court, and a jury selected and impaneled. The state's witnesses had been sworn, and one of them had begun to testify. He was interrupted by one of the jurors, who stated that he was sick, and unable to continue to serve as a juror. He was examined at length by the court touching his physical condition. He declared that he had been attacked by sickness; that he could not sit on the case as a juror by reason of his illness; and that it was necessary that he be excused. The court therefore found as a fact that the juror was unable, by reason of his sickness, to continue to serve as a juror in the case. The prisoners' counsel offered to proceed with 11 jurors. The solicitor for the state refused to so proceed. The prisoners' counsel then proposed to select another juror from the special venire, which had not been exhausted. The solicitor declined the proposition, the said venire having been discharged, and their names having become confused and commingled with those already passed on. Then the prisoners' counsel offered that the sheriff should call from the bystanders, and a juror be selected from them; but the state did not accept the suggestion. Thereupon the court excused the sick juror, and ordered a mistrial and new trial. The prisoners moved for their discharge. The court refused to discharge them. Prisoners excepted and appealed.

Justice & Justice, for appellants. The Attorney General, for the State.

MacRAE, J. No appeal lies in a criminal action until after the rendition of final judgment in the cause. *State v. Twiggs*, 90 N. C. 685. If the case were properly before us, as on an application for a certiorari, we should find no ground for granting the writ, for it has long been settled that in a trial for a capital felony, for sufficient cause, the judge may discharge the jury, and hold the prisoner for another trial, in which case it is his duty to find the facts, and set them out in the record, so that his conclusion as to the matter of law arising from the facts may be reviewed by this court. *State v. Jefferson*, 66 N. C. 309. All this his honor did, and it will serve no good purpose for us to do more than to say that, upon the facts found, it was the duty of his honor to direct a mistrial, and hold the prisoner. The jury provided by law for the trial of indictments is composed of 12 men; a less number is not a jury; and a trial by jury in a criminal action cannot be waived by the accused. *State v. Stewart*, 89 N. C. 563. While it might have been permissible to call another juror in place of the one who was sick, and begin

the trial anew, it was a matter in the control of the presiding judge, who, we doubt not, for good reasons, pursued the regular course. Appeal dismissed.

(115 N. C. 552)

#### BRENDLE v. REESE et al.

(Supreme Court of North Carolina. Dec. 27, 1894.)

#### APPEALABLE ORDER.

Appeal will not lie from an order denying leave to amend defendants' answer.

Action by John M. Brendle against A. J. Reese and others. From an order refusing defendants leave to amend, they appeal. Dismissed.

G. S. Ferguson and J. B. Batchelor, for appellants.

CLARK, J. The appellants moved to remand the cause because there is no case on appeal, and the judge (Graves) died before settling the same. This would be true if it was an appeal in which a case settled is essential, and the appellants have not been guilty of laches. *State v. Parks*, 107 N. C. 821, 12 S. E. 572. But the present case is an appeal from a refusal of leave to amend the answer. No case on appeal was necessary, as there were no facts dehors the record to be set out. Furthermore, no appeal lay at this stage, as it was an interlocutory order; nor, indeed, at all, as the granting or refusal of the amendment was a matter of discretion. *Henry v. Cannon*, 86 N. C. 24, and numerous other cases cited in Clark's Code (2d Ed.) pp. 564, 565. Appeal dismissed.

(115 N. C. 769)

#### STATE v. McINTIRE.

(Supreme Court of North Carolina. Dec. 27, 1894.)

#### LIBEL—PUBLICATION.

Giving a letter containing matter defamatory of another to a clerk to copy, which he does, is a publication.

Appeal from criminal court, Buncombe county; Jones, Judge.

P. C. McIntire was convicted of criminal libel, and appeals. Affirmed.

H. C. Carter, for appellant. The Attorney General, for the State.

SHEPHERD, C. J. The only question before this court is whether there was any evidence of the publication of the libelous letter in this state. Richard Knebler testified, on behalf of the state, as follows: "The defendant told me to mail the letter. I addressed it to the Armour Packing Company, Kansas City, Mo., and mailed it here at the post office. I read the letter over to him after I wrote it, for him to see if it was all right. I copied it from a letter he had written. \* \* \* I sealed it, and put it in the post office." It appears that the letter reach-

ed the company to which it was addressed, and was afterwards brought to Asheville, and read there by several persons. These last-mentioned facts, however, do not seem to be necessary to be considered, as it is settled by reason, as well as authority, that, according to Knebler's testimony, the letter was published in this state. "Publication in the law of libel is the communication of the defamatory matter to some third person or persons." Odger, L. & Sland. 150. In this case the contents of the letter were communicated to Knebler, a third person, and that this was a sufficient publication is apparent from the authorities. *Id.* 151; Newell, Defam. 229. In *Delacroix v. Thevenot*, 2 Starkie, 63, the defendant knew that the plaintiff's letters were always opened by his clerk in the morning, and yet sent a libelous letter, addressed to the plaintiff, which was opened by the plaintiff's clerk, and lawfully read in the usual course of business. It was held a publication by the defendant to the plaintiff's clerk. In *Snyder v. Andrews*, 6 Barb. 43, the defendant wrote a letter to the plaintiff himself, but read it to a friend before posting it. It was held a publication. See, also, *McCoombs v. Tuttle*, 5 Blackf. 431. In *Klene v. Ruff*, 1 Iowa, 482, the defendant, before posting the letter to the plaintiff, had it copied. It was held a publication by the defendant to his own clerk who copied it. We think these authorities are decisive of the case. Affirmed.

(115 N. C. 776)

**STATE v. ADAMS et al.**

(Supreme Court of North Carolina. Dec. 27, 1894.)

**LARCENY—WHAT CONSTITUTES—KNOWLEDGE AND CONSENT OF OWNER OF PROPERTY.**

1. One who forms the intent to steal, and carries out such design, is guilty, though the owner is advised of the intended larceny, appoints agents to watch such person, and allows him to commit it, with a view of having him punished.

2. Where the agent of the owner of certain property tells a servant to persuade a person to steal such property, and he does so, and the property is taken by such person, the latter is not guilty of larceny, though he previously formed the intent to steal it.

3. Larceny cannot be committed when the owner, through his agent, consents to the taking and asportation, though the consent is given for the purpose of apprehending the felon.

4. Larceny cannot be committed unless the thing be taken against the will of the owner.

Appeal from criminal court, Mecklenburg county; Meares, Judge.

William Adams and Sue Adams were convicted of larceny, and appeal. Reversed.

Clarkson & Duls and Maxwell & Keerans, for appellants. The Attorney General, for the State.

CLARK, J. The court correctly told the jury that "if there was the guilty intent previously formed by the defendant to steal cer-

tain property, and he carried out such design previously formed, he is guilty, notwithstanding the owner of the property was advised of the intended larceny, appointed agents to watch him, and could have prevented the theft, but did not do so, and allowed him to commit the theft with a view of having him subsequently punished." It was error, however, further to tell them that if there was the previous intent to steal the defendant would be guilty, notwithstanding the owner's agent had told a servant to go to the defendant's house, and persuade him to come and steal the sack. *Dodd v. Hamilton*, 4 N. C. 471; *State v. Barna*, 4 N. C. 483.

It was also error to refuse the fifth prayer for instruction, "that larceny cannot be committed when the owner, through his agent, consents to the taking and asportation, though such consent was given for the purpose of apprehending the felon," and likewise the sixth prayer, "that larceny cannot be committed unless the thing be taken against the will of the owner." The object of the law is to prevent larceny by punishing it, not to procure the commission of a larceny that the offender may be punished. The evidence for the state was that the owner's agent, Wilson, having information of an intended theft of cotton by the defendants, watched the cotton house Monday and Tuesday nights, without any one coming; that he returned Wednesday night, and watched till very late, and, no one coming, he filled up a couple of sacks with cotton, and, leaving one of the sacks in the cotton house, he gave the other sack to one Julia Harris, and told her to go to the defendant's house, 300 yards distant, and give it to him, and tell him that he could get some more cotton. Julia did as directed, and in a little while she returned with the defendant, who entered the cotton house, took the other sack of cotton upon his shoulders, and carried it home. The court should have sustained the demurrer to the evidence.

It is not necessary to consider the evidence as to the wife, for the election of this transaction discards the consideration of the evidence as to the taking by her Thursday night. It is also unnecessary to consider the other points raised. We may note, however, that if, as it would seem from the case, the judge, notwithstanding the prayer at the close of the evidence to put his charge in writing, "also fully explained and instructed the jury as to the application of the propositions of law laid down in his written charge and instructions given as to the different phases of the evidence in the case, and pointed out to the jury the grounds upon which the defendants rested their defense, and explained such phases of the case arising from the evidence introduced by the state and the defendants," there was manifest error. When there is a prayer to put the charge in writing (Code, § 414), all the instructions as to the law must be reduced to writing, though

not the recapitulation of the evidence. *Dupree v. Insurance Co.*, 92 N. C. 417; *Lowe v. Elliott*, 107 N. C. 718, 12 S. E. 383. If this were not so, section 414 would be nugatory. We can only incidentally refer to the point, and not declare error in that regard, as there is no exception for a refusal or failure to put the charge in writing. *Taylor v. Plummer*, 105 N. C. 56, 11 S. E. 266; *Lowe v. Elliott*, supra. The exception "for refusal of prayers for instructions" does not embrace a refusal or failure to grant a prayer to put the charge in writing. If the proper exception on that ground had been made, the case should, and doubtless would, have contained the written charge; and, if any oral charge had been given, it should have been set forth, that this court might see that it was mere repetition of the written charge. It is only out of deference to the authority of *Currie v. Clark*, 90 N. C. 355, that the court will permit even that, and will not extend the exception.

When the demurrer to evidence is overruled, the defendant should not introduce evidence. *Starkie*, Ev. 797, 798; 2 Tidd, Prac. 865, 866; *Whart. Cr. Pl.* (9th Ed.) §§ 407-706; *Hutchins v. Com.*, 82 Pa. St. 472. If the defendant has evidence which he intends to introduce, he should take advantage of the failure of plaintiff to make out a case by a prayer to instruct the jury.

In failing to sustain the demurrer to the evidence, and also for refusing to instruct the jury that there was no evidence to go to them, there was error. But this does not dispose of the case. Non constat that the state may not produce more evidence on the next trial. *State v. Rhodes*, 112 N. C. 857, 17 S. E. 164. Error.

(115 N. C. 550)

**CURETON v. GARRISON et al.**

(Supreme Court of North Carolina. Dec. 27, 1894.)

**EJECTMENT—WRIT OF POSSESSION—REVIEW ON APPEAL.**

Where, on an application for a writ of possession, the affidavits tend to show that the land claimed was not included in the ejectment suit on which the application was predicated, a finding of the trial court that the land was not so included will not be disturbed.

Appeal from superior court, Polk county; Graves, Judge.

Ejectment by Mary M. Cureton against John Garrison and others. There was a judgment for plaintiff, and, from an order of the judge of the superior court affirming an order of the clerk denying plaintiff a writ of possession, she appeals. Affirmed.

Jones & Tillett, for appellant. W. J. Montgomery and Justice & Justice, for appellees.

**CLARK, J.** The plaintiff brought an action against Garrison alone. Subsequently, the other two defendants were made parties, but no complaint or amendment was filed,

embracing them. The issue, verdict, and judgment were against the defendant,—in the singular. Writ of possession was sued out by plaintiff against Garrison alone, and the plaintiff put into possession. More than a year after, the plaintiff files an affidavit that she recovered judgment also for land of which the other two defendants were in possession. Affidavits were filed by the defendants, the surveyor, and the jury that only the title to the tract of which Garrison was in possession was in controversy. We put no stress on defendants' contention that the writ of possession was *functus officio* by having been returned executed, because it was only executed as to the land embraced in the execution; and the gist of plaintiff's contention is that the writ of possession should have been broader, so as to embrace the additional land. But his honor found, "upon an inspection of the record, the complaint, and answer, and the judgment and execution, and the return of the sheriff thereto, that said execution conformed to the judgment, and, from the affidavits, the writ of execution was issued and executed by direction of an agent of the plaintiff," and refused to issue another execution. His finding of fact from the affidavits, there being evidence on the point, is conclusive. *Burke v. Turner*, 85 N. C. 500. Only his inference of law upon such fact and on the record is reviewable. *Trice v. Turrentine*, 85 N. C. 213; *Simpson v. Simpson*, 63 N. C. 534. Upon such finding of fact, and an inspection of the record, we find no error. The title to the land now in dispute not having been put in issue in the former action, it is still open to the plaintiff to bring an action therefor, unless otherwise barred. No error.

(115 N. C. 498)

**CAMPBELL v. SMITH et al.**

(Supreme Court of North Carolina. Dec. 28, 1894.)

**SUMMONS—RETURN—RIGHT OF OFFICER TO AMENDMENT.**

An officer has not, "as a matter of law," right to amend his return to a summons; but the court may, under its discretionary power of amendment, in meritorious cases, grant him leave.

Appeal from superior court, Stokes county; Battle, Judge.

Action by W. F. Campbell against A. J. Smith and others. T. F. Rankin, sheriff, moved for permission to amend his return to the summons. From an order granting the motion, plaintiff appeals. Reversed.

Stack & Bickett, for appellant. Watson & Buxton, for appellees.

**CLARK, J.** If the person upon whom a summons is incorrectly returned as "Served" moves to have the record amended, he is entitled to have it amended so far as it may affect him as a matter of right, so that the rec-

ord may "speak the truth." Not so as to the officer making the return, in a proceeding against him for liability for such return, for then, as to him, the record does already speak the truth, which is that he made such and such return. Whether such return was in fact true or not when made is not a matter of record evidence. Amendments in such cases have been allowed by the courts at the instance of the officer to prevent hardships (*Hassell v. Latham*, 52 N. C. 465; *Patton v. Marr*, 44 N. C. 377; *Finley v. Hayes*, 81 N. C. 372); but only "by the leave of the court," in the exercise of the powers wisely vested in the presiding judge. To hold that in such cases, as "a matter of law," the officer has the right to amend his return, would be simply a repeal by the courts of every statute, which the legislature, in its wisdom, has seen fit to provide as a security against carelessness or fraud in the return of process. *Tomlinson v. Long*, 53 N. C. 469; *Albright v. Tapscott*, Id. 473. The courts have never gone further than to leave the question of relief to the judgment of the presiding judge, under the discretionary power of amendment in meritorious cases. Whether even this could be done after proceedings for the penalty or a motion for amercement had been entered was left an open question in *Manufacturing Co. v. Buxton*, 105 N. C. 74, 11 S. E. 264, though finally sustained in *Steelman v. Greenwood*, 113 N. C. 355, 18 S. E. 503. But that question is not before us. His honor held that he had no power, but, "as a matter of law," the sheriff was entitled to take his amendment. In this there was error.

(115 N. C. 535)

**JENKINS v. GASTONIA COTTON MANUFACTURING CO.**

(Supreme Court of North Carolina. Dec. 27, 1894.)

**CORPORATION — RATIFICATION OF VOID CONTRACT — LEASE.**

1. A contract void under Code, § 683, requiring that a contract with a corporation incurring a liability of more than \$100 must be in writing, cannot be ratified by silence.

2. On an issue as to whether a verbal lease was for a year, it is proper to admit evidence that the rent was payable quarterly, and had been paid for three quarters.

Appeal from superior court, Lincoln county; Boykin, Judge.

Action by L. L. Jenkins against the Gastonia Cotton Manufacturing Company to recover money due for rent. There was a judgment for defendant, and plaintiff appeals. Reversed.

There was much testimony on both sides as to the contract between defendant and the hotel company, and the public sale of the premises and announcement of the crier concerning the rights of the tenants. The sale took place two days after the repeal of section 683 of the Code, which required contracts with corporations by which a liability exceeding \$100 might be incurred to

be in writing; and plaintiff contended that the occupation of the premises by defendant after said date was evidence of a new contract of renting by the year, or at least for the balance of that year.

Jones & Tillett and D. W. Robinson, for appellant. Walker & Cansler, for appellee.

MacRAE, J. We do not deem it necessary to have the testimony set out in the case, for we have repeatedly considered the statute (section 683); and at this term, in *Spence v. Mills*, 20 S. E. 372, we have held that such contract, not being in writing and in compliance with the statute, and being executory in its nature, was void, and incapable of ratification. The plaintiff cannot therefore be aided by the principle laid down in *James v. Russell*, 92 N. C. 194, that where one stands silently by, and hears a contract made for him by another, he is bound by it, for a void contract could not be ratified or continued. But the defendant became the tenant of plaintiff on the 13th of February, 1894, and paid the rent to him by the quarter as if the quarter had begun on the 1st of January, 1893. No special contract was made between plaintiff and defendant, and we can have no light from the dealings between defendant and the former owner. Did this constitute defendant plaintiff's tenant up to January 1, 1894? Tenancies at will are not favored, and regular payments of rent, there being no express agreement that the tenancy shall be at will, raised the presumption of a contract for a time certain. "In the absence of words limiting or defining the nature of a tenancy, the principal test of a tenancy from year to year is whether there is a reservation of annual rent, or payment of or an agreement to pay rent for such an aliquot part of a year, as monthly, quarterly, or half yearly, so that a presumption can be raised that the parties intended to create such a tenancy." 2 Wood, Landl. & Ten. 97; *Stedman v. McIntosh*, 4 Ired. 291. There was in this case evidence to show occupation and three quarterly payments, and no contract confining the tenancy to the quarter. We are of opinion that this evidence should have been submitted to the jury, with proper instructions, that they might determine the rights of the parties. New trial.

(115 N. C. 540)

**CRAWFORD v. WEARN et al.**

(Supreme Court of North Carolina. Dec. 28, 1894.)

**WILLS — CONSTRUCTION — RULE IN SHELLEY'S CASE — POWER OF LIFE TENANT.**

1. A will gave and devised to C. the use of \$1,000, also certain lots, and provided that C. "may invest or use all this property as he may, in his discretion, think best, during his natural life, and at his death to go to the heirs of his body, and to be used for their education, if necessary." Held, that the rule in *Shelley's*



Case did not apply, but that C. took only a life estate.

2. The power given C., to "invest or use" all the property, authorizes a sale of it by him.

Appeal from superior court, Mecklenburg county; Winston, Judge.

Action by L. W. Crawford against J. H. Wearn and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Plaintiff sued defendants for breach of contract to purchase certain land devised to plaintiff by paragraph 5 of a will. Defendants claimed that, under the will, plaintiff was not the owner of the land, in fee simple, and could not give them good title. The will was as follows: "(1) I give and devise to my son Thomas M. Crawford one of my first mortgage bonds, No. 119, on the Charlotte, Columbia and Augusta Railroad Company, to be put in the hands of his brothers, Robt R. Crawford and Leonidas W. Crawford, as trustees, to be used for his benefit, not to be subject to any debts. If he continues to try to make a living and be steady, they may, in their discretion, invest the proceeds of the sale of the bond in anything they may think would be more profitable, giving him the use of it during his natural life, and a decent burial. Whatever may be left is to be equally divided between the heirs of his body, and, if necessary, used for their education. (2) I give and devise to my son William H. Crawford the use of one thousand dollars, during his natural life, of the judgment I hold on him for money paid the First National Bank, giving him the privilege of investing in anything he thinks best, and after his death to be divided between Carrie Ida Crawford, his oldest daughter, and his three youngest children, Henderson, Annie, and Aggie, to be used in whatever would be best for them. (3) I give and devise to my son James R. Crawford my remaining bond on the C., C. & Augusta Railroad Company, No. 182, to be used as he thinks best during his natural life, and then to be equally divided between the heirs of his body. (4) I give and devise to my son Robert R. Crawford one thousand dollars (\$1,000) in money or notes; also one house and lot in Charlotte, N. C., purchased from John L. Brown, known as the 'Alexander Property,' in square No. 76, as the deed will show; also my carriage, now in his possession; also three lots, purchases from the estate of John I. Shaver, in the town of Salisbury, adjoining Benjamin Fraley on one side and Samuel Willey on the other, as the deed will show. All this property he is to have the use of during his natural life, to sell and invest, as in his judgment he may think best for the benefit of the heirs of his body at his death. I will, if it be necessary, it be used for his education. (5) I give and devise to my son Leonidas W. Crawford, the use of one thousand dollars (\$1,000) in money or notes; also four lots in the town of Charlotte, N. C., purchased from John L. Brown, known as the 'Depot Lots

Nos. 242, 241, 240,' and a fraction of lot No. 239, in square 37, as the deed will show. The said Leonidas W. Crawford may invest or use all this property as he may, in his discretion, think best, during his natural life, and at his death to go to the heirs of his body, and be used for their education, if necessary. (6) I give and devise to my grandson, Robert Baker Crawford, six hundred dollars in money, to be spent for his education. (7) I give and devise one hundred dollars (\$100) to Eva, to be used for her benefit, at the discretion of my executors, L. W. Crawford and R. R. Crawford. (8) I give and devise five hundred dollars (\$500), to be used, at the discretion of my executors, L. W. Crawford, for any worthy institution, church, or charitable purpose. (9) I give and devise five hundred dollars, or whatever it may take, to put a rock fence around the old family graveyard on the old place. I will, if there is not enough to pay off all the legatees, that the property remain as it is until the rents and interest bring in the amount. I leave it in the hands of my executors to manage as they think best. I appoint Robert R. Crawford and Leonidas W. Crawford my executors of my last will and testament."

Walker & Cansler, for appellants. Jones & Tillett, for appellee.

PER CURIAM. After a careful examination of this case, we have arrived at the conclusion that the rule in Shelley's Case does not apply, and that L. W. Crawford takes but a life estate in the property in question. Such seems the intention of the testator, from the context of the will; and this intention, it is well settled, must prevail over technical language, when such language is qualified by superadded words. We are also of the opinion that the power to "invest or use" all of the property, in view of other expressions in the will, authorizes a sale of the same by the life tenant, and on this ground the judgment is affirmed.

BURWELL, J., did not sit on the hearing of this case.

(115 N. C. 784)

#### STATE v. SUTTLE.

(Supreme Court of North Carolina. Dec. 27, 1894.)

RESERVATION IN DEED—RIGHT TO RAISE MILLDAM—EASEMENT—HOW DIVESTED—ADVERSE POSSESSION—NUISANCE.

1. The reservation of the right of "raising and rebuilding" a milldam, "in case it washed away," reserves the right to raise as well as to rebuild the dam.

2. An easement reserved in a deed is not affected by the fact that deeds of the land to subsequent grantees do not mention it.

3. The mere cultivation of land upon which the owner of a milldam has the right to back water is not an act of possession adverse to such owner.

4. The erection of the frame of a milldam, which, when completed, will pond the water back, and thereby create a nuisance, does not itself constitute a nuisance.

Appeal from criminal court, Buncombe county; Jones, Judge.

D. D. Suttle was convicted of destroying a certain milldam, and appeals. Affirmed.

This was an indictment under section 1087 of the Code, charging the defendant with cutting away and destroying a certain milldam, the property of John Hildebrand, tried in the criminal court of Buncombe county, before Jones, J. The defendant pleaded not guilty. The counsel contended, among other things, that if he did destroy so much of the dam as would bring it down to the height of the original dam before Hildebrand rebuilt and raised it, he did it in the exercise of his right to abate the public nuisance. The prosecutor conveyed a tract of land to three persons, in 1886, by deed containing the following clause: "Reserving and excepting to the parties of the first part, their heirs and assigns, the perpetual right and privilege of backing water from their milldam on the land herein conveyed, and of raising and rebuilding the dam in case it washed away, at their pleasure, and all without cost, charge, or expense to said parties of the first part, their heirs and assigns, on account of land damaged thereby or on any account; the parties of the second part, their heirs and assigns, being allowed to take all the ice that may be in the pond, and the right also of hauling out the mud that may accumulate in said pond."

The Attorney General and Locke Craig, for the State.

AVERY, J. The right was reserved in the original deed in clear and unmistakable terms to raise as well as to rebuild the dam. Those who took title to the land subject to the servitude had no just ground to complain of the exercise of this right, and were in no better condition before the court, when indicted under section 1087, of the Code, than any other person who ventures to take the law in his own hands, and seek redress for an imaginary injury by destroying another's milldam. When the prosecutor reserved the right of raising as well as rebuilding the dam, we cannot agree that both words were used to mean the same thing, because, giving to the language its ordinary import, the parties obviously had in view the possibility that the grantor, his heirs or assigns, might deem it best for their own interests to do just what it appears was done by them, in case the old dam should be swept away. It seems to us that the defendant has no ground to object to the construction placed upon this clause by the court, nor of the instruction as to the application of the facts to it. It was suggested that the defendant, who holds through the mesne conveyances from the grantees under the

deed from Hildebrand, in neither of which is any mention made of the reservation by Hildebrand, may hold discharged of the servitude. But Hildebrand having reserved the easement, the right to it could not be divested out of him, except by a conveyance or by adverse possession for the necessary period. The mere cultivation of the soil, being no interference with the enjoyment or right to use the easement, does not expose the occupant to an action of trespass by the dominant owner, and therefore does not constitute a possession adverse to him. *Osborne v. Johnson*, 65 N. C. 26; *Boomer v. Gibbs*, 114 N. C. 85, 19 S. E. 226; *Hamilton v. Icard*, 114 N. C. 536, 19 S. E. 607. The right to an easement may be acquired by prescription or lost by an adverse user, but in either case the user must be of such a nature as to expose the claimant under it to an action at any time for 20 years. *Emery v. Railroad Co.*, 102 N. C. 232, 10 S. E. 141. The owner of the agricultural interests may become a trespasser as to the reserved mineral interest, but only by engaging in mining for the mineral or minerals reserved (*Ashman v. Wigton* [Pa. Sup.] 12 Atl. 74); and so he can, by direct interference indicating an unequivocal claim to the easement as distinguished from the right to cultivate, subject himself to liability to the dominant owner of the easement to build or raise a dam. The defendant had no reasonable ground to object to the instruction that his right was not infringed unless the water was actually ponded back further than Hildebrand was authorized to throw it back. The mere erection of the frame of a dam, which by further work in putting on or grooving plank or boards would so pond the water back and create a nuisance, does not constitute a nuisance before any injury ensues. We deem it unnecessary to mention in detail the several assignments of error. What we have said meets the reason of all the exceptions, and therefore we think that the judgment should be affirmed.

(115 N. C. 500)

#### HALL v. TILLMAN et al.

(Supreme Court of North Carolina. Dec. 28, 1894.)

REPLEVIN—BY VENDOR AGAINST VENDEE—JUDGMENT—SURETIES ON BOND—LIABILITIES.

1. Where, in replevin, defendant pleads that he originally obtained possession from plaintiff under a conditional contract of sale for a certain price, and the property is sold by order of the court, without objections from defendant, and the proceeds applied in payment of the contract price, plaintiff is entitled to a judgment for the balance due on the contract price.

2. Where, in such a case, the sureties on defendant's bond bind themselves to pay "such sum as for any cause may be recovered against defendant," they are liable for the balance due on the contract price, and not merely for the actual value of the property when seized. *Clark, J.*, dissenting.

Appeal from superior court, Chatham county; Bryan, Judge.

Action by J. L. Hall against Leander Tillman and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

A. P. Gilbert, for appellants. T. B. Womack and J. B. Batchelor, for appellee.

EVERY, J. The plaintiff complained of the wrongful detention of, and demanded judgment for, the property (which was detained by defendants under replevy bond), if a return could be had, for \$900, damages and costs, etc. The defendants answered that they had bought the property for \$800, denied that it belonged to plaintiff or had been damaged, pleaded a payment of \$100, a set-off of \$35, and a counterclaim for damage done by pulling down a house in removing the machinery. At the spring term, 1886, a trial by jury was had, and the verdict was set aside by consent of parties. At the fall term, 1886, the issues were tried by a jury, and a verdict was rendered on only two of the six issues, as follows: "(1) Is the plaintiff the owner of the sawmill and engine described in the pleadings? Yes. (2) Is the plaintiff entitled to the immediate possession of said sawmill and engine? Yes. (3) What was the value of said sawmill and engine at the time of the contracts of the defendants to buy? (4) What sum has been paid by defendants on the contract price? (5) What is the value of the sawmill and engine now? (6) What damage, if any, has the plaintiff sustained by reason of the detention of said sawmill and engine?" The actual value placed upon the property by the plaintiff's affidavit, upon which the first order of seizure was made, was \$800; and the defendants, on November 28, 1884, gave the usual bond in the sum of \$1,600, conditioned for the safe return of the property, if such delivery should be adjudged, and for the payment to plaintiff of such sum as he might recover against the defendants. At the same term when the said partial verdict was rendered, it was adjudged by the court that the plaintiff recover of the defendants the sum of \$668.63, with interest on \$587.08, from the first day of the term till paid, together with costs of action, etc.; and that unless said sum should be paid before the 1st of December, 1886, then the commissioners therein named should sell the property on certain terms, and apply the proceeds to the payment of the judgment and costs, and the residue, if any, to the defendants. At the spring term, 1887, the commissioners reported that the property had been sold in pursuance of the order for \$250, and the said sum had been applied to the payment of the judgment; and on motion the said report was confirmed. At the February term, 1888, it was, on motion for summary judgment on the defendants' replevy bond, adjudged by the court that the plaintiff recover of the defendants and the sureties the

sum of \$1,600 (the penalty of the bond), to be discharged upon the payment of \$448.59, with interest from the first day of the term, with costs, etc. Judge Gilmer presided at this term. Thereupon, at said February term, 1888, before Gilmer, J., the defendants moved to set aside, as irregular and contrary to the course of the court, the judgment rendered at the fall term, 1886, by Connor, J., and, from the refusal of the said motion, appealed to the supreme court.

It was held by this court (103 N. C. 276, 9 S. E. 194), Justice Davis delivering the opinion, that it was not in accordance with the course of the court to have rendered any judgment upon the findings or response to two issues, which determined only the title and right of possession, except for restitution; and that, the judgment for damages that was rendered not being authorized by Code, § 326 (as amended by Act 1885, c. 50), and section 431, the jury must find, preliminary to a final judgment, upon at least one of the issues not passed upon at the former trial. Accordingly, another trial was had, and the case was heard on appeal in this court at February term, 1893 (110 N. C. 220, 14 S. E. 745), when attention was called to the fact that the defendants had set up as a defense that they became possessed of the property under a contract of sale for \$800, and had made certain payments on the contract price. The court held that where defendants proved such an agreement to sell, and it also appeared that the property had been sold, and was beyond the control of the court, while ordinarily the value is assessed under the statute, as amended, "as of the time of the tortious taking or wrongful detention by the defendants," with interest from that time, in such a case the purchaser would be treated as though the original taking had been tortious, instead of permissive, and the damage would be assessed as of that date. And it was declared in that case, at page 227, 110 N. C., and page 747, 14 S. E., citing *Taylor v. Hodges*, 105 N. C. 849, 11 S. E. 156, that where the owner reserves title in himself in a contract for sale, or takes a reconveyance by way of mortgage, "though he has the right to demand possession on default in the payment of the price or breach of the conditions of the mortgage, the sureties, upon a final adjustment of their liabilities, may justly demand that the jury shall find what was the price agreed upon between the parties for the property, and what sums had been actually paid." This was declared upon the principle announced in *Walsh v. Hall*, 66 N. C. 233, and substantially reaffirmed in *Wilson v. Hughes*, 94 N. C. 182,—that the court will look at the transaction that is being investigated before it, without regard to the form and manner of action. The history of the transaction in this case was fully developed before the court. It was admitted on the trial that \$800, the sum alleged in plaintiff's affidavit to be the value, and in

the defendants' answer to be the price agreed upon at the time of the sale, was in fact the contract price, and so, in response to the issue, was entered. The amount of the payments was found in response to another issue, and the balance still due, after deducting the partial payments, was the answer to the third issue. This last sum was therefore the amount that still remained unpaid of the original purchase money, with interest, allowing for the two partial payments, with interest on each, found by the jury to have been made, and for the sum realized by the sale made by the commissioners, and paid to the plaintiff, with interest thereon; so that, upon the findings of the jury, judgment was rendered against the defendants' sureties for \$1,600, the penalty of the bond, to be discharged upon the payment of the precise amount of the original purchase money still remaining unpaid, with costs. This was an equitable adjustment of the whole matter, and was in exact accord with the opinion in *Hall v. Tillman*, 110 N. C. 226, 227, 14 S. E. 745.

From the refusal of the court, Judge Gilmer presiding, to set aside the judgment first rendered by Judge Connor, the appeal was taken which was first heard in this court; and it appears (103 N. C. 281, 9 S. E. 194) that the court declared there was error, and sent the case down for trial upon additional issues, only the plaintiff's title and right of possession having been determined by the previous findings. The sale which had been made under the same order, and subsequently confirmed, was left undisturbed; the property having passed to a purchaser, and the proceeds having been paid to the plaintiff, and credited on his judgment. It was this question that was declared by this court (110 N. C. 225, 14 S. E. 745) to have been adjudicated. The property having been placed beyond the control of the court or the reach of the parties, the question of deterioration was no longer a living issue. The defendants had contracted to pay \$800, and set up the contract in the answer. When they allowed the property to be sold, and the proceeds applied to their debt, without objection, it was equivalent, for the purposes of this appeal, to an agreement that it should be so disposed of. If the court was not in error, as we hold, in requiring the jury to ascertain, as a basis of the judgment, the contract price, with interest, less payments, then the testimony offered tending to show the value of the property at the commencement of the action was irrelevant and incompetent. For the same reason, the offer to show the value at the October term, 1888, when the property was ordered to be sold, or at the commencement of the action, was properly refused; and it was not error to decline to submit issues involving the question of value at these periods.

In view of the original contract set up in the answer and the subsequent history of the

transaction, this was a cause in which the court could not properly have given any other construction than that the net damage due plaintiff was the contract price, less the payments made by the defendants and the proceeds of sale by order of the courts; and, under the statute, the proper judgment was that given. The material portion of the undertaking of the defendants was as follows: "Now, therefore, we, J. R. Jones, of Chatham county, and D. A. Palmer, of Chatham county, undertake in the sum of sixteen hundred dollars that, if said property be returned to defendants, it shall be delivered to plaintiff, if said delivery be adjudged, and that the plaintiff shall be paid such sum as for any cause may be recovered against the defendants in this action." Accordingly, the plaintiff recovers the amount still due on the original contract price. Surely, this recovery falls within the express letter of the undertaking. The decision of the case as to the sureties is founded upon the language of the undertaking; and it may be that under another undertaking, differently drawn, the liability of sureties would be limited to actual value. No such case is before us. No error. and the judgment is affirmed.

OLARK, J. (dissenting). As to the defendants, the proposition is unquestionable that the plaintiff can recover, as to him, the contract price, less the payments made by the defendants and the proceeds of sale made by order of the court. But, as to the sureties in claim and delivery, it is "not so nominated in the bond." They did not become liable for the debt, but for the return of the property, or its value. As, on the plaintiff's objection, they were debarred from showing the value of the property when the replevy bond was given, the sureties were clearly liable only for its proceeds when sold, and, such proceeds having been applied on the debt, they are no longer liable therefor. The condition of the bond "for the return of the property, if it should be adjudged, and for the payment to plaintiff of such sum as he may for any cause recover against the defendants" means such sum as he may recover for any cause concerning the property replevied, as for failure to return the property, and for damage to or use of same, and not liability on the part of the sureties for any indebtedness of defendants to plaintiff over and above the value of the property agreed to be returned, if so adjudged, and the damages caused by the detention. This is in accord with the express decision of this court (Davis, J.) in this case, when it was here. 103 N. C. 276, 9 S. E. 194. The rule as to the measure of the liability of sureties laid down when the case was again here (110 N. C. 223, 14 S. E. 745) only applies when the property is worth or sells for more than the balance due on the contract price. I do not think the sureties on the replevy bond are bound for the deterioration of the

property between the time of the contract and the date of the seizure under the claim and delivery, and giving the bond thereunder.

(115 N. C. 811)

STATE v. HALL et al.

(Supreme Court of North Carolina. Dec. 27, 1894.)

INTERSTATE EXTRADITION — AUTHORITY OF STATE GOVERNOR.

1. One who has not actually been within the territorial limits of a state since the commission of the crime with which he is charged, though it was constructively committed therein, cannot "flee from justice and be found in another state," within Const. U. S. art. 4, § 2, cl. 2, providing that a person so doing shall be surrendered on demand of the state from which he fled.

2. In the absence of a statute requiring him to do so, the governor of North Carolina has no authority to surrender, upon requisition of another state, a person who is charged with crime therein, but who has not fled from justice, within the meaning of Const. U. S. art. 4, § 2, cl. 2.

3. A state may provide by statute for the surrender upon requisition of persons indictable for crime in another state, although they are not fugitives from justice.

Petition by William Hall and another for a writ of habeas corpus. From an order refusing to discharge the petitioners from custody, they appeal. Reversed.

This case upon former appeal is reported in 114 N. C. 909, 19 S. E. 602. The petitioners, Hall and Dockery, were incarcerated in the jail of Cherokee county on a warrant issued by a justice of the peace charging them with being fugitives from justice from Tennessee for killing in said state one Andrew Bryson. The judge refused to discharge the prisoners, and recommitted them to jail to await the warrant of extradition, and they appealed. After setting out the affidavit and the warrant of the justice of the peace, and their arrest thereunder, they show that at fall term, 1892, they were indicted for the murder of Andrew Bryson; and at spring term, 1893, were tried and convicted; and appealed to the supreme court and obtained a new trial (setting out the judgment of the last-mentioned court). They further show that at spring term, 1894, the judgment and opinion of the supreme court were filed in the said superior court, and they, being brought to the bar of the court, demanded a trial by jury; whereupon the judge informed the solicitor that he must either try the prisoners, or they would be entitled to their discharge; and thereupon the solicitor entered a noli pros, and the prisoners were discharged. They further show that immediately thereafter they were arrested and taken in custody by the sheriff upon the warrant of the justice of the peace, and that they are advised and believe that, under the constitution and laws of the state and United States, they are entitled to a jury trial upon said indictment in the state of North Carolina, and that they still stand charged with the mur-

der of said Bryson in the courts of this state, and cannot, while so charged, be committed or extradited to the state of Tennessee for trial for the same offense. The petitioners further show that, at the time of the alleged killing of Bryson, they were not in Tennessee, nor have they been in said state since the alleged killing; and they are not fugitives from justice from Tennessee; and they are, and ever have been, citizens of North Carolina, and at the time of the alleged killing of Bryson were actually in North Carolina, and have not since been in Tennessee. They further show that they are not guilty of the alleged murder in the state of Tennessee or elsewhere, and pray that the writ of habeas corpus may issue, directed to the sheriff and to whomsoever may hold your petitioners in custody, commanding him or them to have your petitioners before your honor immediately for the purpose of inquiring into the cause of their commitment and detention, and that they may be discharged from custody.

G. S. Ferguson, for petitioners. The Attorney General, for the State.

AVERY, J. The defendants were arrested and are now held under the statute (Code, § 1165), which provides that any one of certain judicial officers therein named, "on satisfactory information laid before him, that any fugitive in the state has committed, out of the state and within the United States, any offense which by the law of the state in which the offense was committed, is punishable either capitally or by imprisonment for one year or upwards in any state prison, shall have full power and authority, and is hereby required to issue a warrant for said fugitive and commit him to any jail within the state for the space of six months unless sooner demanded by the authorities of the state wherein the offense may have been committed, pursuant to the act of congress in that case made and provided," etc. It is manifest that the prisoners cannot be lawfully detained, under the unmistakable language of the law, unless it has been made to appear that they are liable to extradition under the act of congress, passed in pursuance of article 4, § 2, cl. 2, of the constitution of the United States, in order to provide for the surrender of persons charged with criminal offenses "who shall flee from justice and be found in another state." The prisoners were tried for murder in Cherokee county, and upon appeal it was held (114 N. C. 909, 19 S. E. 602) that, if the deceased at the time of receiving the fatal injury was in the state of Tennessee, and the prisoners were in the state of North Carolina, the courts of the former commonwealth alone had jurisdiction of the offense. The prisoners, if such were the facts, were deemed by the law to have accompanied the deadly missile sent by them across the border, and

to have been constructively present when the fatal wound was actually inflicted. As our statute confers no power to detain in custody or to surrender, at the demand of the executive of another state, any person who does not fall within the definition of a "fugitive from justice," according to the interpretation given by the courts of the United States to the clause of the federal constitution providing for interstate extradition, and the act of congress passed in pursuance of it, the only question before us is whether a person can, in contemplation of law, "flee from justice" in the state of Tennessee when he has never been actually, but only constructively, within its territorial limits. Upon this question there is abundant authority, emanating, not only from the foremost text writers and some of the ablest jurists of the most respectable state courts, but from the supreme court of the United States, whose peculiar province it is to declare what interpretation shall be given to the federal constitution and the statutes enacted by congress in pursuance of its provisions, which are declared by that instrument to be the supreme law of the land. If we can surrender under our statute only fugitives within the meaning of the act of congress, it would seem sufficient to cite *Ex parte Reggel*, 114 U. S. 642, 5 Sup. Ct. 1148, where it is held that a person arrested as a fugitive has a right "to insist upon proof that he was within the demanding state at the time he is alleged to have committed the crime charged, and consequently withdrew from her jurisdiction, so that he could not be reached by her criminal process." It is admitted that the prisoners have never withdrawn from the jurisdiction of the courts of Tennessee, and have never been, either at the time when the homicide was committed or since, exposed to arrest under process issuing from them. But in a case involving so important a principle, and calculated to excite general interest on the part especially of the legal profession, we feel warranted in not only citing but quoting from other authorities. Where a person is charged with cheating by false pretenses, by means of a misrepresentation in writing sent to another state, whereby he procures something of value in the state to which such writing goes, he is deemed to be constructively present where the false pretense is successfully used, and where the money or property is obtained, and is consequently liable to be indicted and punished there, if he comes within the reach of the process of its courts. *People v. Adams*, 3 Denio, 190. But the supreme court of Alabama, in a case exactly in point (*In re Mohr*, 73 Ala. 503), state the principle applicable here with great clearness and force. The defendant was charged with cheating by false pretenses a prosecutor in the state of Pennsylvania, though it was admitted that he had never actually gone within the limits of that state. The court said:

"It is clear to our minds that crimes which are not actually, but are only constructively, committed within the jurisdiction of the demanding state, do not fall within the class of cases intended to be embraced by the constitution or act of congress. Such, at least, is the rule, unless the criminal afterwards goes into such state and departs from it, thus subjecting himself to the sovereignty of its jurisdiction. The reason is, not that the jurisdiction to try the crime is lacking, but that no one can in any sense be alleged to have fled from a state, in the domain of whose territorial jurisdiction he has never been corporally present since the commission of the crime." That court cited to sustain this view, among other authorities, *Whart. Cr. Pl.* (8th Ed.) 231; *Kingsbury's Case*, 106 Mass. 223; *Ex parte Smith*, 3 McLean, 121, Fed. Cas. No. 12,968; and *Wilcox v. Nolze*, 34 Ohio St. 520. *Bouvier (Law Dict. 551)* defines a "fugitive from justice" as "one who, having committed a crime within one jurisdiction, goes into another in order to evade the law and avoid punishment." The same writer says, also, that the executive of a state cannot be called upon to deliver up a person charged with a criminal offense in another state, unless it appear that such person "is a fugitive from justice." *Rapalje (Law Dict. 555)* defines a "fugitive from justice" as "one who, having committed a crime in one jurisdiction, flees therefrom into another jurisdiction in order to escape punishment." See, also, 1 Abb. Law Dict. 508, for definition of "fleeing."

To hold that a person who is liable to indictment only by reason of his constructive presence is a fugitive from the justice of a state within whose limits he has never gone since the commission of the offense, involves as great an error as to maintain that one who has stood still, and never ventured within the reach of another, has fled from him to avoid injury. One who has never fled cannot be a fugitive. *Jones v. Leonard*, 50 Iowa, 106; 7 Am. & Eng. Enc. Law, 646, and note 1; *Id.* 647. Moore, in his work on Extradition (volume 2, § 581 et seq.), after quoting the extract already given from *Reggel's Case*, cites a number of other cases, wherein governors of states, under well-considered opinions of their legal advisers, have recognized and acted upon the principle that a person cannot be said to flee from a place where he has never actually been, but to which by a legal fiction he is deemed to have followed an agency or instrumentality, put in motion by him, to accomplish a criminal purpose. *Spear (Law Extradition, pp. 396-400)* cites and discusses the authorities bearing upon the question whether a person can be a fugitive from a state into which he has never entered, and not only reaches the same conclusion at which we have arrived, but maintains, arguendo, that a person who has been extradited as a fugitive cannot be sent back from the demanding state, on requisition of

the executive who surrendered him, to answer a crime committed while he was a fugitive, because one who is forcibly taken away does not, in contemplation of law or in fact, flee from justice. The author says that to assume that an abduction by force, though under legal process, is a fleeing, "is a gross absurdity, quite as bad as the theory of fugitives by construction." Had it not been provided by the constitution of the United States (article 4, § 2, cl. 2) that "a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he has fled be delivered up," etc., the states, as to the right to demand and the power to surrender fugitives from justice, would have sustained relations to each other analogous to those existing between independent nations. *State v. Outshall*, 110 N. C. 538, 15 S. E. 261. If no stipulation by treaty were now in force requiring the government of the United States to surrender, on requisition of the authorities of Canada, persons charged with murder in that Dominion, those guilty of such crimes would find this country a safe asylum. In the absence of any provision of law imposing upon the executive of the state of North Carolina the duty of surrendering, on requisition of the governors of other states, any person charged with a criminal offense in the demanding states, except such as shall be shown to have fled from justice within the meaning of the federal constitution, the governor must search in vain for authority to issue a warrant of extradition, in a case like this before us, as was in effect conceded in *Re Sultan* (decided at this term), reported in 20 S. E. 375. While a statute passed now, and making it murder to willfully put in motion within the state of North Carolina any force which should kill a human being in a neighboring state, might not be amenable to such constitutional objection as that discussed in *State v. Knight*, Tayl. 65 (44), it would as to this case be an *ex post facto* law. But in the exercise of its reserved sovereign powers, the state may, as an act of comity to a sister state, provide by statute for the surrender, upon requisition, of persons who, like the prisoners, are indictable for murder in another state, though they have never fled from justice. If it shall be proved that the prisoners were in fact in North Carolina and the deceased in Tennessee when the fatal wound was inflicted, a law may still be enacted giving the governor the authority to issue his warrant and deliver them on requisition. Meantime it may be asked, what can be done to provide for this *casus omissus*? We may answer, in the language of Spear (*supra*, p. 400): "Nothing, by any extradition process, until there is some authority of law for it. \* \* \* State statutes may be enacted to furnish a remedy not now supplied by either federal or state law." Were the courts, without any semblance of right, to supply

the legislative omission, it would be a criminal usurpation of authority, more pernicious to the public interests than the escape of, not two, but scores of criminals. Appellate courts cannot deliberately legislate for the punishment of crime without incurring a moral accountability as grave as that of the criminal who suffers by the usurpation.

The attorney general, with commendable frankness, admitted that he could find no authority to sustain his contention. It is not pretended that a single appellate court, federal or state, or a respectable law writer, has given any other interpretation to the law than that adopted by us. Courts cannot amend or override constitutions and statutes, and, upon the higher-law idea, anticipate dilatory legislatures by providing for the safety of the public in the event that anarchists should project deadly missiles across a state border. Mobs can be suppressed under the common law wherever they may assemble for an unlawful purpose and attempt to put such purpose into execution. But, if they could not, it would be the duty of the legislature, not of the courts, to provide for their suppression. If there is any foundation for apprehending that the disorderly elements of society are watching for opportunity to take life and destroy property, provided they can see a way of escape through the loopholes of defective laws, the representatives of the people must be trusted to meet, if not anticipate, emergencies as they arise. Neither actual nor possible consequences should deter judges from executing the law as it is plainly written. The argumentum *ab inconvenienti*, when used to bring about a modification of a well-established principle of law, should be addressed to the lawmaker, whose province it is to provide a remedy for any evils growing out of its enforcement. Addressed to judges under such circumstances, it is an invitation or a temptation offered to violate their sacred obligations in order to appease the public. In *Splier's Case*, 1 Dev. 491, the supreme court declared the prisoner entitled to his discharge upon a writ of habeas corpus where the term of the court expired pending his trial for murder, because he could not be again put in jeopardy for that offense. The defect in the law was subsequently remedied by statute allowing the court to continue into the next week if a felony were being tried when the week expired. But the court, composed of Taylor, Hall, and Henderson, did not hesitate for a moment because a guilty man might escape. On the contrary, Judge Hall said: "The guilt or innocence of the prisoner is as little the subject of inquiry as the merits of any case can be when it is brought before this court on a collateral question of law." Courts enforce laws, not simply to punish the guilty, but as well to protect the innocent. The law which fails to provide for the extradition of a guilty man must be understood and adhered to, because it may be invoked as a protection to the innocent, who

are prosecuted without cause, against the annoyance, expense, and invasion of personal liberty involved in being extradited. There was error. The prisoner should have been discharged.

CLARK, J. (dissenting). It is a fact agreed in this petition that the defendants being in this state, slew the deceased, who was over the line in Tennessee. The defendants were indicted in this state for the murder, and convicted. On appeal, the conviction was reversed, this court holding (*State v. Hall*, 114 N. C. 909, 19 S. E. 802) that there was a defect of jurisdiction because the offense was committed in Tennessee, and that in legal contemplation the parties committing the crime were in Tennessee. If they were in Tennessee when they committed the crime, they are now in North Carolina, and in legal contemplation are necessarily fugitives from justice. If they were not in Tennessee, but in North Carolina, when they committed the crime, then it was error to hold that the defendants could not be convicted in North Carolina. They should be tried in the jurisdiction in which they were when the offense was perpetrated. That has been held to be in Tennessee. If that is sound law, and the defendants were then in law in Tennessee, and now in fact are in North Carolina, they are in legal contemplation, and within the language and purport of the extradition law, "fugitives from justice." This term is intended to embrace those who, having committed a crime in one state, endeavor to evade justice by being in another state, whither the ordinary process of the state where the crime was committed will not reach them. That is the situation of these defendants. They are sheltering themselves from process by being in another state. They are charged with murder in Tennessee, and are now where the ordinary process of the courts of that state cannot reach them. They can only be had for trial in the state of the commission of the crime by application to the governor of the state where they are to be found. They are proper subjects of extradition. If a mob occupying the Jersey side of the Hudson should shell the city of New York, or from the opposite shore of the Delaware should cannonade the city of Philadelphia, they would be liable to no punishment in New Jersey, under the decisions of the courts, because, "in contemplation of law," the mobs are in New York and Pennsylvania. But if it is true, as is contended by the defendants, that the members of the mob cannot be extradited because the mob never was in those cities, it would be a singular state of things. This ruling would also place Savannah, Memphis, St. Louis, Cincinnati, Louisville, and hundreds of other cities and towns at the mercy of any mob which might assemble, with weapons of long range, across the state line. The preamble to the constitution of these states recites that

it was ordained "to form a more perfect union and insure domestic tranquillity." Article 4, § 2, cl. 2, provides "that any person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime." It would be a restricted construction, and little calculated to "form a more perfect union and establish domestic tranquillity," to hold that a "fugitive from justice" in the purview of this provision applies only to persons who, being actually as well as potentially in the state where the crime was committed, afterwards departed the same. A person who places himself outside the limits of the state from thence to commit the crime within said state, and ever afterwards avoids going into said state to avoid arrest, as truly "flees from justice" as he who, having committed a crime, flees from the state subsequently. If an infernal machine sent by mail or express from a distant state explodes and kills the receiver, it is murder committed in the latter state. The sender skulking in another state to avoid arrest is as truly a fugitive from justice as if he had accompanied the machine to its destination and then fled. The constitutional provision for extradition, and the laws passed in pursuance thereof, it should be remembered, are not criminal, but remedial, provisions. They should therefore be liberally construed to effect the purpose intended to be served, which is to extend into another state, through the medium of its executive, the process of the state whose laws have been violated. This process, having no validity beyond its borders, can only be made available to arrest the person charged with crime by virtue of the governor of the state, where such person is to be found, acting under the extradition, just as a magistrate of one county may indorse a summons issued by a justice of the peace in another county, under the Code. Civilized man must recoil from the practical ruling that the territory adjacent to state boundaries is a "no man's land," and that murder is privileged if committed across a state line. It may be safely said that the judge who first laid down a ruling from which such result practically follows did not foresee the purport and effect of his decision. We are called upon to correct, not to perpetuate, his errors, though others have since followed him. It is true that this restricted construction has been placed on this clause by several courts and text writers, but their opinions are merely of "persuasive authority," as we have often held, and entitled only to the weight due to the reasons they give. Years ago Chancellor Kent (1 Comm. 477) said that it would not do "to press too strongly the rule of stare decisis, when it is recollected that over one thousand cases in



the English and American books have been overruled. Even a series of decisions are not always conclusive, and the revision of a decision often resolves itself into a mere question of expediency." His remark has received added force since by the fact that overruled cases now number several thousand. Especially a constitutional provision cannot be nullified or rendered of no effect by the erroneous ruling of a judge. When the choice is presented us, it is his error, and not the constitution, which must be disregarded. This is clearly so if the constitution is superior to the power of a court to amend it by erroneous interpretation. Courts do not yet claim infallibility, and are not above correcting errors, especially in a matter so clearly against the very intent and meaning of the federal constitution as a ruling that, though a murder has been committed in the United States, yet a state may be powerless either to try the murderer when found in its borders or to surrender him to another state where he may be tried. There is no authority or precedent in this state, and, this being with us a case "of novel impression," we are not hampered from giving such construction to the clause as is most consonant to our views of its true intent and purport. It is true the several states might pass statutes broader than the clause quoted from the federal constitution, but it is also true that some of them might fail to do so. The federal constitution does not contemplate leaving the security of so many cities and towns, lying near state boundaries, dependent upon the inadvertence or unwillingness of the legislature of a neighboring state to pass an extradition law more liberal than the federal constitution. Besides, our statute (Code, § 1165) is broader, and authorizes the arrest of "any fugitive" who has committed the crimes therein specified "out of the state and within the United States." A fugitive from justice is simply one who, having committed a crime within a state, keeps himself beyond the ordinary process of the courts of such state. The two cases cited from the supreme court of the United States (*Ex parte Reggel*, 114 U. S. 642, 5 Sup. Ct. 1148, and *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. 291), read according to the spirit instead of the letter, sustain, rather than militate against, this view; in which case he can be demanded of the executive of any state in which he may be found. Even if there had been no constitutional provision and no statute, the comity existing between states in a federal union would authorize the surrender to another state of a person who has committed murder in that state while standing in this state. This comity has been extended to recognize corporations chartered in other states and in other cases. Comity certainly should recognize that murder is a high offense against the laws of a sister state, and we should refuse to shelter the offender when demanded for trial. In re-

fusing to discharge the prisoner I think there was no error.

MacRAE, J. I join in the above dissent.

(115 N. C. 448)

BASKET et al. v. MOSS et al.

(Supreme Court of North Carolina. Dec. 27, 1894.)

ILLEGAL CONTRACT—PROCUREMENT OF PUBLIC OFFICE—INTERPOSITION OF EQUITY—PARTIES IN PARI DELICTO.

1. An agreement for compensation for procuring the appointment or resignation of a public officer is void, as against public policy.

2. A mortgage given to secure the payment of compensation for procuring the appointment or resignation of a public officer is void, as against public policy.

3. Though such mortgage is void, its existence is a cloud on the mortgagor's title, which equity will remove by cancellation. *Shepherd, C. J.*, dissenting.

Appeal from superior court, Vance county; Bynum, Judge.

Suit by A. M. Basket and another against John R. Moss and another to restrain the sale of land under a deed of trust. From a judgment restraining the sale of the land until final judgment, defendants appeal. Affirmed.

T. T. Hicks, for appellants. A. C. Zollicoffer, for appellees.

CLARK, J. The public has a right to some better test of the capacity of their servants than the fact that they possess the means of purchasing their offices. The Code (section 1871) provides, "All bargains, bonds and assurances, made or given for the purchase or sale of any office whatsoever, the sale of which is contrary to law, shall be void." Notwithstanding the office is an office under the United States government, if an action were brought in our courts to recover upon a bond or mortgage given for such consideration, our courts would hold it void. Such agreements are void at common law, as well as by statute. So, also, contracts to procure appointments to office are void (*Mechem, Pub. Off. § 351*), or to resign office in another's favor (*Id. § 357; Meacham v. Dow*, 32 Vt. 721; *Graeme v. Wroughton*, 11 Exch. 146). Public offices are public trusts, and should be conferred solely upon considerations of ability, integrity, fidelity, and fitness for the position. Agreements for compensation to procure these tend directly and necessarily to lower the character of the appointments, to the great detriment of the public. Hence such agreements, of whatever nature, have always been held void, as being against public policy. *Meguire v. Corwine*, 101 U. S. 108; *Tool Co. v. Norris*, 2 Wall. 45; *Gray v. Hook*, 4 N. Y. 449; *Gaston v. Drake*, 83 Am. Rep. 548; *Filson v. Himes*, 47 Am. Dec. 422; *Faurie v. Morin*, 4 Mart. (La.) 39; *Liness v. Hesing*, 92 Am. Dec. 153. Says Ames, C. J., in *Eddy v. Capron*, 67 Am. Dec. 541: "By the theory of our government, appointments to office are

presumed to be made solely upon the principle 'detur digniori,' and any practice whereby the bare consideration of money is brought to bear in any form upon such appointment to or resignation of office conflicts with and degrades this great principle. The services performed under such appointments are paid for by salary or fees presumed to be adjusted at the point of adequate remuneration only. Any premium paid to obtain office interferes with this adjustment, and tempts to speculation, overcharges, and frauds, in the effort to restore the balance thus disturbed." Besides, the moral sense revolts at traffic, to any extent, in the bestowal of public office. It is against good morals, as well as against the soundest principles of public policy. If public offices can be sold or procured for money, the purchasers will be sure to reimburse themselves by dispensing the functions of their offices for pecuniary consideration. The law wisely guards against the first step in that direction. For that reason, not only the sum agreed to be paid directly to the holder of this office to resign, but the amounts advanced for expenses and compensation of persons to go to Washington to procure the authorities there to accept the resignation of one party and the appointment of the other, are not recoverable, for the same reason that agreements to pay for lobbying the passage of bills before a legislative body are void. *Lawson, Cont. § 309*, and *Mechem, Pub. Off. § 360*, and cases cited. All agreements for expenses and compensation of persons seeking to influence or procure appointments to office are void. *Lawson, Cont. § 310*. "The courts condemn the very appearance of evil, and it matters not that in a particular case nothing improper was done or expected to be done. It is enough that the employment tends directly to such results." *Clippinger v. Hepbaugh*, 40 Am. Dec. 519; *Wood v. McCann*, 6 Dana, 366; *Mills v. Mills*, 100 Am. Dec. 535, and numerous other cases cited in notes to *Mechem, Pub. Off. § 360*; *Lawson, Cont. § 311*, and cases cited.

If an action had been brought to recover these sums, or to foreclose a mortgage given to secure payment thereof, the court would dismiss the action. The defendant contends, however, that as he was careful to take a mortgage, with a power of sale, the courts will not interfere by injunction, but will let him proceed to collect his ill-gotten gains. This would simply legalize the practice which is denounced both by statute and common law. Reasons of public policy forbidding this species of corruption are too profound, and too important to the public welfare, to be evaded and nullified by so simple a device. A mortgage given to secure a sum of money upon an agreement against public policy is void. *Code, § 1871*; *Teal v. Walker*, 111 U. S. 252, 4 Sup. Ct. 420; *Willey v. Collier*, 7 Md. 273; *Crowder v. Reed*, 80 Ind. 1. The sale under a void mortgage would be a cloud on the title, and an injunction lies, especially when the invalidity does not appear upon the face of the mort-

gage, but requires extrinsic evidence to prove it. 1 High, Inj. § 469; *Yager v. Merkle*, 26 Minn. 429, 4 N. W. 819. In cases where the consideration is immoral, the deed will be set aside. 2 Add. Cont. 716. *Pom. Eq. Jur. §§ 939-942*, calls attention to the fact that the rule "In pari delicto" is often misunderstood, and its application is, properly and correctly, that in such cases "Potior est conditio possidentis,"—that is, that the court will permit nothing to be done which will enable a party to collect from the other the fruits of his wrong. When he sues to recover, the law will not give him judgment. When he has shrewdly attempted to evade this by taking a mortgage with a power of sale, the court will, by injunction, prevent his collecting on a mortgage denounced as void by reasons of public policy. In section 941 he says: "Whenever public policy is considered as advanced by allowing either party to sue for relief against the transaction, then relief is given to him. In pursuance of this high principle, and in compliance with the demands of a high public policy, equity may aid a party equally guilty with his opponent, not only by canceling and ordering the surrender of an executory agreement, but even by setting aside an executed contract, conveyance, or transfer, and decree the recovery back of money paid or property delivered in performance of the agreement." Also, in section 940, he says that whenever the defensive remedy at law will not be equally certain, perfect, and adequate, the equitable remedy will be granted by injunction and the like. "The equitable relief so conferred does not violate the general maxim concerning parties in pari delicto. On the contrary, it carries that maxim into effect." So in the present case the injunction against sale under the void mortgage taken against public policy enforces that maxim, by preventing either party recovering anything from the other. This is also the well-settled rule in England. In *Lloyd v. Gurdon*, 2 Swanst. 181, Lord Eldon granted an injunction to restrain the negotiation of bills of exchange which were made void by statute (9 Anne, c. 14), which is in the very tenor of section 1871 of the Code, applicable to the present transaction. Lord Hardwicke granted the injunctive relief in a similar case (*Smith v. Aykwell*, 3 Atk. 566); and the vice chancellor, in *Earl of Milltown v. Stewart*, 8 Sim. 371, which was affirmed by Lord Cottenham (3 Mylne & C. 18). In such case, before the master of the rolls, Sir John Romilly, where part of the consideration was for money loaned, and part was for an immoral consideration, the whole mortgage was ordered to be canceled; the court declining to pass upon the question whether the mortgagee could recover at law for the valid part of the consideration, i. e. the money loaned. *Willyams v. Bullmore*, 33 Law J. Ch. 461. In the present case, upon the defendant's own showing, \$37.50 is the only valid part of the sum attempted to be secured. Whether the mortgage can be upheld

to that extent is not before us, as the plaintiff, in his reply, expresses his willingness to pay said sum. The plaintiff recovering judgment for the cancellation of the mortgage, the defendant should be taxed with the costs. The injunction was properly continued to the hearing. Affirmed.

SHEPHERD, C. J. (concurring). I concur in the conclusion of the court that the agreement which the mortgage is given to secure is contrary to public policy, and therefore illegal, and I am also of the opinion that the injunction should be continued until the final hearing. It is alleged that the plaintiff Joseph Basket has a resulting trust in the land included in the mortgage, and as it does not appear that he had any connection with the illegal transaction between A. M. Basket, the mortgagor (the holder of the legal title), and the mortgagee, I see no reason why the equitable aid of the court should not be extended to him. I cannot agree, however, in that part of the opinion which declares that A. M. Basket is entitled to equitable relief. "Whenever a contract or other transaction is illegal, and the parties thereto are, in contemplation of law, in *pari delicto*, it is a well-settled rule, subject only to a few special exceptions, depending upon other considerations of policy, that a court of equity will not aid a *particeps criminis* either by enforcing the contract while it is yet executory, or by relieving him against it by setting it aside, or by enabling him to recover the title to property which he has parted with by its means. The principle is thus applied in the same manner when the illegality is merely a *malum prohibitum*, being in contravention to some positive statute, and when it is *malum in se*, as being contrary to public policy or to good morals. Among the latter class are agreements and transfers, the consideration of which was violative of chastity, compounding of a felony, gambling, false swearing, the commission of any crime, or breach of good morals." 1 Pom. Eq. Jur. § 402. "Where the party seeking relief is the sole guilty party, or where he has participated equally and deliberately in the fraud, or where the agreement which he seeks to set aside is founded in illegality, immorality, or base and unconscionable on his own part,—in such cases courts of equity will leave him to the consequences of his own iniquity, and will decline to assist him to escape from the toils which he has studiously prepared to entangle others, or whereby he has sought to violate with impunity the best interests and morals of social life. \* \* \* Courts of equity could not, without staining the administration of justice, interfere to save the party from the just results of his own misconduct, when the failure of success in the scheme would manifestly be the sole cause of his praying relief." 2 Story, Eq. Jur. § 697; Adams, Eq. 418. These principles are so well established that it is hardly neces-

sary to produce authority in their support, and that they have been recognized by this court is plainly evident by a reference to the cases of *York v. Merritt*, 77 N. C. 213; *Sparks v. Sparks*, 94 N. C. 527, and authorities cited. There are, it is true, limitations to the rule, as where parties are not equally in fault, or, as in the case of usury, where the borrower is considered as in *vinculo*, or where the security is for past cohabitation; and there are cases where, under peculiar circumstances, considerations of public policy will be best subserved by granting relief. These and other instances will be found in the textbooks and notes to which I have referred, and there seems to be some confusion in the decided cases upon the subject. No satisfactory authority, however, can, in my opinion, be found, to take the present case out of the general rule. If, as we have seen, the court will not interfere where the consideration is the compounding of a felony or the commission of a crime, it is difficult to understand why it should extend its relief where the consideration is for the commission of the offense alleged in the complaint. Certainly, considerations of public policy are as grave in the former cases as in the latter. Again, it will hardly be contended that the plaintiff A. M. Basket is not equally in fault. Indeed, it appears from the written agreement executed contemporaneously with the mortgage that he was the moving party in the transaction. The proposition was made by him, and it is perfectly clear that his guilt is equal if not greater than that of the defendant. Again, if it be conceded that that he is entitled to relief on the ground that a part of the contract (the note) is executory, the court would only grant it upon terms; and as the mortgagee has, under the agreement, so credited the note that everything is eliminated except certain expenses and counsel fees and a pre-existing debt, leaving only a balance of about \$200, it would seem very clear that the court, even if it interfered, would not place him in any better condition. The expenses and counsel fees were actually expended in furtherance of his own proposition, and it would seem a complete reversal of the maxim, "*In pari delicto melior est conditio defendantis*," to so use the equitable power of the court as to extricate the plaintiff from the position in which he has placed himself, and put the entire expense of carrying out his own proposition upon the shoulders of the defendant. No clearer case can, in my opinion, be conceived for the application of the rule, than the present.

Furthermore, it is a fundamental principle that a court of equity never interferes where there is a complete defense at law. High. Inj. § 473. In the present case it is said that the mortgage is utterly void. If this be so, there is no occasion for equitable relief, not even on the ground that it is necessary to discover and preserve the evidence of its

Illegality, as the contemporaneous agreement executed by all of the parties is plenary proof of the vitiating element. 2 Story, Eq. Jur. § 700. This consideration, as well as the firmly established rule, "In pari delicto," etc., is also a complete bar to the prayer that the deed be canceled on the ground that it is a cloud upon plaintiff's title. *Id.* Public policy will be far better subserved by leaving the plaintiff where his illegal conduct has placed him, than by encouraging him in another attempt to violate the law by the assurance that a court of equity will always stand ready to relieve him against the consequences of his unsuccessful experiments. "The suppression of illegal contracts is far more likely, in general, to be accomplished by leaving the parties without remedy against each other, and by thus introducing a preventive check naturally connected with a want of confidence, and a sole reliance upon personal honor. And so accordingly the modern practice is established." 1 Story, Eq. Jur. § 298. The case of *Patterson v. Donner*, 48 Cal. 369, cited in the opinion to the effect that a mortgage given to secure money upon an agreement against public policy does not divest the title, does not aid the plaintiff; for, if the title is not divested, there is certainly no occasion for resorting to a court of equity, where the illegality is evidenced, as in this case, by the contemporaneous agreement referred to. The case, however, decides the other way. It holds that the title passes, but that the performance of the illegal condition will not divest the title of the grantee. The case cited from *Indiana* is equally inapplicable, as it was an action at law to enforce an illegal executory agreement; and it was, of course, held that the defendant could plead the illegality of the consideration. The case from *Maryland* is also inapplicable, as it was an action to foreclose a mortgage given upon an illegal consideration, and the court refused relief. It is no authority that the court would have aided the mortgagor, had he been seeking a decree for cancellation. The case of *Willyams v. Bullmore*, *supra*, cites no authority. It seems, however, that the mortgagee was seeking foreclosure, and that this action was consolidated with one brought by the mortgagor for cancellation. Under these circumstances, there was a decree for cancellation. It is doubtful whether the court would have made such a decree had not the mortgagee been seeking foreclosure. However this may be, it cannot be regarded as sufficient authority to overturn the well-established rule embodied in the maxim which I have quoted. There is nothing in the reference to *Pomeroy's Equity Jurisprudence* which at all countenances relief under the circumstances of this case. The defendant has already agreed to terms as favorable as would be imposed by a court of equity. I think that *A. M. Basket* has no standing in a court of equity, and that under the circumstances he is en-

titled to no relief. To interfere in his behalf would be giving aid and comfort to the moving party in this illegal transaction.

(115 N. C. 426.)

STERN et al. v. LEE et al.

(Supreme Court of North Carolina. Dec. 27, 1894.)

HOMESTEAD EXEMPTION—RIGHTS OF REMAINDER-MAN—CONVEYANCE BY HOMESTEADER—EFFECT.

1. A remainder-man may, on the determination of the particular estate, claim a homestead in the land as against his judgment creditors who have failed to sell, under execution, his interest in the land before the termination of the life estate. *MacRae, J.*, dissenting.

2. The purchaser of a homesteader's title to land acquires all the rights of the homesteader therein, and therefore, under Const. art. 10, § 3, providing that "the homestead, on the death of the owner, shall be exempt from the payment of any debt during the minority of his children," the land is not subject, in the purchaser's hands, to sale by prior judgment creditors of the homesteader, on his death, until his minor children become of age. *Clark, J.*, dissenting.

Appeal from superior court, Chowan county; *Graves, Judge.*

Suit by *L. Stern* and another against *S. F. Lee*, administratrix, and others, to subject land to the payment of a judgment. From a judgment sustaining a demurrer to the complaint, plaintiffs appeal. Affirmed.

*W. M. Bond*, for appellants. *W. D. Pruden*, for appellees.

*BURWELL, J.* "Land held in remainder dependent upon a life estate in another is not susceptible of that immediate occupancy which is contemplated by law in order to constitute a homestead." *Murchison v. Plyler*, 87 N. C. 79. Hence, while the estate of the judgment debtor, *Lee*, in the land mentioned in the pleadings, was only an estate in remainder after the life estate of *Mrs. Sarah Frances Bond*, his interest in the land was subject to sale under execution. The docketing of plaintiffs' judgments under the provisions of our statutes gave them a lien on the estate of their debtor in this land; and the constitution and the laws, as interpreted by this court in the case cited above, did not protect that estate from sale, though it was all the realty owned by the debtor, and was worth less than \$1,000. But the plaintiffs did not see fit to exercise this right to sell their debtor's estate in remainder, and, by a determination of the particular estate, his right to the land has become such as clearly to entitle him to claim homestead privileges and immunities therein. Plaintiffs' liens are not at all displaced or affected by the change of the debtor's title. Their enforcement is postponed, however, because in lieu of that estate in remainder, which was not protected from sale, there has come to the debtor an estate which, by force of the provisions of the constitution, brought to him a "homestead" in this land. Being thus entitled to a homestead in all the land

(it being worth less than \$1,000, and all that he owned), he conveyed it to another in fee. He could not, by that act, deprive the plaintiffs of any of their rights, or change or in any degree affect them. The limit of the effect of that deed is the line which marks the beginning of plaintiffs' rights under the law. The plaintiffs have liens on the land by virtue of their docketed judgments. The debtor's deed cannot annul or change those liens. The plaintiffs have a right to enforce their liens at the time and in the manner prescribed by law. The debtor's deed cannot for an instant postpone that enforcement. The effect given to the properly executed deed of the "homesteader" and his wife, conveying the homestead land, by the decisions of this court, does not at all interfere with or affect the rights of judgment creditors. By the law they are given a lien. Their lien continues in force, notwithstanding the debtor's conveyance, unimpaired. By the law the enforcement of their liens by sale is postponed until the determination of the "homestead" right. That postponement is not extended by the debtor's conveyance of the land. It seems clear, therefore, that the judgment creditors of homesteaders have no good cause to complain of the effect allowed to the homesteader's deed, as fixed by the case of *Adrian v. Shaw*, 82 N. C. 474, and the long line of cases of like import. They are left in exactly the plight they were in when the deed was made. On the contrary, the homesteader would have, we think, good cause of complaint if it was held that a conveyance by him subjected the land to immediate sale under executions issued on docketed judgments; for in that event, as is most forcibly pointed out in *Simpson v. Houston*, 97 N. C. 344, 2 S. E. 651, the homestead would be, in effect, unalienable, and, being unalienable, the homestead would become, under some circumstances, a prison rather than a home. *Thomp. Homest. & Ex.* § 399.

In many states where homesteads are secured by law to residents, and where docketed judgments are liens on the judgment debtor's land, an exception as to such liens is made as to homestead lands. On the homestead lands, while occupied as such, no lien attaches; and the homesteader, though he is also a judgment debtor, can make a good title to the homestead land. His conveyance, if made while holding the homestead, is good against the docketed judgments. In this state it is settled, *nemine dissentiente*, that a docketed judgment creates a lien on the homestead land. That being fixed, the courts here were driven to the conclusion either that the homestead was, in effect, not alienable, or that the rule announced in *Adrian v. Shaw*, *supra*, was the law of this commonwealth. Under that rule, those who acquired by proper deed the homesteader's title to the land have the right to assert every right to the land that is not inconsistent with or injurious to the rights of

the lienors, the judgment creditors. What the rights of the homesteader's vendees are will be disclosed by an ascertainment of the rights of the plaintiff judgment creditors. The rights of the latter are paramount, and should not be encroached upon. What are they? To have the homestead land sold to satisfy their debts just as soon as the quality of "exemption from sale under execution," as it has been called, passes from the land, —just as soon as the land could have been sold to satisfy the judgments had no conveyance been made, and no sooner. When does that quality of exemption from sale under execution cease? It seems to be conceded by plaintiffs' counsel that that quality, according to the decisions of this court, followed the land in the hands of the purchaser from the homesteader, and continued till his death. But it is insisted that it ceased at his demise. We do not accede to that proposition. Const. art. 10, § 3, expressly provides that "the homestead after the death of the owner thereof shall be exempt from the payment of any debt during the minority of his children or any one of them." The duration of this quality of exemption from sale under execution is thus plainly extended beyond the life of the homesteader. Had he not sold the homestead land, the plaintiffs could not have sold it to satisfy their judgments until all his children had arrived at full age. We do not subtract anything from their rights when we decide (as we think the former decisions of this court, running through a long series of years, and establishing a rule under which many have acquired rights to property, require us to do) that the purchasers of the homestead land from the homesteader and his wife acquired the right to hold the land against judgment creditors, not only for the life of the homesteader, but also "during the minority of his children, or any one of them." In a very recent case (*Ladd v. Byrd*, 113 N. C. 466, 18 S. E. 666) it was decided that where, in an action to recover possession of land, a homestead right is shown to have existed, the burden is on the plaintiff (claiming to own the "reversion" after the expiration of that right) to show, not only the death of the homesteader, but also the arrival at full age of his youngest child. That case seems decisive of this one. In *Rogers v. Kimsey*, 101 N. C. 559, 8 S. E. 159, there was a contest, as there is here, between judgment creditors and the vendee of the deceased judgment debtor. One question in that appeal was, when did the homestead right terminate so as to allow the creditor to have a sale of the aliened land? Chief Justice Smith there said that "the right to such homestead terminated at his death without wife or infant children, and hence, if a lien had been acquired, it may now be enforced." This language clearly implies that, if he had left infant children, it would not have terminated at his death, and so that case is also decisive of this one. In *Fleming*

v. Graham, 110 N. C. 374, 14 S. E. 922, the justice who delivered the opinion, combating the rule established by *Adrian v. Shaw*, supra, uses this language: "If this were law, upon the termination of the homestead right by the death of such debtor *and the arrival of his youngest child of age*, numerous one thousand dollar tracts of land would be for sale, which he had kept *till then* exempt from his creditors." The words we have italicized in the above quotation seem to indicate an opinion that the homestead right did not terminate till the youngest child of the homesteader became of age. No error.

MacRAE, J. (dissenting). I do not think that any homestead question arises upon this appeal. In September, 1883, the first judgment was taken and docketed against D. M. Lee; and in May, 1884, the other two judgments were docketed against him, and from the docketing of these judgments the lien attached upon his estate in remainder. Code, § 435; *Mannix v. Ihrie*, 76 N. C. 299. It is perfectly clear that, during the widowhood of Sarah F. Bond, the remainder-man, D. M. Lee, had no estate in the land which could be set off by metes and bounds, or that was susceptible of present occupancy. It has been so expressly held in *Murchison v. Plyler*, 87 N. C. 79, where, under the same circumstances, the tenant in remainder, without the joinder of his wife, mortgaged the land. The court held that, not being subject to a homestead in favor of Murchison, the joining of his wife was unnecessary; that his power to convey was without limit. "And if he should exert this power, either absolutely or conditionally, by a sale of his estate and interest in the land while thus untouched by the right of exemption, it can never again be made subject to that right by anything that may thereafter occur." When D. M. Lee, in 1888, married Sarah F. Bond, the particular estate determined, and he became owner in fee of the land, and upon his interest the lien of the docketed judgments had already attached when there was no right of homestead exemption. This lien could not be divested by the falling in of the particular estate. It is like the case of *McKeithan v. Terry*, 64 N. C. 25, where, the lien having been acquired in 1867 by a levy, it was held to be a vested right, which could not be divested by the homestead provision of the constitution. If there was no homestead exemption, the lien of the docketed judgment was lost at the expiration of 10 years. So the first judgment lost its lien in September, 1893, and the others in May, 1894, and the plaintiff is not entitled to the relief demanded. *Whitehead v. Latham*, 83 N. C. 232.

OLARK, J. (dissenting). The homestead is prescribed and its limits defined by the constitution. The legislature has no power to increase it. *Wharton v. Taylor*, 88 N. C.

230. Of course, neither can the courts enlarge it. In construing its limitations, we must look to the plain, unvarnished language of the constitution, and not back of it to some supposed public policy, which caused the adoption of this constitutional provision, as to which minds may easily differ. Looking at the constitution itself, it is clear that the homesteader was given a life exemption, no more. There is no indication whatever that he should have the power to exempt any part of his property from liability for his debts longer than his life. Another clause gives his children the right to claim the exemption for themselves during minority, and this it has been held they may do, whether the homesteader has had the homestead laid off or not. And still another clause provides that, when there are no children, the widow may likewise have it laid off during her widowhood, if she have no homestead in her own right. The only limitation upon this right of the widow and minor children is that it must be as to a homestead of which the father and husband is the "owner" when he dies. As to the homesteader himself, his right in the homestead dies with him. He has no interest therein which he can transmit to another by devise, to the detriment either of his creditors, his children, or his widow. Whatever right he had to protect the land from sale by virtue of the homestead dies with him if he remains in possession of it till his death, and he cannot extend it by conveying the land to another, neither by deed nor by devising it in his will. Const. art. 10, § 3, provides that "the homestead, after the death of the owner thereof, \* \* \* shall be exempt during the minority of his children or any one of them." Was the debtor here the "owner of the homestead" at his death? If so, his minor children would have the benefit of a shelter for their heads till the youngest became of age. They, and they alone, after the death of the homesteader, have the right to longer postpone the enforcement of the just claims of his creditors, except in the case in which the widow can make the claim. This is a wise and beneficent provision, intended to shelter the helpless. But if the homesteader has conveyed away the homestead right to other parties, by conveying away the homestead lot, where is the protection of the roof-tree for the children? What object could the constitution have in protecting from his creditors these purchasers from the life tenant, and leaving the minor children upon the cold charities of a heartless world.

Now, I understand the majority of this court to be of the opinion that, if a homesteader convey the homestead, he cannot take a second or a third or a fourth or a tenth homestead. This would seem clearly so in the face of the constitutional provision for a homestead "not exceeding in value one thousand dollars"; otherwise, during the homesteader's life, there might be several home

steads outstanding in the hands of his grantees, each of \$1,000, exempt from liability for his debts. If the father, owning a homestead, die, not having had it laid off, the children can have it laid off, under this provision of the constitution. *Gregory v. Ellis*, 86 N. C. 579. But if the homesteader has already conveyed a former homestead, and such conveyance protects it, in hands of his grantee, from judgment liens even beyond his life, then either the children and the widow are deprived of the constitutional protection given them, to the shelter of the homestead of which he dies in possession, or else the rights of the creditors are impaired by having two homesteads (or more) held against them,—one by the children or widow, and the other or several others by the grantees of the debtor,—and this in the face of a constitution which exempts only one homestead, and that “not exceeding one thousand dollars.” This confused state of things, it seems to me, is due solely to the fact that the homestead right and the homestead lot have not always been distinguished. The homestead right is personal and inalienable. It is the right to a shelter from the storms of life,—to a roof-tree. The homesteader can claim it as often and whenever he has the roof over his head. When he dies, his children, during their minority, can claim it as to the homestead their father owned when he died. As to the tract or lot of land over which, at any given moment, he claims the homestead exemption, the homesteader is empowered to convey that, to prevent the tying up of realty. But to argue that with such conveyance there must also go the grantor’s homestead right, because otherwise the liens of judgment creditors might take the land, and the conveyance would be futile, is at best the argument *ab inconvenienti*. It should not avail to change an “exemption” personal to the “owner and occupier of a homestead,” which the constitution gives, into an “estate” or so-called “quality,” which, invisible to mortal eyes, attaches to the lot, and travels around with it into all the successive hands into which that lot of land may go. Besides, even this argument loses sight of the fact that, when the homestead lot is conveyed, there are not always liens upon it, and, if liens, not necessarily for the full value of the homestead. And, if the liens are for the full value, the homesteader need not convey. He can stand as he is. If he voluntarily, nevertheless, should see fit to abandon his shelter, the constitution expressly authorizes him to do so as to the lot conveyed. But he has an inalienable and indefeasible power to assert his homestead right, not by proxy over the lot he has conveyed away, but, in his own behalf as to any other lot he may become the owner of; and his minor children and wife can assert it as to any homestead he may be the owner of at his death. It is true in the late case of *Vanstory v. Thornton*, 112 N. C. 196, 17 S. E. 568, this court

(though not by a unanimous bench) departed from the then recent decision of *Fleming v. Graham*, 110 N. C. 874, 14 S. E. 922, and reverting to the older decision of *Adrian v. Shaw*, 82 N. C. 474, held that the conveyance of the homestead lot was not merely a conveyance of the land described, but also of an invisible quality attached to it by virtue of the grantor’s homestead right. Taking it, for the argument’s sake, that the latter case will be adhered to after the maturer thought which already in so many instances (notably in *Long v. Walker*, 105 N. C. 90, 10 S. E. 858) has corrected the erroneous earlier rulings as to the homestead, still, *Vanstory v. Thornton* does not go to the extent of holding that a person can convey an interest in land which he cannot devise, nor that the owner of a lifetime exemption, which expires as to him at his death, can prolong it after his death by conveying it to another. If any one can claim the homestead right after his death, it is the minor child or widow, and not the grantee. The extension of the homestead exemption given to the minor children may last 21 years. That in favor of the widow (when there are no children) may last 50 or 60 years. Such instances are not infrequent. The constitutional convention certainly never intended that a man could take, say, a dozen homesteads all at one time, notwithstanding liens of docketed judgments, and protect all 12 pieces of land from sale in the hands of grantees; nor that all 12 should be further protected after the debtor’s death, perhaps for 21 years if there are minor children, or 50 or 60 years when there is a widow, and during all that time the children and widow receive no benefit from such extension of the exemption. Such a result would be against the common sense of mankind. The convention, instead of that, would have given one homestead in fee (which they voted down), in preference to a multitude of such as this. Our predecessors, handling a new subject, made a mistake in *Adrian v. Shaw*. This court has not hesitated to overrule nine other erroneous rulings as to the homestead. There is every reason to overrule this, which is the greatest mistake of them all, and which, if allowed to stand, will surely jeopardize the existence of the homestead provision itself.

With the profoundest respect always for the opinions of my respected associates on this bench, my convictions of my own duty prohibit my permitting it to be understood that I yield assent now to the doctrine of *Vanstory v. Thornton*. In my humble opinion, the principle there laid down is so clearly and palpably a misconception of the plain meaning and letter of the constitution which confers an exemption, and nowhere intimates an intention to create a homestead estate,—it is so evidently, in my judgment, a construction against the best interests alike of the homesteader and of the just rights of creditors,—and will so certainly lead us into

inextricable confusion and uncertainty (of which the present case is a fair example), that I still deem it the wisest course to adhere to what seems to me to be the plain meaning of the constitution. In this way, we will not only come to the construction held by all the other states having similar provisions, but we will place our feet on the solid rock. If the homestead right is, as the constitution calls it, an "exemption,"—a cessat executio,—there will be no conflicting or confusing questions like the present which can arise. In reasserting the views expressed in the dissenting opinion in *Vanstory v. Thornton*, I am but following the precedent set by Chase, C. J., and Miller and Field, JJ., of the United States supreme court in *Washington University v. Rouse*, 8 Wall. 441, in which, dissenting from the oft-repeated and most unfortunate decision of that court to the effect that a legislature could grant to a corporation an irrevocable and perpetual exemption from taxation, they say: "With as full respect for the authority of former decisions as belongs, from teaching and habit, to judges trained in the common-law system of jurisprudence, we think that there may be questions 'of constitutional construction' which can never be finally closed by the decisions of a court," when contrary to the clear meaning of the constitution; that in such cases the ruling of the court must ultimately conform to the constitution; and that the constitution does not bend to the mistaken ruling of the court, for the courts have no power to amend the constitution. They further add that they were strengthened as to that view by the fact that there had been a series of dissents to the preceding decisions relied on by the majority. So, as to *Vanstory v. Thornton* (itself by a divided court), it followed, it is true, the older case of *Adrian v. Shaw*, held by a court of three judges, but it disregarded the later opinion of a unanimous bench of five judges, in *Fleming v. Graham*, 110 N. C. 374, 14 S. E. 922.

It is not necessary to go over again the reasons set out for the dissent in *Vanstory v. Thornton*. They will speak for themselves. But one additional argument will be drawn from a most recent decision of this court. In *Fulton v. Roberts*, 113 N. C. 421, 18 S. E. 510, it is held, affirming a long line of decisions, and in accord with the palpable meaning of the constitution, in an opinion by Avery, J., that the homestead right ceases upon the removal of the homesteader from the state. If this is so, when the homestead remains in the hands of the owner till his removal from the state, will it not be so when it is in the hands of his grantee? Can the homesteader convey a greater or longer right to exempt the property than he has himself? Can he make it greater than the constitution gave it to him by simply conveying it to another? Will not the exemption cease, and the land be-

come liable to his judgment liens, in force at the time of the conveyance, on the removal from the state of the homesteader, equally whether he owns the land or has conveyed it to another? Does not the homestead also terminate as to the homesteader who is in possession, "owning and occupying" it, at his death, leaving to his minor children and widow their right to claim it during infancy and widowhood? And, if so, can he extend his rights, and debar them of claiming a homestead in the land he leaves by having conveyed away a former homestead? In truth, *Fulton v. Roberts* recognizes the true basis of the homestead; i. e. exemption in favor of an occupant. The constitution gives an exemption to the owner and occupier, if a "resident" of the state. It determines certainly upon the occupier ceasing to be a resident of the state. But it must equally determine upon his ceasing to be the owner and occupier. Each of the three requisites is named by the constitution, and each is essential. It is true he can occupy it by a tenant, for the occupation of the tenant is the possession of the owner. But he cannot "own" it when he has conveyed it away, and such conveyance forfeits the right to exemption given only to the owner as surely as the removal to another state forfeits the exemption given only to a resident. The homestead provision in different states and the judicial construction placed thereon vary much, but the decisions are uniform in this: that, wherever a judgment is held to be a lien on the homestead, there, on a conveyance of the homestead, the lien can be enforced; and, wherever a judgment is held not to be a lien on the homestead, there a conveyance of it passes it exempt from liability. *Thomp. Homest.* §§ 398, 399. The only exception to this line of demarkation is *Adrian v. Shaw*, which recognizes that a judgment is a lien, whose enforcement the homesteader, by his occupancy, can postpone, but which also illogically holds that such right of postponement can be transferred to the grantee of the homestead lot, to be enjoyed as fully as if the grantee was the homesteader himself. Our constitution, however, contemplated only the protection of the homestead to the debtor himself, and his wife and children after him. It did not embrace his grantee.

With all deference to my colleagues, I am of the opinion, therefore: (1) That the homestead right is personal and indefeasible, save by death or removal from the state; that the conveyance of a lot of land over which a homestead right has been asserted neither alienates the right to assert it again as to another tract of land, nor does it go attached as a quality or estate with the conveyed land, so as to enable the debtor to maintain two or more homesteads outstanding, at one and the same time, against his lawful creditors. (2) That, even if this could be true, still the grantee could not hold longer than



the homesteader himself could have held if he had remained in possession. When he dies or leaves the state, the homestead exemption would determine equally in the hands of his grantee as it would if it had remained in the grantor's possession. The grantee takes the land subject to the determination of the homestead exemption (when there are judgment liens at the time of the purchase), and the duration of the exemption in favor of the grantor cannot be altered or extended by his mere conveying the exempted property. When the exemption ceases by the homesteader ceasing to be a resident, the judgment liens on it come into vigor no more certainly than when by deed he ceases to be the owner of the lot. I find no warrant in the constitution for the proposition that a debtor can abstract from liability for his debts as many homesteads as he sees fit, all at one and the same time. Nor do I find, on the other hand, any warrant there for the proposition that if a homesteader convey away the homestead lot, forever thereafter, no matter how many other lots of land he may own, he, and his minor children and widow at his death, are forever debarred from claiming a roof to shelter them when it may be needed most. Yet, if the homestead is an estate or a quality, to one of these two alternatives we must come. Either may be cruel and unjust, and either must bring upon us confusing and perplexing situations to solve. But I find nothing in the constitution in regard to the homestead being a quality or an estate. But I do find it called in the constitution an "exemption." Treated as an exemption, the way is smooth and clear. No complications can possibly arise. While the homesteader has the constitutional requirements of "owning and occupying" the lot, and being a "resident" of the state, he has his "exemption," not exceeding \$1,000 of realty, protected from sale for debt. There is the plain letter and meaning of the constitution. When he ceases to be a resident (*Fulton v. Roberts*, supra, and cases cited), or ceases to own and occupy the lot (*Fleming v. Graham*, supra), in either case that lot ceases to be protected from the liens in force against it by docketed judgments at the time of the conveyance, or from enforcement of any indebtedness when there is removal from the state. Should he "own and occupy" another lot, he can, if a resident of the state, claim it as his homestead. Viewed as an estate or quality, a doctrine which is not found in the constitution, but first "invented" in *Adrian v. Shaw*, the contradiction and confusion are interminable, and will become greater as we wander from the plain guidance of the constitution. Viewed as an exemption, all difficulties vanish, and the constitutional homestead is beautiful in its very simplicity.

AVERY, J. (concurring). The constitution (article 10, § 8) provides that nothing in that article shall "operate to prevent the owner

of a homestead from disposing of the same by deed, but no deed made by the owner of the homestead shall be valid without the voluntary signature and assent of his wife, signified on her private examination, according to law." The necessity for the joinder of the wife only arises where the homestead right attaches, or when he becomes the owner, not only of land, but of land devoted by law to the purposes of a homestead. *Hughes v. Hodges*, 102 N. C. 250, 251, 9 S. E. 437. The first sentence in the section is inserted to exclude any possible conclusion that the homesteader could not alien his "homestead," whatever that term may mean. We have numerous decisions to the effect that the homestead is not a determinable estate, but a determinable exemption. *Gheen v. Summey*, 80 N. C. 190; *Bank v. Green*, 78 N. C. 247; *Markham v. Hicks*, 90 N. C. 205. The legal effect of the constitution and statutes "is simply to protect the occupant in the enjoyment of the land set apart as a homestead, unmolested by his creditors." *Markham v. Hicks*, supra.

Two questions are suggested by the announcement of this principle in connection with the case at bar: (1) When does this exemption terminate? (2) What occupants are freed from molestation by the creditors of the homesteader until such determination? In *Adrian v. Shaw*, 82 N. C. 474, the court said: "The constitution then vests the homestead right in the resident owner of the land, and authorizes him to convey it. The vendee must take it with the same quality annexed that had attached in the possession of the vendor,—that is, to be exempt from execution for the debts of the debtor at least during his life,—for the homestead is a right annexed to the land, and follows it, like a condition, into whosever hands it goes, without regard to notice." The quality of exemption annexed to the land must continue "at least" during the life of the homesteader, because that is the shortest time for which it is operative, when the right of disposition is not exercised. In the hands of the homesteader and of his family, the liability of the homestead does not accrue till his youngest child arrives at the age of 21 years. It is conceded that the right of disposition is guaranteed to the homesteader by the constitution, and that the homestead is not an estate, but an exemption, which lasts according to circumstances, at least for the life of the original owner, and, when he has children, after his death, till the youngest of them arrives at the age of 21 years. The language of section 3, art. 10, is that "the homestead, after the death of the owner thereof, shall be exempt from the payment of any debt during the minority of the children, or any one of them." If the constitution, in plain language, confers the *jus disponendi* on the husband, with the joinder of the wife, of a homestead, and the homestead has been defined to be not an estate,

but a determinable quality of exemption, I confess my inability to conceive of any principle upon which the courts can interpolate a provision into the constitution limiting the right of alienation to only such portion of the exemption as may be covered by the life of the owner. When Justice Ashe said for the court that in such cases the estate of the vendee must last "at least" for the life of the vendee, the inference is irresistible that the earliest possible determination of the exemption was to be fixed at the death of the alienor, with a possible extension of the right "after the death of the owner" during the minority of any surviving infant child. "When once established and impressed upon the land," said Justice Ruffin, in *Murchison v. Plyler*, 87 N. C. 82, "the right to the homestead cannot be waived. Nor can it in any manner be divested, save as provided for in the constitution, and then, too, on the possible rights of wife and children in the right of exemption observed and guarded by law." Here we find a clear recognition of the possible elongation, for the benefit of wife and children, of the exemption, and quite as distinct an acknowledgment that, while even the possible rights of wife and child could not otherwise be aliened or divested, they could be disposed of "as provided in the constitution." In *Simpson v. Houston*, 97 N. C. 346, 2 S. E. 651, Chief Justice Smith said: "While the primary object of the exemption is to preserve a home for the insolvent and his family, there is nothing in the enactments of the state or the United States \* \* \* to indicate that the interdiction put upon the creditor is to cease by the debtor's transfer, and leave the property at once exposed to sale under execution. \* \* \* The value of what is assigned consists in the right to possess and enjoy it, as the assignor could, for the same term and under the same securities." The doctrine announced in *Adrian v. Shaw*, supra, and reiterated when that case was again considered on rehearing (84 N. C. 832), as well as in *Baker v. Legget*, 98 N. C. 304, 4 S. E. 37, was that, while the homestead right was conferred for the benefit of residents, and might be abandoned by the removal of the occupant of the land from the state, if no right in favor of others had attached, yet, when the right of homestead was conveyed in conformity to the requirement of the constitution, the alienee acquired a vested right, which could not be divested by any subsequent act of the alienor. The case of *Ladd v. Byrd*, 113 N. C. 472, 18 S. E. 666, is exactly in point. The court in that case, after advertent to the recognition by the court in *Lowdermilk v. Corpening*, 92 N. C. 333, and in *Corpening v. Kincaid*, 82 N. C. 202, of the right of the creditor, suing even upon an old debt, to favor the debtor by selling only the reversionary interest accruing after the expiration of the exemption, held expressly that the purchaser of the reversionary in-

terest must show affirmatively, not only that the homesteader had died, but that there was no elongation of the exemption in favor of an infant child. The dictum announced in *Fleming v. Graham*, 110 N. C. 374, 14 S. E. 922, was expressly so characterized in *Van-story v. Thornton*, 112 N. C. 196, 17 S. E. 566; and the doctrine of *Adrian v. Shaw*, upon the original and the rehearing, that the conveyance of a homesteader with the joinder of his wife passed the determinable exemption attached to the land in the hands of the debtor, was reaffirmed. The same principle had been announced in unmistakable terms by Justice Merrimon in *Jones v. Britton*, 102 N. C. 166, 9 S. E. 554, before the dictum in *Fleming v. Graham* was written, and before it was expressly held by the whole court, *nemine dissente*, in *Ladd v. Byrd*, supra, that the right of the holder of the reversionary interest accrued, not upon the death of the homesteader and the failure of a minor child to set up any claim, but upon a showing, in the assertion of such right, that there was no minor child.

While it is admitted that we are confronted by these direct authorities as to the effect of a conveyance by a homesteader and his wife, it is contended that a long line of decisions shall be overruled in order to avoid some quicksand that has never been encountered during the 26 years in which our exemption laws have been enforced. The case of *Long v. Walker*, 105 N. C. 90, 10 S. E. 858, is adverted to as one in which a previous ruling of the court in reference to our homestead law was overruled. In that case the court said (at page 107, 105 N. C., and page 858, 10 S. E.): "The general policy of adhering to the declared opinions of the court is subject to the limitation that inadvertent decisions should be overruled, unless they have been acted on for a long time, and property has been bought by reason of the public faith in the stability of the principles decided in them." The decision was then based upon an argument intended to show that the overruled case could not have become a rule under which property had vested. It is familiar learning that, while it is safer generally to adhere to precedent, yet it is the duty of a court to overrule erroneous decisions when they operate perniciously, if no property rights have been founded upon them, but to preserve them in their integrity, however erroneous, if they have become a rule of property under which contracts have been framed and titles acquired. 23 Am. & Eng. Enc. Law, 28. I do not concede that any case has ever arisen where it became necessary to decide whether a resident of North Carolina could acquire and dispose of more than one homestead, nor do I admit that a majority of the court are committed to any theoretical opinion upon that question. When the point is properly presented, grave reasons may readily suggest themselves for standing by the long line of decisions beginning with *Adrian v. Shaw*.

held in January, 1880. The most potent and serious of them is that, during 14 years, homestead rights have been freely offered in the market on the faith of the stability of our decisions, and probably hundreds of purchasers have bought with an eye to the chances of life of the owners of homesteads and the probabilities as to minor children. A constitutional inhibition prevents a court from divesting property out of one person, in whom it is rightfully vested, and transferring the title to another, by its decrees. The principle that underlies this fundamental provision of law makes it unjustice, if not judicial robbery, on the part of the court, to arbitrarily so modify its decisions as to destroy titles which are valid under such overruled opinions. But if hereafter some person should attempt to indulge in the luxury of acquiring a series of homesteads, though we have no judicial knowledge that any resident of the state has done so during the last 26 years, and should succeed in having them laid off in different counties, to which he had migrated successively, innocent purchasers of such rights would receive hard measure under the new rule insisted on as correct. In this country, where it is deemed so essential to commercial prosperity that property of all kinds should pass freely from one to another, and that, in order to facilitate that object, no lien should attach to real estate that cannot be discovered by a diligent examination of public records, it would be startling to the legal profession and to dealers in real estate to announce that, after a careful searching of such records, a purchaser might in many instances be still unsafe, unless he should trace the proposed vendor, by the aid of detectives, through all of his wanderings in different counties of the state for a score of years, in order to ascertain whether the allotment of some other homestead to him in another county had disabled him from making a valid title to that offered for sale. It is always best, when supposititious cases are conjured up, as an argument for disturbing settled principles, to wait till we reach the stile before attempting to jump it. This court, in a number of opinions, heretofore rendered, has adverted to the fact that it is not safe to follow decisions of the courts of other states where no lien whatever attaches to the homestead in the hands of the person to whom it is allotted. I concur in the conclusions reached by my Brother BURWELL in delivering the opinion of the court.

(42 S. C. 546)

**PRICE v. PRICE et al.**

(Supreme Court of South Carolina. Jan. 9, 1895.)

**CASE ON APPEAL—EXTENSION OF TIME—STATUTORY PROVISIONS.**

An extension of time in which to perfect an appeal will be allowed under Code Civ. Proc. § 348, providing for such extension in the discretion of the court, where, though appellant's

counsel made timely application for further time in which to prepare their case, they did so before but a single justice of the court, and their further delay was occasioned by their being engaged in the discharge of important public duties.

Appeal from common pleas circuit court of Anderson county; Watts, Judge.

Motion by Julia M. Price, substituted as plaintiff in place of Robinson, Boylston, McKeldin & Co., appellants, addressed to the discretion of the court, for an extension of time in which to perfect an appeal from an adverse judgment in an action by her against James A. Price and H. C. Summerra. Granted.

J. E. Breazeale and Cole Blease, for appellant. G. E. Prince, for respondents.

**PER CURIAM.** This is a motion by appellants, addressed to the discretion of this court, under section 349 of the Code of Civil Procedure, for further time for the preparation of the papers necessary to the perfection of their appeal. That section provides that "when any party shall omit, through mistake or inadvertence, to do any act or acts necessary to perfect an appeal, or stay proceedings, the supreme court may, in their discretion, permit such act or acts to be done at any time to perfect the appeal on such terms as may be just, provided that the court shall be satisfied that the appeal was taken bona fide, and provided that notice of the same was given as now required by law." In this case the affidavits show, and it is not disputed, that notice of the appeal was given as required by law; otherwise, this court would have been without power to interfere. So that the first question is whether the appellants are entitled to the relief they seek by reason of the omission to do any act "through mistake or inadvertence." It appears that appellants' counsel made an application for further time to prepare their case, and that this application was made within 30 days from the service of the notice of appeal, to a single justice of this court; but they were then advised that they should have given notice. This was their first mistake. Appellants then gave notice within 30 days of a motion before a single justice to be made on a day which was after the expiration of 30 days. Appellants' second mistake was in seeking relief before a single justice of this court. This motion now before us was then made on the first day thereafter when this court was in session. We think that mistake or inadvertence has been shown. So, then, the next question is whether this court shall exercise its discretion in granting relief; for the law does not imperatively require the relief to be given, but leaves the matter to the discretion of this court. We are of opinion that we ought to grant the motion; for the affidavits show that, during the time within which the proposed case should have been prepared, both of the counsel for appellants were engaged in the discharge of important public duties.—

one as a member of the board of state canvassers, and the other as a member of the legislature.

(48 S. C. 1)

**COLEMAN v. CURTIS.**

(Supreme Court of South Carolina. Jan. 8, 1895.)

**TAXATION OF COSTS—ALLOWANCE TO COUNSEL—WITNESSES' FEES.**

1. An allowance will not be made for attendance by opposing counsel upon a reference not consented to by the party against whom the costs of an action at law are being taxed.

2. Fees and mileage are allowed witnesses, irrespective of whether the action is one at law or in equity.

Appeal from common pleas circuit court of Chester county; T. B. Fraser, Judge.

Action by John K. Coleman against George W. Curtis, as assignee of F. H. Reid, and others, to recover on a building contract between plaintiff and defendant's assignor. A judgment therein for defendant was affirmed on appeal (15 S. E. 709), and a rehearing denied (16 S. E. 770). Plaintiff again appealed from a judgment confirming the taxation of costs, which was reversed (19 S. E. 499), and the cause remanded. It appears again on appeal by plaintiff from a judgment of the same nature. Modified.

S. P. Hamilton, for appellant. Whitlock & Curtis, for respondent.

**GARY, J.** This is the second time this case has been before the supreme court on an appeal from the taxation of costs. On the former appeal this court rendered judgment as follows: "The judgment of this court is that the judgment of the circuit court be reversed, and that the cause be remanded to the circuit court, in order that the legal costs of an action at law, and no more, may be taxed." 19 S. E. 499. His honor, Judge Fraser, granted an order referring it to the clerk of the court, to tax the costs in the cause in accordance with the judgment of the supreme court. The plaintiff excepted to two items of costs allowed by the clerk of the court in his report upon such taxation,—\$10, to defendants' attorney, for attending two references; and \$9, to F. H. Reid, assignor, and his wife, for witnesses' fees and mileage.

The only question for our consideration is whether the judgment of the supreme court supra allows such costs. It nowhere appears in the case that the plaintiff consented to an order of reference. The items of costs allowed defendants' attorney for attending the references are only to be found in the Revised Statutes under the head "Plaintiffs' and Defendants' Costs in Equity Causes." The supreme court having adjudged that the legal costs of an action at law, and no more, should be taxed, such items cannot be allowed. The fees and mileage of witnesses are allowed, irrespective of the fact whether the action is one on the law or equity side of the

court. There is nothing in the case which shows that Reid and wife are not entitled to their fees and mileage. It is the judgment of this court that the order appealed from be modified in the particular herein mentioned, and that the cause be remanded to the court of common pleas for Chester county for such further proceedings as may be necessary to carry out the views herein announced.

(43 S. C. 96)

**McCORKLE, Judge, et al. v. WILLIAMS et al.**

(Supreme Court of South Carolina. Jan. 9, 1895.)

**ACTION ON ADMINISTRATOR'S BOND.**

Under Rev. St. 1893, § 2018, providing that an administrator's bond shall be made payable to the probate judge, and may be sued on by any person injured by a breach of its conditions, the probate judge and the heirs may join as coplaintiffs in a suit on the bond.

Appeal from common pleas circuit court of Chester county; R. C. Watts, Judge.

Action by William H. McCorkle, as probate judge, and Eliza P. Edwards and Joseph Pratt, against Grandison Williams and others, on the official bond of said Williams, as administrator of the estate of Henry Pratt, deceased. Judgment for plaintiffs, and defendants appeal. Affirmed.

A. G. Brice, S. P. Hamilton, and W. A. Barber, for appellants. Hemphill & Hemphill and G. W. S. Hart, for respondents.

**GARY, J.** Grandison Williams, appellant, was appointed administrator de bonis non of the estate of Henry Pratt, deceased, in the court of ordinary for York county, on the 21st January, 1868. He then executed to the ordinary his bond as such administrator, in the penal sum of \$38,000, in the required form, with W. Holmes Harden and Jesse Williams as sureties thereto. In 1891 the respondents Eliza Edwards and Joseph Pratt, children of Henry Pratt, deceased, brought action against the said Grandison Williams, as such administrator, in the court of probate for York county, for an accounting, and demanding judgment for their respective shares of the estate of their father. By the decree rendered in that action on the 1st day of August, 1891, it was determined that such share of Eliza Edwards was \$10,692.74, and that of Joseph Pratt was \$8,292.74, and that Grandison Williams, as such administrator, should pay them accordingly. Jesse Williams, surety as aforesaid, has died, and the appellants Newton Williams and L. T. Grant are his qualified executors. This action is brought by William H. McCorkle, as probate judge and successor to the ordinary, and by Eliza Edwards and Joseph Pratt, as the heirs at law of Henry Pratt, deceased. The complaint alleges, as the single breach of the said bond, that the said Grandison Williams, as administrator, and his codefendants, have

failed to pay the said Eliza Edwards and Joseph Pratt the aforesaid amounts adjudged to be paid them by the decree of the probate court for York county. It demands judgment for the whole penalty of the bond. The defendants first demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action as to all the plaintiffs, and there is a misjoinder of parties plaintiff, in that while it seeks to enforce the right of action of the plaintiffs as a joint one, and asks a joint relief, they have really each a separate right of action, and are entitled only to a separate judgment against these defendants. The presiding judge overruled this demurrer. The defendants then demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action as to the plaintiff William H. McCorkle, as probate judge, and that he is improperly joined as plaintiff, in that, while it seeks to enforce the right of action of the plaintiffs as a joint one and as joint relief, it shows that the plaintiff William H. McCorkle has been improperly joined with the other plaintiffs, because he has no right of action as probate judge, nor as the real party in interest, nor as being united in interest with the other plaintiffs, nor as having any interest in the subject of the action and in obtaining the relief demanded. This demurrer was also overruled. From the orders of his honor, the presiding judge, overruling the demurrers, the defendants appealed to this court.

Section 152, Code, provides: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 134." Section 134 is as follows: "An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name a contract is made for the benefit of another." Section 138, Code, is as follows: "All persons having an interest in the subject matter of the action, and in obtaining the relief demanded, may be joined as plaintiff except as otherwise provided in this title." There is nothing in said title providing against the joinder of said plaintiffs as is herein made. Section 2018, Rev. St. 1893, providing for suits on such bonds, uses this language: "The said bond shall be made payable to the probate judge of the county and his successors, and may be sued by any person injured by the breach of the condition," etc. (Italics ours). In the case of *Kaminer v. Hope*, 9 S. C. 253, the court decided that an action could be brought by the distributees as plaintiffs on the administration bond. The court in that case, after deciding that such action could be brought by the distributees, says: "At the trial the court, in order to meet the

objection that the action should be brought in the name of the proper officer, ordered the complaint amended by inserting the name of the judge of probate as plaintiff, to which the defendant excepted. According to the view we have taken, there was no necessity for such amendment. If, however, the effect of the amendment was merely the insertion of the name of the probate judge as a party plaintiff, to have him present before the court, the act was immaterial." *Johnson v. Dawkins*, 20 S. C. 528, decides that the probate judge may bring such action. It thus appears that any person may sue upon bond who is injured by the breach of its condition; that distributees have such interest as will sustain their action; that the probate judge has such interest as will sustain his action; and that all such persons having an interest in the subject, and in obtaining the relief demanded, may be joined as plaintiffs in such action. It is true the interest of the probate judge is only in a representative character; nevertheless it is such an interest as the law recognizes, and is sufficient to sustain such action, when he sues alone. The cause of action of the probate judge and of the distributees is not several in its nature, but one and the same. If the probate judge had sued alone, and recovered judgment on the bond, the distributees would have been barred from bringing a second action thereon; and, vice versa, if the distributees had recovered payment on the bond, this would have barred an action thereon by the probate judge. On the subject of joinder of parties, see the well-considered opinion of Mr. Justice Haskell, speaking for the court, in the case of *Trimmer v. Thomson*, 10 S. C. 164. It is the judgment of this court that the orders appealed from be sustained, the appeal dismissed, and the cause remanded to the circuit court for Chester county.

(42 S. C. 454)

## WHALEY v. BARTLETT et al.

(Supreme Court of South Carolina. Nov. 2, 1894.)

INJURIES TO EMPLOYE — ACTION AGAINST MASTER — MOTION FOR NONSUIT — EFFECT — CONTRIBUTORY NEGLIGENCE — DEFECTIVE APPLIANCES — INSTRUCTIONS.

1. On appeal from an order denying a motion for a nonsuit, the case should show the grounds of the motion, together with the ruling thereon, and not merely point out the alleged errors in the exceptions.

2. Evidence that a master, instead of supervising the erection of a gas holder in another state, sent another person to attend thereto, who had full charge of the work, tends to show that such person was his master's vice principal in the work.

3. On motion for a nonsuit, neither the credibility nor the sufficiency of the evidence can be considered, but merely whether there is any evidence tending to support plaintiff's cause of action.

4. On motion for a nonsuit, in an action for personal injuries, the question of contributory negligence cannot be considered.

5. On a motion for a nonsuit, in an action by a servant against his master for personal injuries, the question whether the risk was a patent one, or one which plaintiff assumed, cannot be considered.

6. Nor can the court consider whether the injuries were caused by the negligence of a fellow servant, it being a question for the jury.

7. The refusal of the trial court to sustain a motion for a new trial for insufficiency of the evidence cannot be reviewed.

8. Where the minutes of the trial judge recite, without exception being taken thereto, that the motion for a new trial was made on the ground that the verdict was excessive, and the case fails to show that the order refusing the motion was excepted to, and no such exception appears in the grounds of appeal, the appellate court is bound to conclude that the motion was made on such ground alone.

9. Where a charge, taken as a whole, distinctly states the law, the fact that isolated portions thereof are indistinct is not ground for reversal.

10. In an action by a servant against his master for personal injuries caused by the fall of a heavy piece of iron, due to the defective means used to raise it, an instruction that, in determining whether reasonably safe means were used, the jury may consider whether safer means were at hand, is not ground for complaint by defendant, where the court also instructs that defendant was not required to obtain the most improved appliances, but was simply required to use reasonably safe means.

11. The court, in giving requested charges, is not bound to use the exact words in which the requests were couched.

12. In an action by a servant against his master for personal injuries, the burden of proving contributory negligence is on defendant.

13. In an action against a firm, by an employee thereof, for personal injuries, the fact that the court, in its charge, designated defendant as "the company," is not ground for reversal.

14. The question whether the court misstated the testimony to the jury, not being a question of law, is not reviewable on appeal.

Appeal from common pleas circuit court of Charleston county; D. A. Townsend, Judge.

Action by Henry C. Whaley against Bartlett, Hayward & Co. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Defendants requested the court to charge as follows: "That in order to sustain his case the plaintiff must prove by the preponderance of evidence: (1) That the defendant was guilty of negligence which caused the accident to him. (2) That it is not enough to prove that the servants or agents employed by the defendants were guilty of negligence which resulted in the injury to the plaintiff. (3) But also that the defendants were guilty of negligence in selecting such servants and agents, and, when they chose them for the work entrusted to them, knew they were incompetent for the work intrusted to them, and were habitually negligent, and known to be incompetent. (4) That the risk plaintiff ran in moving the section of standard was, if 'a risk ordinarily incident to the business,' one he is 'presumed to have contracted with reference' to, and to have voluntarily incurred, and hence he cannot recover for his accident. (5) The risk of moving this section of standard, if 'a patent risk,' was one plaintiff was bound to guard himself against

'by the exercise of his own skill and judgment,' and not 'blindly (to) rely on the skill of his master' to protect him from. (6) Admitting for the moment (which is denied and claimed to be disproved by the defendant) that the block and tackle was a preferable method of moving this section of standard, still there was no obligation on the part of Bartlett, Hayward & Co. to provide the latest and best improvements and methods to move this section of standard. They were only required to provide a proper and suitable method of moving this section. (7) Whaley must also show that, even were there negligence on the part of the employees of Bartlett, Hayward & Co., that he used all reasonable efforts to avoid and fend off the results of this negligence. (8) If the jury find that he was injured by the negligence of the employees of Bartlett, Hayward & Co., still he cannot recover, if these were his coservants. All are coservants who are engaged in the same kind of work, and if the jury find, as a matter of fact, that J. J. Kinsey was engaged like the others in moving this section of standard, then he was a coservant; and it matters not, in other respects, that J. J. Kinsey was the foreman of the men. He was merely first among equals in position, etc. (9) If in this particular movement, of this section of standard, Whaley, J. J. Kinsey, and others were 'engaged in the same business,' they are coservants; and, for a hurt caused by his coservants, Whaley cannot recover. The master is not liable to one servant for an injury inflicted by another servant in the same common service, unless he (the master) can be charged with some degree of fault or negligence in their employment or retention. (10) If you find that Whaley disobeyed J. J. Kinsey in taking hold of this section of standard with his arms, and not simply with his hands, then he cannot recover, for disobedience is of itself contributory negligence, and prevents Whaley from recovering from Bartlett, Hayward & Co."

The court charged as follows:

"Mr. Foreman and Gentlemen of the Jury: The case has taken a long time, but probably not longer than the importance of it requires. You have heard volume after volume of law discussed, a great deal of which does not apply to this case. So far as I understand the law, it is very simple, and the whole case is in a nutshell, notwithstanding the time taken, and the amount of testimony that has been taken and given to you. The injury is admitted on all sides. The plaintiff sues the defendant for \$10,000 damages for this injury, charging that the injury was due to the negligence of the defendant. If the injury was caused by the negligence of the defendant or the defendant's agents, then the defendant must respond in damages. If the injury was caused by the coservants of the plaintiff, that is a different matter, to which I will refer after a while. The plaintiff must satisfy you

by a preponderance of evidence that this injury was caused by the negligence of the defendant. If he contributed to it, he cannot recover. You are to determine what part Bartlett, Hayward & Co. played in this matter,—what part they took in inflicting this injury upon the plaintiff. Were they present? Was any member of the company present? If you conclude that they were not present in person, were they present by their agents? Did they have any one there to represent them? That brings you to determine whether there was a man there who represented the defendant company, and undertook to perform the duties which the company would have done if present, or had undertaken to do it. Was there any man there acting in that capacity, then, representing the defendant, and supervising the work, and pursuing an occupation differing from those who were moving the iron? Was there any boss or supervisor there acting for the company? It is for you to say. If you find that there was such a person, no matter who he was, he then stands in the place of the defendant; and, if he was guilty of negligence, then the company was guilty of negligence. You have some testimony tending to show that one Kinsey was a foreman. The word 'foreman' has been used in speaking of him. You are to determine whether the testimony shows whether Kinsey was the boss, the supervisor, or controller of the other hands. If you find that he was, then you will determine whether that person, Kinsey, or whoever you find to be the supervisor, was guilty of any negligence in inflicting this injury.

"Now, here is another general opinion. The defendant company was bound to furnish all the necessary appliances, such as will insure reasonable safety to all engaged in that work. They were not bound to go out and buy all the most improved patterns, but they were bound to furnish such appliances as were reasonably safe. But suppose they had supplied appliances that were reasonably safe, and they were carelessly used by this foreman, if you find there was a foreman, or boss, although the appliances might be all right, yet, if they were carelessly used, then the company is liable. Now, you are to determine about the mode of letting down the iron testified to. You have heard the testimony of the witnesses. They have spoken of the two modes of lowering such pieces of iron. Probably, they have spoken of more than two modes. They have mentioned rollers and trucks and a gin pole. What conclusion you come to as to whether the mode employed in lowering that iron was reasonably safe, with the hands employed, you will have to determine. Did they have other means at their command which were safer? As I have said, they were not bound to go out and get the most improved patterns, but they were obliged to furnish some means of moving that iron which was reasonably safe. If you conclude it was not reasonably safe, the com-

pany is liable; but, if you conclude that the mode used was a reasonably safe one, then was that plan carried out carefully, or was anyone connected with it guilty of negligence in the performance itself? I ask your particular attention to that, because this transaction of letting down the iron was the very act in which the plaintiff was injured, and your most careful attention is attracted to that transaction. Was any one connected with the company or representing the company on that occasion guilty of negligence, even if the appliances used were all right, safe, and secure? Was there any one representing the company there, who was guilty of negligence in the way the appliances were used? Was this boss or supervisor guilty of any negligence? That is for you to say. If he was guilty of negligence, he binds the company, and they must respond in damages. You have heard about the rollers, the number of rollers, how they were situated, the weight of the iron, how one roller was kicked out. You have heard all that testimony, and you must conclude whether any one representing the company on that occasion was guilty of negligence which resulted in injury to the plaintiff.

"Gentlemen of the jury, suppose you come to the conclusion that there was not a foreman there,—no particular supervisor,—but that Kinsey was not assisting the supervisor or director of the work, but was simply a sort of laborer among the workmen, and was co-workman with the others. If you come to that conclusion, then they were all coworkers; and if this man was injured by any act of his coservants the company is not liable, unless they were guilty of negligence in employing careless workmen, not able to do what men employed for such purposes should reasonably be expected to do. Under such circumstances, the company would be responsible, even if the injury occurred from the carelessness of the coservants. So, if you find that there was a foreman, and you find that the injury was inflicted, not by any carelessness of the foreman, but was done by the carelessness of the coservants who had hold of that piece of iron, then the company is not responsible, unless they were guilty of employing incompetent, careless, and negligent service. It is contended that every laborer takes the risk of his employment, and, as a general principle of law, that is true. He takes the risk with the employment. But a man is not a mere machine. He has his eyes and senses and judgment. And I call your attention to that transaction, particularly of the plaintiff's approaching that piece of iron,—if he looked at it; had judgment about it, as to its weight and how it was situated; there was nothing hidden about it. The law presumes that a man should be provided with proper machinery, and he is not bound to make investigations as to the sufficiency of the appliances, but if the matter is before his eyes he cannot shut his eyes to it. He can

not run his head into the fire, and then sue somebody for it. You are to judge of all the facts. If, when they were assembled around the iron, the man was warned, and told to act in a certain way, and he disobeyed that order, he cannot disobey,—he cannot go contrary to the foreman's order,—and then hold the company responsible. I do not remember anything else to say to you in reference to damages, I will now charge you in the words of the plaintiff's eleventh request: 'If the jury conclude that the injury resulted from the negligence of the defendant, then they should give the plaintiff such damages as he has proved in this case, not exceeding \$10,000, and in estimating such damages they must take into consideration all the pain and anguish the plaintiff has suffered as a direct consequence of the injury; any permanent impairment of health, or injuries causing disfigurement; the necessary expense of surgical and medical aid; loss of time; and disability to pursue accustomed employment,—that is to say, detrimental effects which naturally and proximately have resulted from the injury. The principle that a man cannot claim damages but up to the time of the suit does not apply in cases of this kind.' I charge you that you have a right to find according to that charge which I have read you. If you find for the plaintiff, you will say, 'We find for the plaintiff' so many dollars damages; writing it out in words, and not figures. If you find for the defendant, you will simply say, 'We find for the defendant.'"

Defendants' grounds of appeal were as follows: "(a) That the defendants had not, in the matter of the accident to the plaintiff, been guilty of any negligence whatsoever. (b) That on the contrary the evidence shows: (1) That the accident was caused by negligence on the part of the plaintiff, in not doing as all the others employed in moving this section of standard did,—stand off from the standard, and thus escape. (2) That, if the accident was caused by the negligence of others beside Whaley himself, it was caused by his coworkers, in quitting hold of the standard too soon. (3) That even if there was negligence on the part of the foreman, J. J. Kinsey, and the men employed in this work, still there was not a particle of evidence that the foreman and men thus employed were 'habitually negligent,' or that the defendants, at the time they employed these persons, knew or had reason to suspect that these persons were, or were likely to be, negligent in the discharge of their duties, respectively. (4) That the risk run in moving this section of standard was not only a risk ordinarily incident to the business for which the plaintiff had hired himself, but also a patent one, against which he was bound to guard himself by the exercise of his own skill and judgment. (5) And further that, even if there was negligence on the part of the defendant, there was no evidence that Whaley used any reasonable effort—much less, all

reasonable efforts—to avoid and fend off the results of such alleged negligence.

"The defendants also appeal from the charge of Judge Townsend, and move for new trial, in case the nonsuit be not granted, on the following grounds, viz.: First. That his honor erred in charging: 'If the injury was caused by the negligence of the defendant or the defendant's agents, then the defendant must respond in damages. \* \* \* Was there any boss or supervisor then acting for the company? \* \* \* If you find there was such a person, no matter who he was, he then stands in the place of the defendant; and, if he was guilty of negligence, then the company was guilty of negligence,'—without limiting the above by the charges prayed for by the defendants, viz.: '(2) That it is not enough to prove that the servants or agents employed by the defendants were guilty of negligence which resulted in the injury to the plaintiff. (3) But also that the defendants were guilty of negligence in selecting such servants and agents, and, when they chose them for the work intrusted to them, knew they were incompetent for the work intrusted to them, and were habitually negligent, and known to be incompetent.' Or '(10) can be charged with some degree of fault or negligence in their employment or retention.' Second. In charging: 'You have some testimony tending to show that one Kinsey was the boss, the supervisor, or controller of the other hands. If you find that he was, then you will determine whether that person, Kinsey, or whoever you find to be the supervisor, was guilty of any negligence in inflicting this injury.' And again: 'If you find there was a foreman or boss, although the appliances were all right, yet, if they were carelessly used, then the company is liable.' And again: 'If you conclude that the mode [of moving that iron] used was a reasonably safe one, then was that plan carried out carefully, or was any one connected with it guilty of negligence in the performance, in itself? I ask your particular attention to that. \* \* \* Was any one connected with the company or representing the company guilty of negligence, even if the appliances used were all right, safe, and secure? Was there any one representing the company there who was guilty of negligence in the way the appliances were used? Was this boss or supervisor guilty of any negligence? That is for you to say. If he was guilty of negligence, he binds the company, and they must respond in damages,'—without limiting the above as prayed by defendants requests to charge, marked 2, 3, and 10, and just cited above, viz.: '(2) That it is not enough to prove that the servants or agents employed by the defendants were guilty of negligence which resulted in the injury to the plaintiff. (3) But also that the defendants were guilty of negligence in selecting such servants and agents, and, when they chose them for the work intrusted to them, knew they were in-



competent for the work intrusted to them, and were habitually negligent, and known to be incompetent.' Or '(10) At least were chargeable with some degree of fault or negligence in their employment.' And further without adding, 'unless the plaintiff was guilty of contributory negligence, or was otherwise barred from recovering damages by the risk he incurred in moving that iron, being a patent risk, or one incident to the work he had undertaken to do,' etc. And further and without limiting it by charging as requested by the defendants in the fifth request to charge, viz.: 'All are coservants who are engaged in the same kind of work, and if the jury find that, as a matter of fact, that J. J. Kinsey was engaged like the others in moving this section of standard, then he was a coservant, and it matters not that, in other respects, J. J. Kinsey was the foreman of the men. He was merely the first among equals in position,' etc. Third. When he charged, 'what conclusion you come to as to whether the mode employed in lowering that iron was reasonably safe, with the hands employed, you will have to determine,' his honor erred in adding, 'Did they have other means at their command which were safer?'—the master being bound only to furnish such means 'as are reasonably fit and safe,' with no question whether he had 'safer' means or not in his control. 'It is only culpable negligence which makes the master liable, and not mere error of judgment.' Fourth. In failing to charge, as requested by the defendants, '(4) that the risk plaintiff ran in moving the section of standard was, if "a risk ordinarily incident to the business," one he is "presumed to have contracted with reference" to, and to have voluntarily incurred, and hence he cannot recover for his accident'; and (5) the risk of moving this section of standard, if 'a patent risk,' was one plaintiff was bound to guard himself against 'by the exercise of his own skill and judgment,' and not 'blindly to rely on the skill of his master' to protect him from,—but limiting this by the following charge: 'But it is contended that every laborer takes the risk of his employment, and as a general principle of law that is true. He takes the risk with the employment. But a man is not a mere machine. He has his eyes and senses and judgment. And I call your attention to that transaction, particularly of the plaintiff's approaching that piece of iron. If he looked at it; had judgment about it as to its weight, and how it was situated; there was nothing hid about it.' Fifth. In failing to charge, as requested by the defendant, that, in order to recover anything, '(7) Whaley must also show that, even were there negligence on the part of the employees of Bartlett, Hayward & Co., that he used all reasonable effort to avoid and fend off the results of this negligence.' Sixth. In designating the private firm of Bartlett, Hayward & Co., throughout his charge, as a 'company,' and thus in nat-

urally, if inadvertently, leading the jury to believe that this was a case between a corporation and a poor man, and thus producing the prejudice against the defendants usual with jurors in all cases of individuals against corporations. Seventh. In charging: 'You have heard about the rollers; the number of rollers; the weight of the iron; how one roller was kicked out. You have heard all that testimony, and you must conclude whether any one representing the company on that occasion was guilty of negligence which resulted in injury to the plaintiff,'—as this implied strongly, and could not have failed to impress the jury with the idea that it was a fact in the case, that one roller had been 'kicked out' from under the standard, and that this constituted negligence on the part of the defendants, whereas there is no evidence that any roller was 'kicked out' at all, but only that the standard was 'side of three rollers, and there was one roller a little further off than the others,' and that the matter being called to Kinsey's attention, as a matter of judgment, he thought it should be 'rolled out,' and did roll it out with his foot. Whereas, the facts of the case should have been left to the jury without any intimation of the judge's opinion. On the contrary, he should have added, as he dwelt on the facts, that the jury should bear in mind that 'the law presumes that the master does his duty.'

Henry E. Young, for appellants. Fitzsimons & Moffett, for respondent.

McIVER, C. J. The plaintiff brings this action to recover damages for injuries sustained by him while in the employment of the defendants as a common laborer. In the complaint it is alleged that these injuries were caused by the carelessness and negligence of the defendants and their agents in handling and moving a large and heavy iron section of the standard or column of a gas holder, which was so carelessly and negligently thrown on, and allowed to fall upon, plaintiff, as to crush him to the earth, and fasten him beneath its weight, whereby serious injuries were sustained by the plaintiff. The acts of negligence specified in the complaint are stated as follows: "Said defendants negligently and carelessly failed to provide or furnish safe and suitable appliances for the work plaintiff was required and ordered to do, and particularly neglected to provide the necessary block and tackle apparatus for the moving of said large iron section of said gas holder. Said defendants neglected to provide or furnish a sufficient number of laborers to move said iron section of gas holder in the manner in which it was attempted to be moved. Said defendants, through their officers and agents, knowingly instructed and ordered plaintiff to remain in the performance of a dangerous if not impossible act, without informing him of the danger to which he was exposed." The de-

defendants answered, admitting their partnership as alleged, that they resided and did business in the city of Baltimore, that at the time of the disaster they were engaged in the erection of a gas holder in the city of Charleston, and that plaintiff was in their employment as a laborer in the erection of said gas holder. But they deny all the other allegations of the complaint, especially that plaintiff's injuries were caused by any negligence on their part, and, on the contrary, allege that such injuries, if caused by the negligence of any one other than the plaintiff himself, they were caused by the negligence of plaintiff's fellow servants; but in fact they allege that the said plaintiff was injured solely by his own negligence. The case came on for trial before his honor, Judge D. A. Townsend, and a jury, when quite a volume of testimony was introduced, which is all set out in the case. At the close of the testimony for the plaintiff, a motion for a nonsuit was made, and after argument the motion was refused, and counsel for the defendant excepted. On what ground or grounds the motion was based, or what particular points were ruled by the circuit judge, if any, does not appear in the case. All that does there appear is that the motion was refused. The defendants then introduced their testimony, and after the defendants had offered certain requests to charge, set out in the case, the judge proceeded to charge the jury as set out in the case, who rendered a verdict for \$8,000 in favor of plaintiff, when a motion for a new trial, on the minutes, was made and refused, in the following order: "In this case, defendants moved for a new trial, on the minutes, on account of excessive damages. The amount of the damage in such cases is so much a matter for the jury that I am not inclined to disturb the verdict of the jury in this case, and must therefore refuse the motion." Judgment having been entered upon the verdict, the defendants appeal upon the several grounds set out in the record, which will not be repeated here, but which, together with the charge, and the requests to charge, shall appear in the report of the case.

The exceptions make two general questions: (1) Whether there was error in refusing the motion for a nonsuit; (2) whether there was any error in the judge's charge to the jury. Before proceeding to consider the first question, we feel bound to say that, according to strict and proper practice, we would be under no obligation to consider any one of the alleged particular errors in refusing the nonsuit specifically pointed out in the exceptions, and nowhere else. The proper function of this court in such a case as this—a law case, pure and simple—is to review the rulings of the court below, and correct any errors of law found therein. Now where, as in this case, the circuit judge was not called upon to make—and, so far as

appears, did not make—any ruling upon these several points, there is nothing for this court to review. These views have long been settled in this state, and it is only necessary for us to cite a few of the most recent cases upon the subject. *Wingo v. Caldwell*, 35 S. C. 609, 14 S. E. 827; *Rollins v. Brown*, 37 S. C. 345, 16 S. E. 44; *Gentry v. Railroad Co.*, 38 S. C. 284, 16 S. E. 893. The proper practice in such cases is to set forth in the case the grounds upon which a motion for a nonsuit is based, together with the circuit judge's ruling, or his failing to rule, thereon. Any other course may work surprise to the plaintiff, as he might, if duly advertised, supply any deficiency,—to say nothing of the injustice of the circuit judge. But, in deference to the zeal with which this appeal has been pressed, we will waive this objection, and proceed to the consideration of his exceptions; having made the preceding remarks as a warning to the bar of the dangers of such a practice.

The first exception is divided into two subdivisions, designated "A" and "B." The first (A) is that there was no evidence that the defendants had been guilty of any negligence whatsoever. If anything can be regarded as settled in this state, it certainly is too well settled to need the citation of any authority that a nonsuit should never be granted where there is any evidence tending to prove the plaintiff's cause of action. The question is not as to the sufficiency of the evidence, or its credibility, nor is contradictory evidence to be considered, for these are all matters exclusively for the jury; and on a motion for a nonsuit the circuit judge has no authority even to consider, much less determine, any such questions, nor have we, when called upon to determine whether he has erred in refusing a motion for a nonsuit. Hence, all the argument of appellants' counsel, based upon alleged contradictions in the plaintiff's testimony, or designed to show that one of his witnesses was not entitled to credit, goes for nothing. Our sole inquiry is whether there was any evidence tending to show negligence—the gist of the action—on the part of the defendants, or any agent of theirs, acting as their representative. Now, there can be no doubt that there was some evidence tending to show that the defendants, residing in Baltimore, did not undertake, in person, to do the work which they had contracted to perform, but, on the contrary, sent out to Charleston an agent (J. J. Kinsey) to perform it for them; that he was in charge of the entire work, and the same was done under his directions. If this evidence does not tend to show that Kinsey was the representative of the defendants in doing this particular job of work, then we are at a loss to conceive what evidence would tend to show such fact. If, then, Kinsey was acting as the representative of the defendants, then the next inquiry is whether there was any evidence tending to show carelessness or negligence on his part.

One of the specifications of negligence alleged in the complaint was the failure to provide safe and suitable appliances for the work required of plaintiff, especially in neglecting to use the necessary block and tackle apparatus for moving such a heavy piece of iron. There was evidence tending to show that Kinsey did not use, and refused to let the third roller be used, upon which the standard or column was to be let down; and, according to the testimony of some of the witnesses, the use of the third roller would have made it much safer, especially for the plaintiff, who was at a point where it was proposed to place the third roller, for, according to the testimony, if this third roller had been used, the heavy piece of iron, when it fell, would have fallen upon this third roller, and not upon the plaintiff. And there certainly was testimony that the block and tackle apparatus, though at hand, and subsequently used in lowering other sections of the standard, was not used in lowering the standard which fell upon the plaintiff, and injured him so seriously. Again, there was testimony tending to show that an insufficient number of laborers were employed in lowering the standard,—only 11,—which was 50 feet long, and weighed 3,950 pounds; for, according to some of the testimony, it was exceedingly dangerous to attempt to lower such a weight by the hands of only 11 men. Here, again, counsel for appellants, in his argument here, has misconceived the true question in considering a motion for a nonsuit; for he has argued that the testimony shows (in which respect, we think, he is mistaken) that the piece of iron was lifted off the plaintiff, after the disaster occurred, by only 4 men. But, as we have intimated, we do not so understand the testimony. On the contrary, as we understand it, the testimony was that the piece of iron was lifted off the plaintiff by 4 men, who came out from the gas works, aided by the others, who had been easing down the standard. Even, however, if counsel be right in his view of the testimony, that would not avail him on a question of nonsuit, as the only effect would be that while there was some testimony tending to show that 11 men were not sufficient to ease down the standard from its position on the blocks to the rollers, there was other testimony tending to show that 11 men were sufficient; and this conflict could only be decided by a jury, and not by the circuit judge. We are of opinion that there was testimony tending to show that Kinsey was the representative of the defendants, and tending to show negligence on his part. Whether such testimony was sufficient for either of these purposes is not for us to determine, as those were matters exclusively for the jury. The first division of the first exception cannot be sustained.

The second division (B) is divided by counsel into five subdivisions. The first and fifth of these subdivisions, as we understand

them, purport to raise the question of contributory negligence; for in the first it is claimed that the evidence shows that the disaster was due to the negligence of the plaintiff, and in the fifth it is claimed that, even if there was negligence on the part of the defendants, there was no evidence that plaintiff used any reasonable effort to avoid the result of defendants' negligence,—in other words, neglected to use reasonable precautions to avoid the effect of defendants' negligence, which is really nothing more than a charge of contributory negligence. Ever since the case of *Carter v. Railroad Co.*, 19 S. C. 20, if not before, it has been settled in this state, at least, that a nonsuit cannot be granted upon the ground that the evidence shows contributory negligence on the part of the plaintiff, for the very obvious reason, as stated in that case, that it involves the decision of a question of fact, of which, under our constitution, the jury alone has cognizance in a law case. In that case the second ground of the motion for a nonsuit was that, even if there was some evidence of the defendant's negligence, yet plaintiff's testimony showed contributory negligence on the part of plaintiff's intestate; and that ground was distinctly overruled, the court holding as above. This case has been followed in a number of other cases, and, while the decisions elsewhere are conflicting, we, of course, are bound to follow our own decisions. Two cases from our state have been cited by counsel for appellants to support his view: *Renneker v. Railway Co.*, 20 S. C. 221, and *Darwin v. Railroad Co.*, 23 S. C. 537. But in the former case there was no motion for a nonsuit, and what is quoted from that case is what was said in considering the charge of the circuit judge, where, of course, the question of contributory negligence could be properly considered; and in *Darwin's Case*, so far from holding or even intimating that the question of contributory negligence could be considered on a motion for a nonsuit, the court expressly held the contrary. In that case there was a motion for a nonsuit, based upon two grounds, the second of which was in these words: "Because the undisputed proof of the plaintiff established beyond a doubt that the deceased had been guilty of gross contributory negligence." And the court, when it came to consider that ground, used this language: "The second ground upon which the nonsuit was claimed cannot be sustained, under the case of *Carter v. Railroad Co.*, supra. Contributory negligence is a matter of defense, and presents a question of fact, to be solved by a jury." The quotations made by counsel from this case are taken from that part of the opinion in which the court was considering certain requests to charge, where, of course, the question of contributory negligence would be an appropriate inquiry; but they certainly do not afford any warrant for the position taken by counsel, especially in view of the fact that in that

very opinion the court had expressly denied that position, in the language above quoted.

The second subdivision of division B is that the evidence shows that, if the accident was caused by the negligence of others besides the plaintiff himself, it was caused by his fellow servants, in quitting hold of the standard too soon. In the first place, whether the evidence shows this was a question for the jury, and not for the court to decide on a motion for a nonsuit. And in the second place, so far as we can perceive, there was no evidence of any negligence on the part of plaintiff's collaborators, in letting go the standard too soon. On the contrary, the evidence rather shows that these collaborators held on to the standard as long as they could, with safety to themselves, do, and only let go in time to escape the injury sustained by plaintiff.

The third subdivision claims that the evidence shows that even if there was negligence on the part of the foreman, Kinsey, and the men employed in the work, still there was no evidence that the foreman and men thus employed were "habitually negligent," or that the defendants knew or had reason to suspect that those persons were likely to be negligent in the discharge of their duties. Besides what we have said in considering the second subdivision, it seems to us that inasmuch as we have held above that there was evidence tending to show that Kinsey was the representative of the defendants, and that there was evidence tending to show negligence on his part, the points made by this subdivision lose their pertinency, at least upon the question of nonsuit. If Kinsey was the representative of the defendants, then his negligence is their negligence; and whether the defendants knew, or ought to have known, that he was negligent in the performance of his duties, is not pertinent to the inquiry.

The only remaining subdivision to be considered is the fourth, in which it is claimed that the evidence shows that the risk in moving this piece of iron was not only a risk ordinarily incident to the business for which the plaintiff was employed, but also a patent risk, against which he was bound to guard himself by the exercise of his own judgment. Whether the evidence shows these facts was a question which the circuit judge could not determine on a nonsuit, but which should be left to a jury. In view of the testimony that Kinsey was sent out from Baltimore to Charleston by the defendants to superintend the erection of the gas holder, involving the lifting of very heavy weights, it was but natural that the laborers whom he employed would assume that he understood his business, and that he would not expose them to any risks which could reasonably be avoided, in doing the work for which they were employed. We are unable to discover any error on the part of the circuit judge in refusing the motion for a non-

suit, and all the exceptions on that point must be overruled.

The counsel for appellants, in his argument here, has contended that the circuit judge erred in stating that the motion for a new trial, on the minutes, was made simply on account of excessive damages, and he has insisted that the motion was made on the whole record; and he goes on to argue that, from a consideration of the whole testimony, the circuit judge should have granted a new trial because the testimony was not sufficient to sustain the verdict. In the first place, there is nothing in the case to sustain any such assertion. On the contrary, from what there appears, we are bound to conclude that the circuit judge was entirely right in stating that the motion was based on the ground of excessive damages. There is no exception to that statement, and, indeed, the case fails to show that the order refusing the motion for a new trial was excepted to, even in the most general terms. Even in the grounds of appeal, we find none presenting any such exception. But, in the second place, even if the assertion of counsel, in his argument, were supported by anything in the record, there is no proposition more fully settled in this state than that the refusal of a circuit judge to sustain a motion for a new trial because of insufficiency of evidence to sustain the verdict cannot be reviewed by this court.

We proceed then to a consideration of the several exceptions to the judge's charge. The first exception is made up of detached extracts from the charge, which are alleged to be erroneous, unless limited by the second, third, and tenth requests to charge; and the same may be said of the second exception, which it is claimed should have been further limited by adding, "unless the plaintiff was guilty of contributory negligence, or was barred of a recovery by the risk being a patent risk, and one incident to the work he had undertaken to do," and also by the fifth request to charge. These exceptions are amenable to the objection that they fail to present distinctly any erroneous proposition which was charged, or any legal proposition which was requested and refused to be charged. But they are also open to the more serious objection that they confound two separate and distinct matters, which depend upon different legal principles: (1) Where the negligence from which the injury results is the negligence of the master or his representative; (2) where such negligence is the negligence of a fellow servant. In the first case, after the jury have reached the conclusion that a given person was acting as the representative of the master, their only other inquiry (except, of course, the amount of the damages) is whether such representative has been guilty of the negligence complained of, and if so, then the master becomes liable, because the negligence of his representative is his own negligence; and hence the inquiry

whether the master was guilty of negligence in selecting such representative is not pertinent to the inquiry. But in the second case, if the negligence complained of is that of a fellow servant, then a plaintiff must go further, and satisfy the jury that the master was guilty of negligence in employing such a fellow servant with the plaintiff. These propositions are fully sustained by the cases of *Gunter v. Manufacturing Co.*, as reported first in 15 S. C. 443, and next in 18 S. C. 262; *Calvo v. Railroad Co.*, 23 S. C. 526; *Boatwright v. Railroad Co.*, 25 S. C. 123,—besides others that might be cited. It seems to us that, when the charge of the circuit judge is looked at as a whole, the only way in which it is proper to consider it, it will appear that these propositions were distinctly and properly charged, as well as the further additions as to contributory negligence,—the risk being a patent risk, and one incident to the work which the plaintiff was employed to perform,—and also as to the question of fact whether Kinsey was a fellow servant with plaintiff, or was acting as the representative of the defendants. These two exceptions must therefore be overruled.

The third exception cannot be sustained. In that part of the charge here complained of, the jury were simply instructed to inquire whether the means used for lowering the piece of iron were reasonably safe, and, as a circumstance bearing upon that inquiry, they were to ask themselves the question whether safer means than those used were at hand; and this, it seems to us, was a very pertinent inquiry to the proper solution of the question as to whether the means actually used were reasonably safe; and when the circuit judge went on, and instructed the jury that the defendants were not bound to go out and obtain the most improved appliances, but were simply bound to use reasonably safe means, we see no proper ground for complaint on the part of appellants. See *Carter v. Oil Co.*, 34 S. C., at page 214, 13 S. E. 419.

The fourth exception imputes error to the circuit judge in failing to charge as requested in defendants' fourth and fifth requests, in relation to the risk being one ordinarily incident to the business, and being a patent risk. It seems to us that the judge did charge substantially as there requested, and the fact that he did not use the exact language in which the requests were couched is, as has often been held, a matter of no consequence. See *Price v. Railroad Co.*, 38 S. C. 199, 17 S. E. 732,—the most recent case upon the point.

The fifth exception alleges error in failing to instruct the jury as requested in defendants' seventh request. That request is based upon the erroneous assumption that a plaintiff is bound to negative any contributory negligence on his part. This is not only in conflict with the principles of logic, but, what is more important, it is in conflict with several distinct decisions of this court. A

party is not required to prove a negative, and, as to this particular matter, it is settled that contributory negligence is an affirmative defense, and the burden of proof is upon the defendant. It was so expressly held in *Carter v. Railroad Co.*, 19 S. C. 20, and in *Crouch v. Railway Co.*, 21 S. C. 495; and the same principle was recognized in *Donahue v. Railroad Co.*, 32 S. C. 299, 11 S. E. 95, and in *Branch v. Railway Co.*, 35 S. C. 105, 14 S. E. 808. This exception must therefore be overruled.

In the sixth exception, appellants complain that the circuit judge, throughout his charge, designated the defendants as "the company," which, as it is claimed, had the effect of conveying to the minds of the jury the impression that the defendants were a corporation, and "that this was a case between a corporation and a poor man, thus producing the prejudice against the defendants usual with jurors in all cases of individuals against corporations." That the exception cannot be sustained is so patent as not to warrant more than a passing notice. It certainly imputes no error of law to the judge, and was not even an error of fact, as is manifest from the very name of defendant's partnership. Besides, defendants own witnesses spoke of the defendants as "the company," and in fact they were so designated throughout the testimony. Indeed, so far as we can perceive, the language used by the circuit judge was not calculated to convey the impression that the defendants were a corporation. On the contrary, his language shows that in using the terms "the company" he referred to the partnership of Bartlett, Hayward & Co. So there is manifestly nothing in this exception.

The only remaining exception is the seventh, in which the complaint is of a two-fold character: (1) That the judge misstated the testimony of the jury; (2) that in his statement of the testimony he conveyed to the jury his own impression of the facts adversely to the defendants. As to the first branch of this exception, even if it should be conceded that the judge did misstate the testimony, it is very clear that this would constitute no error of law, of which this court could take cognizance. See *State v. Jones*, 21 S. C. 596; *State v. Milling*, 35 S. C. 17, 14 S. E. 284; *Rumph v. Hott*, 35 S. C. 459, 15 S. E. 235; and *Simmons Hardware Co. v. Bank of Greenwood*, 19 S. E. 507. But, in justice to his honor, we must say we do not think that he did make any material misstatement. The language used in speaking of the rejection of the third roller, which means to be specially objected to, is that the third roller was "kicked out," when the testimony was that Kinsey rolled it out with his foot. This slight difference in phraseology, which practically means the same thing, certainly does not warrant the charge of misstatement.

The second branch of this exception, which

imputes error to the circuit judge in charging on the facts, in violation of the constitutional provision upon that subject, is, we think, equally untenable. We are unable to find anything in the charge to indicate any impression which may have been made upon the mind of the circuit judge by the testimony. On the contrary, we think the charge was eminently fair for both sides. The judgment of this court is that the judgment of the circuit court be affirmed.

POPE, J., concurs.

(48 S. C. 26)

**COPELAND v. WESTERN ASSUR. CO.**

(Supreme Court of South Carolina. Jan. 8, 1895.)

**ACTION ON INSURANCE POLICY — PLEADING—EVIDENCE.**

1. In an action on an insurance policy, where defendant claims noncompliance with the requirements of the policy, the objection must be alleged.

2. Where the defendant insurance company alleges failure of plaintiff to perform certain requirements of the policy, plaintiff is not required to show such performance.

3. Where defendant alleges that plaintiff failed to perform certain requirements of the policy, although it appears from plaintiff's testimony in chief that he has not performed such requirements, defendant is not entitled to a nonsuit; plaintiff having a right to show defendant's waiver of, or estoppel to make, such objection.

Appeal from common pleas circuit court of Sumter county; D. A. Townsend, Judge.

Action by Samuel Copeland against the Western Assurance Company upon a policy of fire insurance. Judgment for defendant, and plaintiff appeals. Reversed.

Lee & Moise, for appellant. Purdy & Reynolds, for respondent.

GARY, J. This was an action on a policy of insurance for \$1,000. The answer of defendant, among other things, interposed as a defense that the plaintiff failed to comply with the requirements of that clause in the policy of insurance commonly known as the "Iron-Safe Clause." Plaintiff offered in evidence the policy of insurance. During the introduction of plaintiff's testimony in chief, evidence was brought out to show that the plaintiff had failed to comply with the requirements of the policy set forth in the Iron-safe clause. The plaintiff offered to introduce testimony to show that the defendant had waived its right to insist upon such requirement, but his honor, the presiding judge, ruled that such testimony was inadmissible. At the close of plaintiff's testimony, the defendant moved for a nonsuit, which was granted. The plaintiff appealed from such order.

During the progress of the trial on circuit, a number of other questions were raised, and the rulings of the trial judge on them are made the grounds of other exceptions. The conclusion at which this court has arrived in

regard to the order of nonsuit renders it unnecessary to pass specifically on the other exceptions.

In the case of *Sample v. Insurance Co.* (S. C.) 19 S. E. 1020, Mr. Justice Pope, in delivering the opinion of the court, says: "The consumption of unnecessary time in the trial of causes should be avoided. But in a case where the complaint does not set out the facts relied upon by the defendant, and such defendant, for the first time, presents such facts in the answer, the orderly administration of justice demands that the trial shall proceed in the usual way, by first allowing the plaintiff to introduce such proofs as its pleading may require, then hearing the defendant's testimony, then any reply by the plaintiff. Take this case as an illustration. Here the plaintiff did not set out in her complaint the facts relied upon by the defendant for its exoneration from liability under its contract with the plaintiff. Such being the case, the plaintiff was not required to offer evidence as to the facts relied upon by the defendant. But, when defendant's time to open arrived, then it should have proved that there was such a stipulation in the policy issued by it to plaintiff. And the plaintiff, in her reply, had the right to show, if she could, either that the testimony was untrue, or that the defendant had waived this stipulation as to 12 months' limit to action against it, or that the conduct of the defendant had estopped it from urging any such stipulation in its defense. The conduct of the circuit judge practically denied these rights to the plaintiff. Such conduct was error. Being erroneous, a new trial must be ordered." Mr. Justice McGowan, speaking for the court in *Roach v. Fund Co.*, 28 S. C. 431, 6 S. E. 286, says: "When the complaint alleges that the insured performed all that was incumbent on him to perform, and the defendant answers, denying performance in certain named particulars, all else needs no further proof, upon the principles of pleading. It has been held that the burden of proving the truth of the statements of the assured in an application for insurance does not rest upon the insured or his representatives, in an action on the policy, but that their untruth is matter of defense, to be pleaded and proved by the insurer"; citing an array of cases. In the case of *Insurance Co. v. Ewing*, 92 U. S. 377, quoted from with approval in case of *Roach v. Fund Co.*, the court says: "To establish the truth of the answers would, in many cases, require the party to prove a negative. \* \* \* While it may be easy enough to prove the affirmative of one of these questions, it is next to impossible to prove a negative. The number of questions now asked of the assured in every application for a policy, and the variety of subjects, and length of time which they cover, are such that it may be safely said that no sane man would ever take a policy, if proof, to the satisfaction of a jury, of the truth of every answer,

were made known to him to be an indispensable prerequisite to the payment of the sum secured,—that proof to be made after he was dead, and could render no assistance in furnishing it. On the other hand, it is no hardship that, if the insurer knows or believes any of these statements to be false, he shall furnish the evidence on which that knowledge or belief rests. He can thus single out the answer whose truth he proposes to contest, and, if he has any reasonable grounds to make such an issue, he can show the facts on which it is founded." It is true, the last-mentioned case was one of life insurance, but there is no substantial reason why the rule laid down should not apply in a case of fire insurance. In the case of *Mars v. Insurance Co.*, 17 S. C. 514, one of appellant's exceptions was as follows: "Because his honor ruled that it was incumbent on the defendant to show fraud, although the plaintiff's complaint alleged that there was no fraud." In disposing of this exception the court said: "Nor do we think that the rulings of the circuit judge as to the questions of fraud were erroneous. If fraud was involved in the case at all, it constituted a matter of defense, and was no part of the cause of action."

The following rules are deduced from the authorities:

1. That where the defenuant claims that the plaintiff has not a right of recovery on the policy of insurance, by reason of the fact that he failed to comply with the requirements of the policy, such objection must be set up in his answer to the complaint.

2. That where the defendant sets up a defense in his answer that the plaintiff is barred of his right of recovery on the policy of insurance, by reason of his failure to perform certain things therein required to be done on his part, it is not incumbent on the plaintiff to introduce testimony showing such performances by him, and consequently a failure to introduce such testimony does not entitle the defendant to an order of nonsuit.

3. That where the defendant sets up such defense in his answer, and the facts brought out during the introduction of plaintiff's testimony in chief show that there has not been performance by the plaintiff of such requirements of the policy, still the defendant would not be entitled to an order of nonsuit, because such order would deprive the plaintiff of his right to show waiver or estoppel on the part of the defendant to make such objection.

It is the judgment of this court that the order of nonsuit be set aside, and the case be remanded to the court below for a new trial.

(43 S. C. 48)

JEFFERIES v. FORT et al.

(Supreme Court of South Carolina. Jan. 9, 1895.)

**RIGHT TO DOWER — PURCHASE BY MORTGAGEE OF MORTGAGED PROPERTY.**

A. conveyed land to B., who gave a mortgage for the price. B. afterwards recon-

veyed to A. part of the mortgaged land, together with other land, in satisfaction of the mortgage which was satisfied. A. subsequently sold to defendant that part of the land reconveyed to him, and thereafter B. died. *Held*, that B.'s widow was entitled to dower in the land so acquired by defendant.

Appeal from common pleas circuit court of Union county; T. B. Fraser, Judge.

Action by Mary H. Jefferies against W. A. Fort and Sallie C. Fort for dower. Judgment for demandant, and defendants appeal. Affirmed.

J. C. Jefferies and Cothran, Wells, Ansel & Cothran, for appellants. Munro & Munro, for respondent.

**GARY, J.** This is an action for dower in a tract of land in Union county containing 800 acres, instituted in the court of common pleas for Union county by service of summons and complaint on 26th April, 1894. On 12th April, 1893, Samuel Jefferies conveyed to John R. Jefferies a tract of land in Union county containing 1,156 acres, at the price of \$23,135.60. No part of the purchase money was paid in cash, and John R. Jefferies executed his bond for the same, secured by mortgage of the premises. Between 12th April, 1883, and 16th June, 1886, John R. Jefferies made sundry payments on the bonds and mortgage, aggregating about \$7,000. On 16th June, 1886, John R. Jefferies conveyed to Samuel Jefferies in fee simple, with full covenants of warranty, 800 acres of the 1,156-acre tract, and another tract known as the "Brick House Place," containing 1,648 acres, at the price of \$20,000, in satisfaction of said bond and mortgage, which were marked "Satisfied," and delivered to John R. Jefferies. John R. Jefferies retained title to 356 acres of the original 1,156-acre tract, and the 800-acre tract and the Brick House place went into the possession of Samuel Jefferies. On the 30th January, 1888, Samuel Jefferies conveyed the 800-acre tract to his son-in-law, W. A. Fort, and his daughter Sallie C. Fort, wife of W. A. Fort, in fee with warranty. On 10th February, 1894, John R. Jefferies died, and this action was commenced on the 26th April, 1894, for dower in said 800-acre tract. The defendants answered, denying the right of the demandant to dower upon the ground that it could not be claimed against the mortgage for the purchase money. The cause was referred to the master by consent, to hear and to determine all issue of law and fact. He reported in favor of the demandant 12th September, 1894. Exceptions having been filed to said report, the cause was heard by Hon. T. B. Fraser, presiding judge, at Union, during October term, 1894, and he filed a decree also in favor of demandant. The case was appealed to this court upon exception to Judge Fraser's decree, raising the single question, Is the widow entitled to dower?

The marked research of appellants' attorneys has enabled them to present to this

court quite an array of authorities outside of this state, some of which directly, and others indirectly, sustain the proposition for which the appellants contend,—that in such a case as this the widow is not entitled to dower. It is unnecessary for us to review said authorities at length, as we do not regard this question an open one in this state. This case is controlled by the principles announced in *Agnew v. Renwick*, 27 S. C. 562, 4 S. E. 223, in which the court says: "There can be no doubt that a widow is entitled to dower in lands mortgaged to secure payment of the purchase money at the time the mortgagor acquires title, but such right is subordinate to the lien of the mortgage. As against all persons other than the mortgagee, or one claiming through the mortgagee, her right to dower cannot be disputed by reason of such mortgage. *Stoppelbein v. Shulte*, 1 Hill (S. C.) 200; *Klinck v. Keckley*, 2 Hill, Ch. 250; *Wilson v. McConnell*, 9 Rich. Eq. 512. \* \* \* Reduced to its simplest form, the transaction amounted to a purchase by the mortgagee from the mortgagor of the mortgaged premises, not under proceedings for foreclosure, but at private sale. Now, under the admitted general rule, the legal effect of such a transaction is to extinguish the mortgage, and the only exception to this rule recognized in this state is that established by the case of *Agnew v. Railroad Co.*, 24 S. C. 18. And this court has said in *Bleckley v. Branyan*, 26 S. C. 424, 2 S. E. 319: 'We cannot venture to go further in relieving a mortgagee who purchased the mortgaged property than was indicated in the case of *Agnew v. Railroad Co.*' \* \* \* Now, in the case under consideration, it is quite certain that there was no express agreement or covenant that the mortgage should remain open as a protection against intervening incumbrances, and hence the case cannot be brought under the exception recognized in *Agnew's Case*. \* \* \* There is also another ground upon which such defense should be defeated. While a widow can only claim dower out of land mortgaged to secure payment of the purchase money contemporaneously with the acquisition of title by her husband, subject to the payment of the mortgage debt, or, as some of the cases express it, her claim is subordinate to the lien of the mortgage, yet, when the mortgage debt is paid, or otherwise extinguished, the lien of the mortgage is gone, and there is then nothing in the way of the claim of dower,—nothing to which it is subordinate." The appellants rely upon the case of *Stoppelbein v. Shulte*, 1 Hill (S. C.) 200. That was a case in which the transaction took place after the death of the husband, and the distinction is therein recognized between transactions taking place during the life of the husband and those after his death. In that case, O'Neal, J., says: "The fact that this incumbrance has since passed into the hands of the person who purchased the estate does

not add to or diminish its previous value. It may be true that this acquisition of the mortgage is a satisfaction of it, yet that is a satisfaction made since the husband's death, and not by his administrator, and cannot inure to the enlargement of his estate in the land." Continuing, he says: "The case of *Bolton v. Ballard*, 13 Mass. 227, does not militate against the conclusion to which I have come in this case. In that case the mortgage was paid by one of the intermediate grantees, in the lifetime of demandant's husband, and according to a contract with him when he conveyed the land. This was held to have completed the seisin of the husband, so as to endow his wife. And if the fact had been that the mortgage in this case had been paid by the defendants to *Nicholson* in the lifetime of the demandant's husband, it is possible that she would have been dowable of the unincumbered fee-simple value at her husband's death. But the fact that it was not paid until after his death makes the distinction in the case before us and the one cited. In the cases of *Hildreth v. Jones*, 18 Mass. 525, and *Snow v. Stevens*, 15 Mass. 279, the mortgages were paid by the respective administrators of the deceased, and the demandants were held entitled to their dower, and I think most properly, for the payment by the administrator was the same as if it had been made by the mortgagor himself. But the payment here cannot be considered as the act of the mortgagor. In the cases referred to from *Massachusetts Reports* another distinction exists which ought to be kept in mind: the mortgagor there has only an equity of redemption; here he has a legal estate, and the mortgage is only an incumbrance." The exceptions are overruled. It is the judgment of this court that the judgment of the circuit court be affirmed.

(43 S. C. 36)

GARRET et al. v. WEINBERG et al.  
(Supreme Court of South Carolina. Jan. 8, 1895.)

**DEED BY TENANT IN COMMON—PARTITION.**

1. Where a tenant in common of land conveyed her interest by a deed which purported to convey the entire interest therein, and her grantee subsequently conveyed by metes and bounds portions of said tract to defendants, his deeds also purporting to convey the entire interest, defendants took proportionate shares of the individual interest of the original tenant in common.

2. Where one of several heirs, as tenant in common of land, conveyed her interest to the grantor of defendants by deed, which purported to convey the entire estate, and the remaining heirs brought partition against defendants, who were in possession of different portions of the land under deeds purporting to convey the entire interest in their respective portions, complaint alleging such facts did not improperly join two different causes of action.

Appeal from common pleas circuit court of Sumter county; W. C. Benet, Judge.

Action by John A. Garret and others against



Rosa Weinberg and another. From a judgment overruling a demurrer to the complaint, defendants appeal. Affirmed.

Lee & Moise, for appellants. A. Brooks Stuckie, for respondents.

McIVER, C. J. This was an action for partition of real estate, and, as the only question presented by the appeal arises under a demurrer to the complaint upon the ground that it shows on its face that there is an improper joinder of causes of action therein, it will be necessary to state substantially the allegations of the complaint, which are as follows: (1) That in November, 1865, one Thomas G. Garret died intestate, being seised and possessed at the time of his death of a certain tract of land, containing 508 acres, more or less, more particularly described in the complaint. (2) That the said Thomas G. Garret left surviving him, as his heirs at law, his widow, Elizabeth, who has since intermarried with one — Moore; his son, the plaintiff John A. Garret; his daughter the plaintiff Harriet D. Singletary; and his daughters Mary Pritchard, Ellen De Louch, and Maria Norton. (3) That said Mary Pritchard, Ellen De Louch, and Maria Norton have since died intestate. (4) That said Mary Pritchard left no husband and no lineal descendant surviving her. (5) That said Ellen De Louch left surviving her, as her only heir at law, her granddaughter, the plaintiff Louisa Rushing, who, being a minor, sues by her guardian ad litem, duly appointed. (6) That said Maria Norton left surviving her, as her only heirs at law, the plaintiffs John, Davis, George, Mary, Anna, and Charles Norton. (7) That the said Elizabeth Moore, widow of the said Thomas G. Garret, has "sold and conveyed her interest in said premises, purporting to be the entire interest or estate therein, to Edwin W. Moise." (8) That by a subsequent conveyance the defendant Rosa Weinberg became, and is now, the owner of the interest of the said Elizabeth Moore in two separate parts or parcels of the tract of land above described,—one containing 52 acres, more or less, more particularly described in the complaint, and the others containing 116 acres, more or less, more particularly described in the complaint,—and the defendant William L. Osteen is now the owner of the interest of the said Elizabeth Moore in the remainder of the said tract of land, to wit, 839½ acres thereof, more particularly described in the complaint. (9) That the defendants, and those through whom they claim, have received and enjoyed, respectively, the rents and profits from the above-described several and respective parts of the said tract of land since the death of the said Thomas G. Garret. (10) Sets out the alleged shares and interest of the several parties in the said tract of land,—whether correctly or not, we are not now called upon to say. (11) That all the debts of Thomas G. Garret have been

paid. (12) That the plaintiffs own no other land in this state in common with the defendants, and are desirous of a partition of the real estate above described; and pray for an accounting and partition.

The case was heard by his honor, Judge Benet, upon the complaint and the demurrer, who rendered judgment overruling the demurrer, and allowing defendants 20 days from the filing of his decree to answer. From this judgment, defendants appeal, upon the ground that the circuit judge erred in overruling the demurrer.

There can be no doubt that upon the death of Thomas G. Garret, intestate, the title to the land of which he died seised and possessed descended to and became vested in his heirs at law, and any one or more of his heirs at law were entitled to demand partition of the same, and as, in this case, one of the heirs was a minor, it became necessary to invoke the aid of the court for that purpose. The fact that one of the heirs had sold and conveyed her interest in the land to Mr. Moise, by a deed purporting to convey the entire interest or estate therein, certainly could not defeat the right of the other heirs to demand partition. The only effect of such a conveyance would be to convey her undivided interest in the whole land (*Young v. Edwards*, 33 S. C. 404, 11 S. E. 1066), thereby making her grantee, Mr. Moise, a tenant in common with the other heirs. Nor can the fact that, by subsequent conveyance, certain defined portions of the land passed into the possession of the defendants, defeat the right of the other heirs, the plaintiffs herein, to demand partition. The only effect of such subsequent conveyances, even though they may purport to convey the entire estate in the several portions claimed by each, would be to vest in the defendants proportionate shares of the undivided interest of Mrs. Elizabeth Moore, who had conveyed her entire undivided interest to Mr. Moise, under whom these defendants claim, thereby making the defendants tenants in common with the other heirs, the plaintiffs in action. As was held in *Young v. Edwards*, supra, while one tenant in common may convey to a third person a certain portion of the common property defined by metes and bounds, which would be good and valid as between the parties to such conveyance, yet such a conveyance will not be allowed to operate to the prejudice of the other tenants in common. When, therefore, Mrs. Elizabeth Moore conveyed her interest in the tract of land of which the original intestate died seised and possessed, to Mr. Moise, no matter how broad may have been the terms of her deed, it could only have the effect, as against the other tenants in common, of vesting in him her undivided interest in the land, and those who claim under him, by subsequent conveyances, cannot have any higher or greater right than he had.

It is clear, therefore, that there was no error on the part of the circuit judge in hold-

ing that there was no improper joinder of causes of action, and his decree overruling the demurrer must be sustained. Indeed, we do not see that there was more than one cause of action stated in the complaint, for it seems to us that it was nothing more than an action for the partition of a tract of land among the several tenants in common, entitled to share therein, in certain proportions, which we are not called upon to fix, as the only question presented for our decision is whether there was error in overruling the demurrer, and to that question alone we have confined our attention. The judgment of this court is that the judgment of the circuit court be affirmed, with leave to the defendants to answer within 20 days after written notice of the filing of this opinion.

(48 S. C. 3)

### STATE v. BURCH.

(Supreme Court of South Carolina. Jan. 8, 1895.)

#### CRIMINAL LAW—JURISDICTION OF TRIAL JUSTICE.

Under Gen. St. § 824, which provides that trial justices may punish all assaults "when the offense is not of a high and aggravated nature requiring in their judgment greater punishment," than they are allowed to impose, the determination of the trial justice that a certain case is or is not within his jurisdiction is not binding on appeal to the circuit court.

Appeal from general sessions circuit court of Florence county; Norton, Judge.

J. B. Burch was convicted in a justice court of assault, and from an order of the circuit court affirming the judgment of the justice court and dismissing the appeal, he appeals. Reversed.

Dargan & Coggeshall, for appellant. R. O. Purdy, Acting Sol., for the State.

GARY, J. The defendant was tried and convicted before a trial justice under a warrant in which it was alleged that he "did commit a misdemeanor by assaulting deponent with drawn pistol, and saying he would shoot him, contrary to the statutes made and provided, and against the peace and dignity of the state; said Burch being at the time under a bond to keep the peace towards M. E. Harrell." The defendant appealed to the circuit court, and his honor, Judge Norton, made the following order: "This case having come on to be heard, the attorneys for the defendant, in addition to the grounds of appeal which had been filed, entered a plea to the jurisdiction of the court, which plea I heard along with the exceptions filed. After carefully considering the whole case, I concur with the trial justice in the conclusions reached by him. It is therefore ordered that the judgment of the trial justice be sustained; the appeal dismissed; the exceptions, together with the plea to the jurisdiction, which, under section 824, Gen. St. 1882, is controlled by the discretion of the trial justice, be overruled; and that the case

be remanded to the trial justice court for the purpose of carrying into effect the judgment rendered." The defendant appeals to this court on the following exceptions: (1) "Because his honor erred in holding that the jurisdiction of the trial justice court in regard to assaults and batteries is controlled by the discretion of the trial justice, it being respectfully submitted that trial justices have no jurisdiction in aggravated assaults, and that in this case the trial justice was without jurisdiction." (2) "Because from the testimony in the case, when considered in connection with the affidavit of J. R. Coggeshall, it is not clear that the trial justice intended to find as a matter of fact that the defendant cocked and presented his pistol within shooting distance at the prosecutor." (3) "Because, admitting that the said assault was committed, it appears from the undisputed testimony in the case that the prosecutor was an intruder upon the lands, upon which he had been forbidden to enter, and it does not appear that the defendant, in compelling him to leave the same, was employing more force than was necessary."

Section 824, Gen. St. 1882, referred to by the presiding judge (which is in reference to trial justices), is as follows: "They may punish by fine not exceeding one hundred dollars, or imprisonment in the jail or house of correction, not exceeding thirty days, all assaults and batteries, and other breach of the peace, when the offense is not of a high and aggravated nature, requiring in their judgment greater punishment." To show that the determination by the trial justice as to what cases are not within his jurisdiction is not binding on the circuit court, it is only necessary to quote from the case of *State v. McKettrick*, 14 S. C. 354, 355, so much of the opinion of the court as bears upon this question, as follows: "It is true that the act of 1870, defining the jurisdiction of trial justices in criminal cases in reference to assaults and batteries, leaves it to the discretion of the trial justice in the first instance, when a party is brought before him, to determine whether he will take jurisdiction or bind the accused over; but the act certainly never intended that his judgment in this matter should be final, and that he should have the power to fix indisputably the character of the offense when it came before the higher court. The offense in the higher court consists of two ingredients: First, that it should be an assault and battery; second, that it should be of a high and aggravated nature. If the trial justice's judgment as to the last ingredient, when he sends the case up, was conclusive, then this strange result would follow: That of the two ingredients which make up the defense before the court of sessions the trial justice has already tried one without jury and without opportunity to the accused to defend, and the jury in the court of sessions is to try the other, and which perhaps is the least important; two tribunals adjudi-

cating different ingredients of the same offense. Such could not have been the intent of the act of 1870." This doctrine is also sustained by the case of *Harvey v. Huggins*, 2 Bailey, 252. This exception is therefore sustained.

The second and third exceptions only involve questions of fact, which this court cannot consider. These exceptions are overruled. It is the judgment of this court that the order appealed from be reversed, and that the case be remanded to the court of general sessions for Florence county for such further proceedings as may be necessary to carry out the views herein announced.

(43 S. C. 39)

**PERKINS v. LOAN & EXCHANGE BANK  
OF SOUTH CAROLINA.**

(Supreme Court of South Carolina. Jan. 8, 1895.)

**CHATTEL MORTGAGE — WHAT CONSTITUTES—FAILURE TO RECORD—EFFECT.**

1. A contract for the sale of personal property, which provides that title shall remain in the vendor until the price is paid, and that, in case of default in any of the several payments provided for, all payments shall, at the option of the vendor, become due, and the property may be retaken by him, constitutes a mortgage for the payment of the price.

2. A duly-recorded mortgage, in terms covering after-acquired property, is effectual to charge such property, as soon as it is acquired by the mortgagor, with an equitable lien, which will prevail against an unrecorded purchase-money mortgage given by such mortgagor.

Appeal from common pleas circuit court of Richland county; J. H. Hudson, Judge.

Action by Willis J. Perkins, trading under the name of Perkins & Co., against the Loan & Exchange Bank of South Carolina. There was a judgment for plaintiff, and defendant appeals. Reversed.

The contract referred to in the opinion is as follows: "Philadelphia, Pa., Sept. 23, 1892. Messrs. Perkins & Co., Grand Rapids, Mich.: You will please ship the following goods that have prices carried out, via best route, — R. R., to our address at Fort Motte, state of S. C., for which we agree to pay you as follows:  $\frac{1}{2}$  cash, 90 days after shipment of  $\frac{1}{4}$ ths the value of order; balance as follows: Time from date of shipment of  $\frac{1}{4}$ ths the value of order,  $\frac{1}{2}$ , 6 months; \$—, — months; \$—, — months; \$—, — months; \$—, — months; \$—, — months; interest, 6%. Where three months' or more time is given on all or part, insurance is to be effected to the amount of unpaid notes and accounts, loss, if any, payable to Perkins & Company, as their interest may appear, and policy delivered to them within thirty days from shipment; or Perkins & Company are hereby entitled to effect said insurance, adding premium and expense to amount of first note becoming due thereafter. Perkins & Co.'s security notes to be used in settlement as per time stated above. This contract order

is taken subject to the approval of Perkins & Co., and strikes, accidents, and delays, unavoidable or beyond control of Perkins & Co. Shipment to be made for goods specified below about soon as possible. Acceptance of machinery, when delivered by transportation company, is understood to constitute a waiver of all claims for damage by reason of any delay. No understanding, whether verbal or otherwise, will be recognized, unless specified in this contract. All property sold under this contract shall be held and recognized at all times as personal property. Title and ownership of all property herein contracted for, and of all repairs and additions thereto, and all contracts for machinery, made within one year from date hereof, shall remain in Perkins & Co. until the full purchase price is paid; and, in case of any default in any or either of the payments, all payments shall, at the option of Perkins & Co., notice of which is hereby waived, become and be at once due and payable, and said property may be taken back by Perkins & Co., and all payments made shall apply for rent, or Perkins & Co. may commence suit for full amount remaining unpaid. This order does not include belting or power, unless specially mentioned. All machinery that is hereby ordered, purchased, and sold is subject to the following warranty and agreement: That each machine and part of mill included in mill drawing, and hereby purchased, shall be well made and of good material, and, if properly set, run, and if rightly managed, shall be capable of performing all the functions in a proper manner that it was represented by us in circulars to accomplish. If, upon trial, any machine or part of the mill shows any defect or works improperly, and the purchasers, after intelligently following such directions as may be given them, shall be unable to make it operate well, written notice, stating wherein it fails to satisfy the warranty, is to be given immediately by the purchaser to Perkins & Co., Grand Rapids, Mich., and a reasonable time allowed for the receipt of such notice and to remedy the defect (if any) described, unless it be of such nature that the purchaser can be advised by letter. If said Perkins & Co. are not able to make it operate well (the purchaser rendering friendly and necessary assistance), and the fault is in a machine or part of mill machinery, it may be taken back by said Perkins & Co., the purchaser delivering the defective machine or part of mill at nearest freight depot, on receipt of order from said Perkins & Co.; and all payments for the purchase of said machine or part of mill shall be refunded, and all claims for damage are to be canceled thereby, or the defects remedied, and the machine or part of mill made to perform satisfactorily. If cause of failure is through improper management or mill construction or lack of proper appliances or neglect to follow directions, then the purchaser to pay all expenses incurred. Use, after thirty days without such notice, shall be con-

clusive evidence of satisfaction and fulfillment of warranty." Here follows description and price of articles of machinery. Signed: "Fort Motte Lumber and Shingle Co. Charles Fraser, Treasurer. Office, 104 Walnut street, Philadelphia."

Allen J. Green, for appellant. Abney & Thomas and Raysor & Summers, for respondent.

McIVER, C. J. The Ft. Motte Lumber & Shingle Company purchased from James A. Peterkin the "timber leaf" upon a certain tract of land in Richland county, together with certain machinery, boilers, etc., then on said land; and, to secure the payment of the purchase money thereof, on the 8th of August, 1892, executed a mortgage to said Peterkin upon all its stock of timber, lumber, and shingles, as well that which it should thereafter manufacture and prepare for market or otherwise acquire as that which was then in existence, and also all the sheds, buildings, property, machinery, and plant then on the mill sites of said company, and also that which it should from time to time thereafter place on its said mill sites. This mortgage was duly assigned, for value, by said Peterkin to the defendant, on the 13th of August, 1892, and the same was duly recorded, in the proper office, on the 22d of August, 1892. On the 23d of September, 1892, the said lumber and shingle company entered into a written contract for the purchase of the several articles of personal property mentioned in the complaint from the plaintiff, consisting of machinery and other appliances to be used in its work as a portion of its "plant," a copy of which contract is set out in the case, and should be incorporated in the report of this case. In that contract it was stipulated that the title and ownership of the said property should remain in the plaintiff until the full purchase price was paid, and, in case of default in payment, the property might be taken back, and such payments as had been made should be applied for rent, or the plaintiff might bring suit for the amount remaining unpaid. Upon the execution of this contract the property mentioned in the complaint was delivered to the said lumber and shingle company, and by it placed upon its mill sites. On the 20th of December, 1892, the defendant, upon breach of the condition of its mortgage, seized the said property, and took it into its possession, where it remained until it was destroyed by fire, some time in August, 1893. In the meantime, to wit, on the 27th of June, 1893, the plaintiff demanded from the defendant possession of said property, which demand being refused, this action was commenced to recover damages for the conversion of said property. It is conceded that no part of the purchase money of the property in dispute was ever paid by the lumber and shingle company to the plaintiff; that the contract above referred to, for the purchase of said property, was never recorded until the 7th of February, 1893; and that the defendant never had any

notice, either actual or constructive, of such contract until that date. All the material facts being conceded, a jury trial was waived, and the case was heard by his honor, Judge Hudson, upon the pleadings and the agreed statement of facts, who rendered judgment in favor of the plaintiff; and from his judgment defendant appealed upon the several grounds set out in the record, which need not be repeated here, as the sole question presented is one of law,—which of the two parties have the legal right to the property in dispute, under the agreed facts?

It seems to us that the first question to be determined is, what is the true nature and legal character of the contract between the plaintiff and the Ft. Motte Lumber & Shingle Company, a copy of which is set out in the case, under which the property in question was sold and delivered to said company by the plaintiff? Looking at the terms of that paper, in the light of the decisions of this court cited below, we cannot doubt that it was nothing more nor less than a mortgage on the property in dispute to secure the payment of the purchase money of said property. *Talmadge v. Oliver*, 14 S. C. 522; *Herring v. Cannon*, 21 S. C. 212; *Straub v. Screven*, 19 S. C. 445; *Talbott v. Sandifer*, 27 S. C. 624, 4 S. E. 152; *Manufacturing Co. v. Smith*, 19 S. E. 132. If, then, this paper must be regarded as a mortgage, which was not recorded until the 7th day of February, 1893, and if, as it is conceded, the defendant had no notice of it, either at the time when the Ft. Motte Lumber & Shingle Company purchased the property in question from the plaintiff, and the same went into its possession, or at the time when the defendant acquired possession by the seizure thereof under its mortgage, in December, 1892, it follows necessarily that the defendant has the superior right. By section 1776 of the General Statutes of 1882, now incorporated in the Revised Statutes of 1893 as section 1963, it is declared that "all mortgages, or instruments of writing in the nature of a mortgage of any property, real or personal, \* \* \* shall be valid, so as to affect the right of subsequent creditors or purchasers for valuable consideration without notice, only when recorded within forty days," etc.; with a proviso in these words: "That the above-mentioned deeds or instruments of writing, if recorded subsequent to the expiration of said period of forty days shall be valid to affect the rights of subsequent creditors and purchasers for valuable consideration without notice only from the date of such record." And this court, in construing that section, in the case of *King v. Fraser*, 23 S. C., at page 569, held that a mortgage recorded after the time limited for that purpose had the same legal effect as if a new mortgage was given on the day of such record; and cites, with approval, the case of *Cameron v. Marvin*, 23 Kan. 622 (a case which we may say, in passing, is in principle very much like the case under consideration), where the same view is presented. So that whether we look to the dates

of the two papers,—the defendant's mortgage, and the contract under which plaintiff claims, which we have held to operate as a mortgage,—or to the dates at which these two papers were recorded, it is very obvious that the defendant has the prior lien, and therefore the superior right. But while it is not disputed, and could not well be, under the cases of *Moore v. Byrum*, 10 S. C. 452; *Parker v. Jacobs*, 14 S. C. 112; and *Hirshkind v. Israel*, 18 S. C. 157,—that, by a mortgage covering after-acquired personal property, the mortgagee may obtain a lien upon such property after it is acquired by the mortgagor,—it is earnestly contended by counsel for respondent that a mortgagee of after-acquired property takes only a lien on the interest of the mortgagor, and, if such property, when it is acquired, is subject to mortgages or other liens, the original mortgage does not displace such liens, though they may be junior to it in point of time; and he cites in his argument several decisions of the supreme court of the United States to sustain his contention. But, as we understand it, the cases draw a distinction between a case where the mortgagor still retains possession of the acquired property and a case where such property has passed into the possession of the original mortgagee by a seizure under his mortgage. In the former, the mortgagee has only an equity to subject such property to the lien of his mortgage, which may be met and overcome by some superior equity, but in the latter the mortgagee acquired the legal title. It is observable that the cases cited from the supreme court of the United States were cases on the equity side of the court, and it is noticeable that in one of them (*Fosdick v. Schall*, 99 U. S. 251) *Waite, C. J.*, in delivering the opinion of the court, takes occasion to say that the possession of the receiver, being that of the court, adds nothing to the previously existing title of the mortgagees; which seems to imply that if possession had been acquired by the mortgagees, by seizure under their mortgage, the result would have been different, as in that case the mortgagees would have acquired the legal title. It seems to us that the true rule is stated and the proper distinction drawn in the following quotation from *Parker v. Jacobs*, *supra*: "There can be no doubt that the rule at law is that it is necessary to the validity of the mortgage that the mortgagor should have a present property, either actual or potential, in the thing mortgaged (1 *Jones, Mortg.* § 149); but in equity the rule is different. As is said by Judge Story in *Mitchell v. Winslow*, 2 Story, 630, Fed. Cas. No. 9,673, it seems to me the clear result of all the authorities that wherever the parties, by their contract, intended to create a positive lien in charge, either upon real or personal property, whether then owned by the assignor or not, or, if personal property, whether it is then in esse or not, it attaches, in equity, as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto, against the latter and all persons asserting a

claim thereto under him, either voluntarily or with notice or in bankruptcy. This doctrine is fully established by the case of *Holroyd v. Marshall*, 10 H. L. Cas. 191, and is recognized in *McCaffrey v. Woodin*, 65 N. Y. 459. We take it, therefore, that a mortgage on personal property, in which the mortgagor has no present interest, either actual or potential, is ineffectual to transfer the legal title to such property when subsequently acquired by the mortgagor, unless, when acquired, possession thereof is given to the mortgagee, or taken by him under the mortgage (*Moody v. Wright*, 13 Metc. (Mass.) 32; *Williams v. Briggs*, 11 R. I. 476, and many cases there cited); but that, in equity, such a mortgage is effectual to charge the property as soon as it is acquired by the mortgagor, and before possession is obtained by the mortgagee, with an equitable lien which will prevail against a subsequent judgment or attaching creditor. *Holroyd v. Marshall*, 10 H. L. Cas. 191; *Mitchell v. Winslow*, 2 Story, 630, Fed. Cas. No. 9,673; *Smithurst v. Edmunds*, 14 N. J. Eq. 408; *McCaffrey v. Woodin*, 65 N. Y. 459."

Applying this doctrine to the case under consideration, it is clear that the defendant, by its mortgage, executed and duly recorded in August, 1892, acquired, at least, an equitable lien upon the property in question so soon as it was acquired by the mortgagor under the contract of 23d of September, 1892; but when the property was seized by the defendant under its mortgage, on the 20th of December, 1892, and taken into its possession, the defendant thereby acquired the legal title, before any notice, either actual or constructive, of plaintiff's mortgage, and was therefore entitled to retain the possession thereof. There is another view which leads to the same conclusion. If, as we have seen, the contract of the 23d of September, 1892, under which the Ft. Motte Lumber & Shingle Company acquired possession of the property in dispute, must be regarded as a mortgage, or at least as an instrument in writing in the nature of a mortgage, then it follows necessarily that said company thereby acquired the legal title to said property subject to the lien of plaintiff's then unrecorded mortgage; and when the defendant, by its seizure of said property, on the 20th of December, 1892, acquired the legal title, before any notice, either actual or constructive, of plaintiff's mortgage, the defendant may well be regarded as becoming then the purchaser,—for it was then that the defendant acquired the legal title, and, this being subsequent to the lien under which plaintiff claims, the defendant is entitled to the protection secured to subsequent purchasers by the terms of the registry laws. In *Norwood v. Norwood*, 86 S. C. 343, 15 S. E. 382, Mr. Justice Pope, as the organ of the court, after discussing this subject, lays down the rule as follows: "This court, therefore, now announces that a secret mortgage, or a mortgage not recorded, is displaced in lien by a mortgage subsequently delivered and duly recorded, ev

en if the debt secured by the recorded mortgage is an antecedent indebtedness." The present case falls under this rule, thus clearly and emphatically announced; for, of course, the same doctrine, under the express terms of the statute, would apply to a subsequent purchaser as well as to a subsequent creditor. It seems to us, therefore, that, in any view which may be taken of this case, the decree below cannot stand. The judgment of this court is that the judgment of the circuit court be reversed, and that the complaint be dismissed.

(93 Ga. 823)

**CONLEY v. ARNOLD et al.**

(Supreme Court of Georgia. Aug. 31, 1894.)

COMPETENCY OF COUNSEL—TIME FOR OBJECTION  
—MITIGATION OF DAMAGES—SUIT FOR ASSAULT  
—VERDICT FOR NOMINAL DAMAGES.

1. Although, in a civil case, the counsel for one of the parties was legally disqualified to appear and take part in the trial by reason of his being solicitor general, and, as such, having acquired from the opposite party a knowledge of the facts involved in the litigation, yet, as no objection to his competency on this or any other ground was presented to the court until after verdict, the objection came too late.

2. Matter pleaded in mitigation of damages is not objectionable as mitigation, because it would not serve to justify.

3. In an action for a personal injury, where a plea of justification is filed, and the jury find for the plaintiff damages to the amount of one dollar only, the verdict is contrary to law, for in such case failure of the defendant to prove justification entitles the plaintiff to a verdict which would carry all the costs of the action, and, under section 3681 of the Code, a verdict for one dollar and costs would not have this effect.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by John L. Conley against Reuben Arnold and others for damages for assault. From a judgment for one dollar in favor of plaintiff he brings error. Reversed.

D. P. Hill and John L. Conley, for plaintiff in error. C. D. Hill and Arnold & Arnold, for defendants in error.

**LUMPKIN, J.** 1. Mr. Hill, as solicitor general of the Atlanta circuit, prosecuted Reuben, Frank A., and Reuben R. Arnold for an assault upon Conley. By virtue of his connection with this criminal case, he necessarily acquired from Conley, the prosecutor, a full knowledge of all the facts involved in the difficulty between him and the accused. Afterwards, Conley brought an action for damages against the Arnolds because of the beating they had inflicted upon him. In this case Mr. Hill appeared as counsel for the defendants, and represented them so successfully that the trial resulted in a verdict for the plaintiff for only one dollar and costs. No objection was made by the plaintiff to Mr. Hill's appearance for and representation of the defendants. So far as the record discloses, nothing whatever was said on this subject until after the verdict

had been rendered. In his motion for a new trial, the plaintiff inserted a ground alleging that the verdict ought to be set aside because the appearance of the solicitor general as counsel for the defendants, whom he had prosecuted for the identical assault on which the present case is based, was calculated to prejudice the jury against the plaintiff's case. We do not think it was lawful or consistent with public policy or with sound professional ethics for Mr. Hill to represent the defendants in this case. We have not the slightest idea that anything intentionally wrong or unbecoming on his part was intended, but we feel constrained to hold that he had no right to be in any way connected with the defense to Conley's action. In *Gaulden v. State*, 11 Ga. 47, this court held in explicit terms that public policy forbade that a solicitor general, after the expiration of his term of office, should be employed as counsel to defend a person against whom, while in office, he had instituted a prosecution by preferring an indictment. The same public policy is applicable in a case like that now before us. We think, however, the objection to the competency of Mr. Hill came too late. It ought to have been made at least before the trial actually began. Upon this ground of the motion, therefore, we could not feel authorized to set the verdict aside.

2. It appears from the evidence that Frank A. Arnold was a brother, and that Reuben R. Arnold was a son, of Reuben Arnold. The defendants filed a joint plea of justification. Afterwards an amendment was offered, which began with these words: "The defendant amends his plea of justification, and says that, in addition to the matters of justification therein set out," etc. The amendment then proceeded to allege that the plaintiff had maliciously, and without probable cause, falsely brought in Fulton superior court a rule against the "defendant" for the purpose of disbarring him as an attorney, and set out the petition which Conley had filed for this purpose. This amendment was evidently offered in behalf of Reuben Arnold. It was objected to mainly on the ground that the matters set forth therein did not amount to a justification of the battery. The defendants then offered to plead the facts connected with the effort to disbar Reuben Arnold in mitigation of damages, and this the court allowed. The only objection of any consequence to the offered amendment was that it did not set up facts amounting to a justification. This position was sustained by the trial judge, and he so distinctly ruled. If, however, the amendment did allege facts which could properly be received in mitigation of damages, the objection already mentioned presented no legal reason for rejecting the amendment. We are not now called upon to enter into a discussion of the merits of the amendment as a plea in mitigation. Nothing in the rec-

ord properly presents for our adjudication the question whether or not the matters alleged in the amendment would be good in mitigation, and it is therefore left open to be passed upon at the next trial, if it should arise.

3. As already stated, the verdict in favor of the plaintiff was for one dollar and costs. By finding for the plaintiff, the jury necessarily found that the plea of justification was not sustained. Consequently, even if the plaintiff was entitled to nominal damages only (which we by no means wish to be understood as asserting), he was entitled to a verdict for an amount sufficient at least to carry against the defendants all the costs of the action. It was laid down in *Ransone v. Christian*, 56 Ga. 351, that "nominal damages mean in law some small amount sufficient to cover and carry the costs." Under section 3881 of the Code, in an action for assault and battery, if the jury shall find the damages to be less than \$10, the plaintiff shall recover no more costs than damages, unless the judge certifies that an aggravated assault and battery was proved. The insertion of the words "and costs" in the verdict would not, of itself, be sufficient to carry all costs against the defendants. See *Hardin v. Lumpkin*, 5 Ga. 452. Under the principle announced in this case, a verdict for one dollar and costs would enable the plaintiff to recover only one dollar of the costs. It stands demonstrated, therefore, that Conley was entitled to a recovery of at least \$10 damages, and, as the jury did not find this much in his favor, a new trial is ordered. We certainly do not mean to intimate that the recovery in his favor should, at the last trial, have been limited to \$10. This amount is here mentioned solely because it is indispensably necessary to do so in presenting the argument to show that the verdict is contrary to law. Accordingly there must be no inference that we have in mind this of any other sum as the one which the jury ought to have found. Nor do we express any opinion as to what the verdict should be when the case is tried again. We leave the whole matter open for investigation and determination, with due regard to the law and the rights of the parties on both sides. Judgment reversed.

(94 Ga. 107)

#### ATLANTA & W. P. R. CO. v. SMITH.

(Supreme Court of Georgia. June 30, 1894.)

**MINOR EMPLOYE—MASTER'S DUTY TO INSTRUCT—DANGEROUS EMPLOYMENT—ACTION FOR INJURIES—QUESTIONS FOR JURY—DAMAGES—LIFE TABLES.**

1. There is no presumption of law that a minor over 14 years of age, who applies for a position involving dangerous service, is aware of the danger, and needs no instruction.

2. The obligation to instruct an employé, before putting him to work, as to any of his duties which are dangerous, does not necessarily follow, as matter of law, from his minority when

employed, his inexperience, the fact that the service is dangerous, and the fact that his inexperience is known to the employer. In a case like the present, it is a question for the jury whether the particular service was so dangerous, and its dangers so obscure, or whether the information of the employé was so limited or his mind so immature, at the time he was injured, as to render it needful and proper that instruction should have been given when he was employed, or at some time previous to the injury.

3. On the question whether, in the particular instance, the plaintiff used due care for his own safety, evidence of his character for prudence or recklessness in the conduct of such business is inadmissible, either against him or for him.

4. In order for a minor to recover of his employer on account of lost time, due to a permanent personal injury inflicted by his employer, damages for the whole period of his life from the infliction of the injury, he must show, so as to cover the interval between the time of the injury and the time he would attain his majority, that his earnings for that period, if he had not been incapacitated, would have belonged to himself, and not to his father.

5. Where the mortuary table and the annuity table are both before the jury, any instruction given by the court as to their use in ascertaining present value should not leave it uncertain as to which table is to be consulted for that purpose, but the jury should be told that the annuity table alone is applicable. And the court should also put the jury on their guard against overlooking that there are two columns in the table, one applicable to 6 and the other to 7 per cent.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action by J. W. Smith against Atlanta & West Point Railroad Company for personal injuries. Judgment was rendered for plaintiff, and defendant brings error. Reversed.

Dorsey, Brewster & Howell, for plaintiff in error. Smith & Pendleton, for defendant in error.

**LUMPKIN, J.** The plaintiff, a youth about 17 years of age, and an employé of the defendant, in the capacity of train hand, while endeavoring to couple two cars, received an injury resulting in the loss of his right arm. On the trial the jury returned a verdict in his favor for \$7,000. The defendant's motion for a new trial contained a large number of grounds. We will not attempt to discuss all of them, but have endeavored to condense in the headnotes the principles of law applicable to the case, upon all the material questions in controversy. The recovery was very large, and for this reason we have, in determining whether or not a new trial should be granted, felt constrained to give the railroad company the benefit, in the strictest sense, of all its legal rights in the premises. At the same time, we have not been unmindful of the legal rights of the plaintiff, and have endeavored to bear them in mind in laying down rules for the guidance of the trial court upon the next hearing.

1. Among the charges of the court, complained of, was the following: "If you find from the evidence that he was a minor at the time, but over fourteen years of age,

and that when he applied for the position he stated that he knew the duties of a car coupler, and could discharge them, the defendant had the right to accept the statement as true, and act on it; and it would not be under any obligations to instruct the plaintiff as to the dangers attending the work, or as to how to avoid them, unless you should believe from the evidence that the circumstances were such as to require a prudent person, in the exercise of ordinary diligence, to give such instructions." It was insisted that this charge was erroneous for several reasons, but we shall notice only one of them. It was stated thus: "If the boy was more than fourteen years old, and applied for the position of brakeman, the defendant had a right to presume that he knew how to discharge the duties of such a position, whether he represented that he knew them or not." The position of counsel for the railroad company, broadly stated, is that if a minor above the age of 14 years applies for a position involving dangerous service, ipso facto, a presumption of law arises that he is aware of the danger, and needs no instruction. We have no difficulty in holding that this position is not sound. The proposition that no such presumption arises, under the circumstances indicated, is so plain that it need not be supported by argument. We are therefore content to allow the statement contained in the first headnote to stand upon its own merits, without discussing it.

2. The court also charged the jury as follows: "If you find from the evidence that the plaintiff was a minor when he applied for and obtained the position of train hand, and that he was inexperienced in that service, and the defendant's agent knew it; and if you find that to couple cars was a part of his duty, and that it was attended with danger, the defendant would not have a right to put him at that work without notifying him of the danger, and giving instructions as to how to avoid it." This charge was too strong against the defendant. In *Davis v. Factory*, 92 Ga. 712, 18 S. E. 974, the question of the duty of employers as to giving instructions to minors employed in operating dangerous machinery was to some extent involved, and was very carefully considered. After an examination of numerous authorities, the writer felt authorized to say: "Without doubt, in some cases, even minors are not necessarily entitled to any warning at all as to the character of the machinery about which they are at work, or as to the proper method of operating it and avoiding obvious dangers. Much depends upon the nature of the machinery, the age, capacity, intelligence, and experience of the employe, as well as all the surrounding facts and circumstances." Applying the language just quoted to the facts of the case at bar, we think the court should have left it to the jury to determine whether, under all the circumstances, it was incumbent upon the de-

fendant to give to the plaintiff at the time of his employment, or at some time previous to the injury, instructions regarding the dangers of the work, and how he could safely perform it.

3. During the trial, counsel for the defendant asked a witness on the stand what was the character of the plaintiff for being prudent or reckless in the conduct of his business, the purpose of the question evidently being to show that the plaintiff was habitually reckless in performing his work. The court properly refused to allow the question to be answered. One of the contested issues of fact was whether, on the occasion on which he was injured, the plaintiff used due care for his own protection and safety. We do not think this question could be elucidated by evidence, one way or the other, as to the general character of the plaintiff for prudence or recklessness. *Railway Co. v. Kane*, 92 Ga. 188, 18 S. E. 18, and the authorities there cited, sufficiently sustain the ruling now made. It is true that in one of these cases (*Railway Co. v. Flannagan*, 82 Ga. 579, 9 S. E. 471) this court sanctioned the admission of evidence showing the high speed at which the same engine was habitually run by the same engineer at the same place; but Chief Justice Bleckley said it was of doubtful admissibility, and besides there is some difference between proving habitual acts of recklessness or negligence at particular times and places, and proving the general character of a particular person for recklessness, or the contrary.

4. While instructing the jury as to the measure of damages, the court charged, in substance, that if they found for the plaintiff he would be entitled to recover for all the time he lost. As has been stated, the plaintiff, at the time of the injury, was only 17 years of age, and consequently, in the absence of some showing to the contrary, his earnings for the period of time elapsing until his majority would have belonged to his father. Under the charge, as given, the jury were authorized, in computing the damages, to allow the plaintiff himself his entire earnings from the time of the injury. As he did not show his earnings, during the period of his minority, would have belonged to himself, and not to his father, the charge in question was not entirely just to the defendant. Even if a parent should allow a minor son to engage in a particular employment, and retain for himself his wages for his services rendered while so engaged, it would by no means follow that the minor had been manumitted by the father for the whole period of his minority. In such case it would be incumbent upon the minor to show affirmatively that the manumission extended up to the time of his majority. In the argument before us, however, it was insisted for the defendant in error that the charge now under consideration was cured by another charge which the court gave to



the jury. As there is to be a new trial, it is unnecessary to decide whether this contention is well founded or not, but the law as above stated will be applicable on the next trial.

5. The most serious error committed by the trial judge, and because of which we think the railroad company is undoubtedly entitled to a new trial, was made in charging in reference to the mortuary and annuity tables which were in evidence before the jury. Referring to these tables, the judge said: "They are known as the 'mortuary and annuity tables.' I will first explain to the jury how to use them: If you find for the plaintiff, you must then look to the evidence, and see what he is entitled to recover annually, if anything. You will then take that sum, and multiply it by the figure opposite his age. That would give you the present value of what he would be entitled to recover, if you see proper to find for him." The obvious vice of this charge is that the court failed entirely to instruct the jury which of the tables should be used in ascertaining the present value of what the plaintiff would be entitled to recover. It is too manifest to require discussion that it should not have been left uncertain which table should be consulted for that purpose. On the contrary, the jury should have been told that the annuity table alone was applicable. And the court ought also to have put the jury on their guard against overlooking the fact that even in the annuity table there are two columns, one applicable to 6 and the other to 7 per cent. In view of the confusion which must have arisen in the minds of the jury with reference to the use of the tables before them, and in view also of the large verdict rendered, it is more than probable that the charge in question resulted in greater or less injury to the railroad company, and the ends of justice require that the case should be tried again. Judgment reversed.

(115 N. C. 507)

**MERCHANTS' NAT. BANK OF RICHMOND et al. v. NEWTON COTTON MILLS.**

(Supreme Court of North Carolina. Dec. 27, 1894.)

**FRAUDULENT CONVEYANCES—INSOLVENT CORPORATIONS—PREFERRING CREDITORS—CONFESSION OF JUDGMENT.**

1. Under Code, § 685, providing that a conveyance by a corporation shall be void as to pre-existing creditors, if such creditors begin proceedings within 60 days, a confession of judgment by an insolvent corporation to prefer a creditor is valid if not attacked within such time.

2. The words "trust fund," as relating to the assets of an insolvent corporation, apply only after it has been placed in the hands of a receiver.

3. Confession of judgment and filing are sufficient authority for its entry, in the absence of words expressly authorizing it in the statement required, under Code, § 571, which pro-

vides for a statement which, *inter alia*, shall "authorize the entry of the judgment."

4. A statement that the amount was due by a certain note described in the judgment; that said note became due on a day named; and that the consideration was cotton sold and delivered,—was a compliance with Code, § 571, subsec. 2, which provides that the statement "must state concisely the facts out of which it arose, and must show that the sum confessed therefor is justly due or to become due."

5. A judgment by confession is not vitiated by failure to file the note upon which it is given.

6. A judgment on a note is not vitiated because confessed for a greater rate of interest than the note bears.

7. Irregularities in a judgment by confession, which do not make it void, may be amended.

8. A judgment by confession is not vitiated by a stipulation therein that no execution shall issue for a certain time.

9. A failure to file authority to confess judgment, where such authority in fact exists, does not vitiate the judgment.

Appeal from superior court, Catawba county; Bynum, Judge.

Action by the Merchants' National Bank of Richmond, Va., and others, against the Newton Cotton Mills, for the appointment of a receiver, etc. From a decree sustaining exceptions by the Potter & Atherton Machine Company to the report of the referee, the bank and others appeal. Modified.

Jones & Tillett and L. L. Witherspoon, for appellants. Walker & Canaler and W. P. Bynum, Jr., for appellees Potter Mach. Co. and Mitchell & Co.

MacRAE, J. Let us examine first the case presented by the appeal as to the right of an insolvent corporation to make a preference. It is contended with great learning and research by the counsel for the appellees that, when a corporation becomes insolvent, it is thenceforward unlawful for its directors to make any preference in the payment of its debts, but that all its property must be kept and administered for the common benefit of all its creditors, in the same manner as if the receiver had taken charge thereof, under sections 379 and 668 of the Code. The late cases of *Hill v. Lumber Co.*, 118 N. C. 173, 18 S. E. 107, and *Foundry Co. v. Killian*, 99 N. C. 501, 6 S. E. 680, are cited as direct authority for such contention. If it has been adjudged by this court that such is the law, every consideration in favor of the stability of judicial decision demands, except in the face of manifest error, that we should abide by it. This leads us to inquire what was decided in *Hill v. Lumber Co.* The question there was as to the validity of a preference made in favor of a director of an insolvent corporation. His duties and liabilities, as one occupying a fiduciary relation to the stockholders and creditors, were there discussed, and the language of the opinion delivered is to be understood in its application to the facts of that case. In the examination and decision of appeals, we are confined to the questions at issue.

Whatever is written must be taken with reference to its environment; and that which, isolated, would be a broad proposition, when considered in connection with the subject-matter under discussion, may be, and generally is, restricted in its meaning. It is the tendency to give further effect than was intended to words used in reference to a particular state of facts, which sometimes confuses the interpretation of the law, and makes that broader and more comprehensive which in its application to the case at bar is simple and plain. Could a director of an insolvent incorporation, who was also a creditor, take advantage of the means of information at his hands, and so protect himself, to the injury of other creditors who were debarred from the same opportunities? Herein was invoked the principles of equity, the relation of trust and confidence borne by the director to all the stockholders, and extended in case of danger of loss to all the creditors; and the broad proposition, so often stated and so often explained in cases like the present, where it was thought to extend its meaning beyond the purposes for which it was used, was laid down that a director is a trustee, first, for the stockholders, and then for the creditors. The present question was in that case not necessary to be and was not decided, and, if it had been in express terms decided, such decision would have been simply a dictum, binding no one further than in its application to the question then before the court. Understood as used and applied in *Hill v. Lumber Co.* in case of the insolvency of a corporation, and as against the fiduciary in charge of its assets, those assets are a trust fund, and the general creditors are, at least, entitled to be secured out of the assets upon equal terms with the directors who are also creditors. But, after diligent examination, we find that, by the laws of this state, corporations have never been restrained from the exercise of preference in favor of creditors, not corporators, further than individual persons are, subject, of course, in both instances, to the controlling principles of the statute of frauds that these preferences must not be made with a purpose to defeat, delay, or hinder other creditors or parties in interest. We may here say that the expression used in *Hill v. Lumber Company* that creditors have a lien upon the assets was a quotation from 2 Story, Eq. Jur. § 1252, where the word "lien" is explained to mean simply a right of priority of payment in preference to any of the stockholders in the corporation.

The case of *Foundry Co. v. Killian*, 99 N. C. 501, 6 S. E. 690, presented one single question,—the liability to creditors of corporations of the stockholders thereof, to the extent of their unpaid subscriptions; and the decision there was founded upon the principle that the property, including the capital stock, paid and unpaid, constitutes a fund for the benefit of

creditors; "that the capital stock of a corporation is a trust fund, to be preserved for the benefit of corporate creditors." Our laws provide for the appointment of a receiver of an insolvent corporation, or one in imminent danger of insolvency. This appointment is to be made on application of any creditor, stockholder, or member of such corporation. Code, § 668, as in *Killian's Case*. And, when the receiver shall have collected the assets, he is required to pay all the debts if the funds shall be sufficient, and, if not sufficient, to distribute the same ratably among all the creditors who shall prove their claims. When once the court of equity, through its receiver, takes charge of the assets, they are to be distributed pro rata among the creditors, subject to such priorities as have already accrued. It is provided in section 685 that corporations may convey by deed, but that such conveyance shall be void as to existing creditors, etc., provided proceedings to enforce such claims be commenced within 60 days after the registration of said deed. The converse of this provision is, if no creditor or party injured brings his action within 60 days, his remedy fails, and the conveyance is good. Thus, a conveyance by an insolvent corporation, not forbidden by the statute of frauds, is good, unless some creditor or party injured objects within 60 days. These corporations, creatures of the statute, artificial persons, under the direction of the legislature, have all the rights and liabilities, generally speaking, of individual persons. Before the passage of the amendment to the act of 1798, we think, by the act of 1872 (now section 685 of the Code), a corporation might convey land, etc., by deed executed according to the statute or the common law. The amendment added the provision that any such conveyance should be void as to pre-existing debts and torts, "provided such creditors or persons injured shall commence proceedings, etc., within 60 days after the registration of said deed, as required by law." The effect of this amendment is not to make void such deeds as against creditors and persons injured unless proceedings are begun in 60 days. This has been expressly decided in *Blalock v. Manufacturing Co.*, 110 N. C. 99, 14 S. E. 501, which was cited with approval in *Hill v. Lumber Co.* This question, then, is settled in North Carolina against the contention of the appellees and the judgment of his honor below.

The meaning of the words "trust fund," as used in this connection, is to be explained, as it has been many times in other courts, not strictly a trust to be administered in the first instance upon the insolvency of the corporation for the benefit of all the creditors pro rata; but whenever proceedings under the statute are had, and the court takes charge of the assets, through its receiver, it will make equitable distribution, among all the creditors, of all the assets not subject to prior liens or rights. Until such jurisdiction takes hold of

the assets, they are subject to the action of the individual creditors, and such preferences may be made by the corporation as a natural person might make under the same circumstances of insolvency. The present exigency will not permit us to notice the many authorities adduced by the learned counsel in support of the contrary doctrine. We must content ourselves with a reference to the language used in *Hollins v. Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127, in reference to the ordinary meaning of these words "trust fund" in the present connection: "While it is true language has been frequently used to the effect that the assets of a corporation are a trust fund held by the corporation for the benefit of creditors, this has not been to convey the idea that there is a direct and express trust attached to the property. As said in 2 Pom. Eq. Jur. § 1046, they are not, in any true and complete sense, 'trusts,' and can only be called so by way of analogy or metaphor." After reviewing many cases in that court where these words are used or explained, the court proceeds: "A party may deal with a corporation in respect to its property in the same manner as with an individual owner, and with no greater danger of being held to have received into its possession property burdened with a trust or lien. The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to an account for fraud, or sometimes even mere mismanagement in respect thereto. As between itself and its creditors, the corporation is simply a debtor, and does not hold its property in trust, or subject to a lien in their favor, in any other sense than does an individual debtor. The assets of such a corporation [an insolvent bank] are a fund for the payment of its debts. If they are held by the corporation itself, and so invested as to be subject to legal process, they may be levied on by such process." *Curran v. Arkansas*, 15 How. 304. The text writers, while criticising the doctrine with singular unanimity, admit its existence. In 2 Mor. Priv. Corp. § 802: "In the absence of statutory prohibition, a corporation has the same power of making preferences among its creditors in the distribution of its assets as an individual." This is stated as collected from the repeated decisions of the courts, although the author, in the next section, in giving his own views, strongly combats the principle. To the same effect is 2 Spel. Priv. Corp. § 999. "However unjust it may appear in principle, it seems to be settled by the decisions that a corporation may, prior to any interference with the conduct and management of its agents on account of its insolvency, and in the absence of different provisions in bankrupt or insolvent laws, give a preference in payment or security to one creditor or class of creditors over another." And 2 Wat. Corp. § 208: "A corporation, unless restrained by its charter or by statute, has the same right to prefer one creditor to another in the distribution of its property as

an individual, and it may execute a mortgage or give a lien which shall operate as a preference." The author, after admitting that this doctrine is recognized both at law and in equity, proceeds to question its justice. Seeing, then, that it has already been settled in this state, and is recognized as the law by the supreme court of the United States, and admitted by the text writers, we must declare that his honor was in error in holding these preferences void as against the other creditors.

It is contended by Mitchell & Co. and the Potter & Atherton Machine Company, appellees, that, although they did not appeal from the judgment of the court below, the judgments confessed in favor of the Merchants' Bank of Richmond and others were in conformity to the statute (sections 570-572 of the Code), and they are entitled to have their exceptions to this ruling considered here, in order that if this court shall be of the opinion that, for any reason, the conclusion reached by his honor that said judgment creditors are not entitled to preference or priority over other creditors, the judgment below ought to be affirmed. Conceding this last proposition under the authority of *Bell v. Cunningham*, 81 N. O. 83, we proceed to consider the question whether said judgments were confessed in conformity to the statute.

We reproduce here a copy of the proceedings on the judgment confessed in favor of the Merchants' Bank of Richmond, as all the others except one are substantially similar:

"\$5,371.60. Newton, N. O., March 16th, 1893. Four months after date, we, the Newton Cotton Mills, promise to pay to the order of Heath, Springs & Co. five thousand three hundred and seventy-one and sixty one-hundredths dollars at Mercantile National Bank, New York. Value received. No. ——. Newton Cotton Mills, by W. H. Williams, President. Due July 16-19, 1893.

"North Carolina, Newton Township. Oatawba County, July 31st, 1893. At a meeting of the stockholders of the Newton Cotton Mills, this day duly called, all the stock being represented at such meeting, it was unanimously resolved that the president, W. H. Williams, be, and he is hereby, authorized to confess judgment against the Newton Cotton Mills, and in favor of the Merchants' National Bank of Richmond, Va., for the sum of five thousand three hundred and seventy-one and sixty one-hundredths dollars, for money due the said bank by the corporation; also to confess judgment against the corporation in favor of the Exchange Bank of Chester, S. C., for the sum of forty-eight hundred and thirty-two and thirty-eight one-hundredths dollars, for money due the said bank by note made to Heath, Springs & Co., and indorsed to it, which said note will become due August 4th, 1893; also to confess judgment against the corporation in favor of the Bank of Lancaster, S. C., for the sum of forty-seven hundred and fifty-six dollars

and ten cents, due by the corporation to said bank upon two notes made by it to Heath, Springs & Co., the one to become due on August 20th, 1893, for twenty-four hundred (\$2,400.00) dollars, and the other to become due on August 27th, 1893, for twenty-three hundred and fifty-six and ten one-hundredths dollars, which said notes have been indorsed to the said bank by Heath, Springs & Co. All of the said judgments are authorized to be entered in the superior court of Catawba county, North Carolina.

"I certify that the foregoing is a full, true, and perfect copy of the resolution passed this day at a meeting of stockholders of the Newton Cotton Mills. W. H. Williams, President Newton Cotton Mills. G. A. Warlick, Secretary.

"State of North Carolina, County of Catawba. In the Superior Court. The Merchants' National Bank of Richmond, Va., vs. The Newton Cotton Mills. The Newton Cotton Mills, by W. H. Williams, president, being thereunto duly authorized by the Newton Cotton Mills, hereby confesses judgment in favor of the Merchants' National Bank of Richmond, Va., the plaintiff above named, for the sum of five thousand three hundred and seventy-one dollars and sixty cents, with interest at 8 per cent. from July 19th, 1893. This confession of judgment is to secure the plaintiff the sum above named, which is due by a certain promissory note made by the Newton Cotton Mills to the firm of Heath, Springs & Co., and which the said Heath, Springs & Co. indorsed to the plaintiff for value, which said note became due and payable on the 19th day of July, 1893. That the consideration of this note was cotton sold and delivered to the Newton Cotton Mills by Heath, Springs & Co. Newton Cotton Mills, by W. H. Williams, President.

"North Carolina, Catawba County. Before me, J. F. Herman, clerk of the superior court, of Catawba county, personally appeared W. H. Williams, president of Newton Cotton Mills, who, being duly sworn, maketh oath that the statement above signed by him is true. W. H. Williams.

"Subscribed and sworn to before me, July 31st, 1893. J. F. Herman, Clerk Superior Court.

"State of North Carolina, County of Catawba. In the Superior Court. The Merchants' National Bank of Richmond, Va., vs. The Newton Cotton Mills. Upon filing the foregoing statement and confession, it is ordered and adjudged by the court that the plaintiff, the Merchants' National Bank of Richmond, Va., do recover of the defendant, the Newton Cotton Mills, the sum of five thousand three hundred and seventy-one dollars and sixty cents, with interest at 8 per cent., from July 19th, 1893, and costs of action. J. F. Herman, Clerk Superior Court. July 31st, 1893.

"I agree that no execution issue on this

judgment until after six months from date. H. C. Jones, Attorney for Plaintiff."

The first objection is that there is no authority for entering the judgments stated in the confession. Code, § 571, provides that "a statement in writing must be made, signed by the defendant, and verified by his oath, to the following effect: (1) It must state the amount for which judgment may be entered and authorize the entry of judgment therefor." It will be noted that there are no words in the confession expressly authorizing the clerk to enter the same upon the records, but the record does show that the said confession was sworn to and filed, and judgment thereupon entered. The necessary result of the proceedings was to authorize the clerk to enter the same upon the record. The filing with him could be for no other purpose, and we think that the confession itself, with the filing thereof, was express authority for its entry.

(2) That it is not shown in the confession that the sums for which judgments are confessed are justly due or to become due. It will be observed that it states the amount for which the judgment is confessed; that the same is due by a certain promissory note described therein, which said note became due and payable on a day named; and that the consideration for the same was cotton sold and delivered. The requirement of the statute (the same section last named in subsection 2) is not that it shall state, but "and must show, that the sum confessed therefor is justly due or to become due." If the statement is true, it follows that it is shown to be justly due.

(3) That the evidences of indebtedness, or copies of the same, were not filed with, attached to, or described in, the confessions. We do not understand that the failure to file the specialty when a judgment is rendered has the effect to invalidate the judgment. Frequently, in practice, when the complaint is upon a promissory note, and there is an answer filed admitting the debt, or where the complaint is verified, and no answer filed, judgment is entered, and the attorney permitted to bring in the note at a subsequent time. The note is not strictly part of the record, though it should be produced that it may be canceled when required. In this respect there is no difference between a judgment rendered according to the ordinary course of the court and one by confession. "Among the matters which are not (unless made so by bills of exceptions, or by consent or by order of court) matters of record are all matters of evidence, written or oral, including note, bond, or mortgage filed in the case, and upon which suit is brought." Freem. Judgm. 79. The note upon which the judgment is confessed is thus described in the statement: "A certain promissory note made by the Newton Cotton Mills to the firm of Heath, Springs & Co., and which the said Heath, Springs & Co. indorsed to the plain-

tiff for value, which said note became due and payable on the 19th day of July, 1893." We think this is sufficient description to enable a party to make inquiry, and ascertain the truth of the matter. 2 Freem. Judgm. 549.

(4) "That the said judgments were confessed for goods sold and delivered, and the time of sale, quantity, price, value of the goods, and 'the exact consideration' of the indebtedness are not stated in the confessions." It is required by the statute that "it must state concisely the facts out of which it arose." Recently, in considering similar objections to a confessed judgment, to those now taken, where the affidavit stated that the amount was due "on a bond under seal for borrowed money due and payable November 2, 1876," we held the statement sufficient. *Uzzle v. Vinson*, 111 N. C. 138, 16 S. E. 6. See, also, 1 Black, Judgm. 63.

(5) "That said judgments, except that confessed to J. R. Gaither, were confessed for a greater rate of interest (to wit, 8%) than was allowed by the notes or contracts upon which the said judgments are alleged to have been based, which notes and contracts, when filed, not with the confessions, but before the referee, showed that they carried only 6% interest." It appears in the case that, upon the hearing before the referee, these judgment creditors remitted all claim for interest over 6 per cent. The question is whether the confession of judgment for a greater amount of interest than was justly due was rendered void thereby, or could the judgments stand for the true amount,—interest at 6 instead of 8 per cent.? As we have indicated, the object of the statute in requiring a concise statement of the facts constituting the liability does not necessitate a full history of the whole transaction, does not require a bill of particulars, but does require such a statement as will enable one who desires to inquire into the transaction to do so by reference to the statement made. It would not be contended that an ordinary judgment could be vacated for an overcharge of interest unless the act was fraudulent. Here, by reference to the note which, if not filed with the confession, might be required to be produced by proper proceeding, it would at once be ascertained that the interest confessed was too great. The remedy would be the correction of the judgment to that extent, but, unless fraud was shown, it would not vitiate the judgment. *Hard v. Foster* (Mo. Sup.) 11 S. W. 763; 2 Freem. Judgm. 545, 549.

(6) "That plaintiffs, in said judgments, could not, after said judgments had been confessed, and before the referee, after the hearing was begun, amend or change the same by filing the evidences of indebtedness or resolutions, or remitting interest, or in any other respect or particular." If the proceeding were so defective in form and substance that it was void upon its face, no amendment

could be made to give it life; but, if there were irregularities which in ordinary judgments might be cured by amendment, there is no reason why they could not be amended. 1 Freem. Judgm. 66, 67. No liens had been acquired by the appellees by force of the filing of their complaint. Our statute (Code, § 278) is liberal in the power granted the court to allow amendments.

The next objection is that, to the three judgments confessed in favor of the Merchants' Bank of Richmond, the Exchange Bank of Chester, and the Bank of Lancaster, the stipulation at the foot that no execution should issue in six months was a benefit reserved by the debtor for his ease and comfort, to the impairment of the rights of other creditors, and therefore a fraud which vitiated these confessions. The lien of the judgments began from the docketing of the same, as to the real estate of the judgment debtor. There is no requirement of law that a judgment creditor should at once proceed to have execution. There is no lien upon personal property except from the levying. If there were any personal property to be subjected to the payment of the debts of the corporation, this stipulation was more for the benefit than to the detriment of other creditors. And, the lien on real estate having been acquired by the docketing of the judgments, their rights could not be affected by the agreement on the part of the judgment creditors to a cessat executio.

What we have written disposes of all the exceptions, except the additional one as to the Gaither judgment,—that he was permitted to amend by appending an itemized statement of his open account, and this before any liens had been acquired by the appellees. This amendment it was in the power of the court to permit. 2 Freem. Judgm. 554; 1 Black, Judgm. 66. These matters, connected with confessions of judgments, have been quite fully considered by this court, and the rule laid down in *Davidson v. Alexander*, 84 N. C. 621, has been upheld,—that the confession must contain a concise verified statement of the facts, circumstances, business transactions, and considerations out of which the indebtedness arose. What constitutes such a concise statement has been considered in *Davenport v. Leary*, 95 N. C. 203; *Nimocks v. Shingle Co.*, 110 N. C. 20, 14 S. E. 622; and in *Uzzle v. Vinson*, supra. In *Nimocks' Case* it was said: "Ordinarily, a corporation should act through its properly constituted board of directors, or its officers or agents duly authorized to do particular acts, such as confessing a judgment. That the officer or agent was authorized to have the judgment confessed, as directed, should appear to the clerk in some way, as by a properly authenticated certificate of the proceedings of the directors of the company, and this should be filed with the statement, in writing, of the claim upon which the judgment is founded. This, perhaps, would be the better course."

In our last case, the affidavit set out the authority, but the authority itself, though presumably submitted to the clerk when the judgment was confessed, was not filed until later. We are of the opinion that the failure to file the authority at the time of the confession does not vitiate the judgment.

Having disposed of the exceptions of the appellees, as if the points had been made in an independent action to vacate for fraud or other cause making void the judgment, and not upon a motion to set aside for irregularities, it follows that, in our opinion, there was error in the judgment of his honor that these judgments were void as to the other creditors, for any reason. The judgment will be modified so as to direct the satisfaction of these judgments after the payment of the mechanics' and laborers' liens, except that of the Foster Machine Company, instead of placing them in the class with all the unpreferred claims proved before the referee. Modified.

(115 N. C. 475)

WILSON COTTON MILLS et al. v. C. O. RANDLEMAN COTTON MILLS et al.  
(Supreme Court of North Carolina. Dec. 27, 1894.)

CORPORATIONS—LIABILITY OF STOCKHOLDERS—ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCE BY JUDGMENT—BILL FOR RECEIVERSHIP.

1. The stockholders of a corporation formed under Code, § 677, as amended by Acts 1885, c. 19, are not liable to its creditors, beyond the amount of their unpaid subscriptions, on the ground that the certificate of incorporation filed with the clerk does not set forth the number of shares taken by each.

2. Stockholders who subscribed for a limited number of shares in a corporation which has become insolvent are not, in the absence of actual misrepresentation, liable for the whole amount of its debts as joint tortfeasors with other stockholders, whom they knew to be insolvent, and without any intention of paying their subscriptions.

3. The commissions of the receiver of an insolvent are to be included in expenses, and not classed as a debt.

4. A creditors' bill will lie to set aside an assignment made by an insolvent corporation, and to effect a settlement of the corporate affairs under the direction of the court by its receiver, for the benefit of all creditors, under Code, § 683, which provides that any creditor may defeat the operation of "any conveyance of its property, whether absolutely or upon condition, in trust or by way of mortgage, executed by a corporation," by commencing proper proceedings within 60 days after its registration, and section 688, providing means whereby such creditor may have the corporation's effects put in the hands of a receiver.

5. The splitting up of an account due plaintiff by an insolvent corporation, covering certain sums for which said insolvent, defendant, had given its acceptances, in order to bring it within the jurisdiction of a justice, and the taking of judgments thereon, will give plaintiff no preference over the other creditors, whom it joins in its bill to set aside an assignment by such insolvent and for the appointment of a receiver, where it appears that plaintiff's attorney, one of the trustees in the deed of assignment, had access to its books, and represented

to one who repeated it to insolvent's president, so that he made no defense to the actions, that plaintiff was putting the split account in judgment only to be on an equal footing with bank creditors.

Appeal from superior court, Randolph county; Battle, Judge.

Action by the Wilson Cotton Mills and others against the C. O. Randleman Cotton Mills and others. From the judgment, both plaintiffs and defendants appeal. Modified.

B. F. Long, for plaintiffs. J. H. Dillard, L. M. Scott, and J. N. Wilson, for defendants.

MacRAE, J. There is abundant authority, both in reason and decisions, for the proposition stated by the late Chief Justice Merrimon in Clayton v. Ore Knob Co., 109 N. C. 385, 14 S. E. 36: "Very certainly, the capital stock, paid or unpaid, of the defendant, constitutes a trust fund for the benefit of its creditors; and, whatever may be the rights of the stockholders as among themselves, the creditors have the right to have such fund collected and applied to the discharge of their debts. If the capital stock has not been paid for, it is the plain duty of the court to require it to be collected, or so much thereof as may be necessary to pay its unpaid debts." Note: For the meaning of this expression, "trust fund," we refer to Merchants' Nat. Bank v. Newton Cotton Mills (decided at this term) 20 S. E. 765.

The findings of fact by the referee, affirmed and amended by his honor, show that the corporation defendant was formed under the general law,—section 677 of the Code, as amended by Act 1885, c. 19 (other amendments are not material to our investigation). By this law, the articles of agreement filed with the clerk, and upon which letters of incorporation are to be issued, are to contain (1) the corporation named; (2) the business proposed; (3) the place where it is proposed to be carried on; (4) the length of time desired; (5) the names of persons who have subscribed; (6) the amount of the capital, the number of shares, and amount of each. It will be observed that in the last requirement it is not provided, as it is in similar acts of other states, that the number of shares taken by each subscriber or stockholder should be set out, although in practice it is generally done; and it would have been better had the statute required it. The incorporators in defendant corporation seem to have complied strictly with the statute in their articles of agreement upon which the letters were issued. It is made to appear, however, as a fact, that, although the capital stock was stated in the articles to be \$50,000, the property turned over by C. C. Randleman in payment of his subscription of \$49,700 to the capital stock was a cotton mill and its products, worth at a fair valuation \$22,447.57, and that he did not intend to pay in the balance to make up his subscription.

otherwise than by the application of dividends or profits which he expected to realize from the enterprise, or so much thereof as he might conveniently apply to the payment of said difference, and that he was insolvent and unable to pay it otherwise. It is also found that the other corporators participated in the formation of the company, in the conduct of its business, and the dealings with creditors, well knowing the said facts, and that the alleged or represented capital did not in fact exist, and that no part had been or would be paid in, except the sum of \$22,147.57. It appears that a stock book was kept by the company, which seems to have been mislaid, so that it could not be produced before the referee. In said stock book, C. C. Randleman subscribed for 497 shares; T. C. Worth, J. H. Ferree, and L. H. Weaver, for one share each. When operations were begun, under the letters of incorporation, Randleman was insolvent. We suppose by this it is meant that he was unable to pay the balance of his subscription. Weaver was also insolvent, and Worth and Ferree were solvent and possessed of large means. The corporation was rated high by Dun and Bradstreet. The venture was a failure. Large debts were contracted, and the concern failed within a year.

It is contended by counsel for plaintiffs in this creditors' bill that the conclusion of law reached by the referee should have been sustained, and the court should have declared "that the subscription of Randleman over and above the amount he paid by transferring property to the company was not actual and bona fide, and that Randleman, together with his associates, having obtained the charter, organized the company and conducted its business, and, having dealt with outside parties, the plaintiff and other creditors who have proved their claims in the case, upon the basis of an actual and bona fide subscribed capital of \$50,000, and upon the representation that the actual capital of the company in money or money's worth was equal to the capital stock which it purported to have, there being no evidence that said capital has been impaired by any business losses, the said Randleman, Ferree, Weaver, and Worth are jointly and severally liable to the said creditors of the corporation for the difference between the amount paid in by Randleman and his full subscription, to wit, the sum of \$27,252.43, or for so much of said amount as may be necessary to pay the costs and expenses of the suit, and all the just liabilities of the corporation, allowed by the referee or the court, after applying the assets of the corporation to the payment of the same, including, as part of the assets, the amounts due by said Weaver, Worth, and Ferree on their individual unpaid subscriptions." There is no doubt of the liability of Randleman for the amount of his unpaid subscription, or so much thereof as may be necessary to pay the debts and costs and expenses

of this action. But are the other stockholders liable on their individual unpaid subscription for the same amount? The books of the company showed the amount subscribed by each corporator to be as stated above; and while their liability for all of their said subscription, which is still unpaid, is beyond question, it is equally clear to our minds that upon their contracts they cannot be held for a larger sum than was subscribed by them. It is not the articles of agreement filed with the clerk which bind the liability of each subscriber under our statute. It is true that if, in said articles, it had been stated that each subscriber had taken a certain number of shares, this notice would have bound them in their dealings, for the agreement could contain this stipulation as well as the subscription on the stock book; but the statute did not require it, and parties dealing with the corporation were not required to go to the articles to ascertain the liability of each corporator. We may say that we consider it a defect in the law not to require the corporators to state the number and value of shares taken by each corporator. But we cannot make law; we must take it and interpret it as it is written. The statute, then, only requiring the number of shares and the amount of each to be set out in the articles, we cannot hold any corporator liable for the whole amount of the capital stock because, upon the articles filed, it did not appear how many shares were taken by each corporator. The law requires the stockholders to name their capital and publish it to the world, and they did it; but it does not, though it ought to, require it to be stated how those shares are apportioned among the stockholders. There is a record commonly kept by corporations called a "stock book," and to this book persons interested, before dealing with said company, may have access, to enable them to ascertain by whom the said shares are held. If access to this book or information on the subject shall be withheld, there is no law to compel persons to deal with the corporation. It nowhere appears that any false statements were made in reference to the ownership of the stock. Its distribution did not appear, and was not required to appear, in the articles of agreement. It was therefore necessary for their protection that persons proposing to deal with said corporation should inform themselves upon this point. The liability of the corporators to the amount of their subscription was established. The prospectus or published notice of incorporation failed to inform the public as to the number of shares held by each corporator, and consequently as to the liability of each for unpaid subscription. Persons proposing to deal with said corporation must inform themselves about it. There is no evidence or finding that such information was ever withheld. It would seem, therefore, that the parties dealing with the corporation were not exercising great care in the management of

their business in failing to make due examination before making contracts with the corporation.

The fallacy in plaintiffs' argument is that the "agreement and charter" failed to set out the distribution of shares, and therefore that all subscribers are bound as if stockholders to the whole number of shares, and that the apportionment of shares as appeared on the stock book was in derogation of the original agreement. The cases cited do not bear out plaintiffs' contention. In *Curran v. Arkansas*, 15 How. 304, cited also in 10 Myers' Fed. Dec. §§ 1316, 1323, the state was the sole stockholder in a bank, and laws passed vesting the property of the bank in the state were in impairment of the contract between the bill holder and the bank, and were unconstitutional. *Sawyer v. Hoag*, 17 Wall. 610, was where one had subscribed for a certain number of shares, and paid by check the full amount of his subscription, and had immediately borrowed 85 per cent. of the sum paid in. The court held that this 85 per cent. was still unpaid subscription, and its payment could be enforced by an assignee in bankruptcy, for the benefit of the creditors of the insolvent and bankrupt corporation. *Wood v. Pearce*, 2 Disn. 411, simply holds a stockholder liable for the full amount of his subscription. And to the same effect are the citations from *Angell & Ames on Corporations* (sections 146 and 531). We have examined many of the authorities cited by plaintiffs' counsel, and they all go to show—and in this we fully concur—that subscribers, in case of insolvency of the corporation, are strictly held to the payment of the unpaid part of their subscription, and that the public, in dealing with a corporation, has the right to assume that its actual capital in money, or money's worth, is equal to the capital stock which it purports to have, unless it has been impaired by business losses. The public has also the right to assume that the capital stock has been or will be fully paid up, if it be necessary in order to meet the corporate liabilities. But they nowhere reach a case like the present, where it is sought to subject subscribers to a greater amount than their unpaid subscription, such liability not being provided for in the charter.

But the contention of the plaintiffs goes further. They say that permitting the capital stock to be advertised at \$50,000, while, to the knowledge of all the corporators, the property contributed by the largest stockholder was not worth half the amount of his subscription, and he was insolvent, and did not intend to pay in the balance unless the venture was a successful one and enabled him to pay it in, was a fraud upon persons dealing with said corporation, and that, independent of their liability on their stock subscriptions, they are liable for the injury done, and ought to be held to the payment of the balance of the debts of the concern after the ex-

haustion of its assets. This rule is stated in plaintiffs' brief with regard to the debts of an insolvent corporation: "When it is made to appear that some of the stockholders are insolvent, the solvent must pay the proportion of the insolvent, to be apportioned among them according to and up to the amount of their stock subscribed and unpaid." *Hodges v. Mining Co.*, 9 Or. 200. It will be seen that special reference is made to the amount of their "stock subscribed and unpaid." We have found no authority for the position that a shareholder can be held upon his contract of subscription for a greater amount than his unpaid subscription, except in the case of larger liability being imposed by the statute. All tortfeasors may be held liable in an action of tort for the immediate consequence of their wrongful acts. We are not prepared to hold that stockholders in corporations who have subscribed for a limited number of shares may be held liable in case of insolvency of the corporation for the whole amount of its debts because they knew that other stockholders, who were insolvent, had not paid their subscription, and did not intend to pay it. The books of the company ought to furnish to those with whom it deals a full knowledge of the names of stockholders, and the number of their shares, and the charter, or the general law, the measure of their liability.

Does this case fall within the principle of *Hauser v. Tate*, 85 N. C. 86? In that case the defendant permitted his name to be used and published as the president of a bank and a business to be operated as an incorporated bank, when in fact there was no organization under the charter, and no bank at all; the person holding himself out as cashier using defendant's name as president, and carrying on a spurious business. It was held that the liability of defendant was direct and original, and not the collateral liability of a stockholder upon his unpaid subscription. "The gravamen of the complaint was that there was never any proper organization under the charter, and, the bank having no legal corporate existence, its name was assumed by said Simonon, and his personal banking transactions conducted thereunder, in silent, if not active, co-operation with the defendant; and that the association of them, in imposing upon the public a fraudulent, as and for a regular and real, banking company, and thus securing and abusing the plaintiff's confidence, to his injury and loss, renders each personally and equally exposed to his demand for redress." The present case is different from the above. The organization was perfected under the law. The stock book showed the number of shares held by each stockholder. There is no evidence of concealment from the public of the true status of the concern, and there was nothing to hinder one from informing himself thereof. It is found that there was a stock book, and that it was mislaid, and could not be produced at the hearing before the referee, which was long after the in-



solvency of the corporation. It was also found that the credit was extended by plaintiff the Wilson Cotton Mills upon the report of the financial status of defendant corporation in Dun and Bradstreet, and there was no evidence that this report was procured to be made by defendants. We concur in the view taken by his honor that the defendant corporations are liable only for their unpaid subscriptions. This disposes of plaintiffs' exceptions 6, 7, 8, 9, and 10. Exceptions 1, 2, 3, 4, 5, and 12, to the findings of fact, were withdrawn.

The fourth exception is for failure to find that the deed of assignment was not regularly executed, and therefore was void. As we shall hold on defendant's appeal that this deed was void, under section 685 of the Code, action having been brought by creditors within 60 days from its execution, it will not be necessary for us to consider this exception.

The eleventh is the last exception relied on by the plaintiff,—the ruling of his honor that the commissions of the receiver, Worth, should be included in the expenses, and paid as such, instead of being classed as a debt. It seems plain to us that the commissions are part of the costs and expenses. No error.

#### Defendants' Appeal in Same Case.

The first and second exceptions of defendants are to findings of fact. This was a consent reference. This court will not review such findings except upon the ground, taken in apt time, that there is no testimony to support them. *Battle v. Mayo*, 102 N. C. 413, 9 S. E. 384. We have examined the testimony sent up, and are of the opinion that there is some evidence to support the findings.

The third, fourth, fifth, sixth, and seventh exceptions relate to the validity of the deed of trust, and to estoppels arising from the conduct of the attorney of the Wilson Cotton Mills in connection therewith. Notwithstanding the very able argument of defendants' counsel to the effect that the making of an assignment for the benefit of all its creditors by an insolvent corporation does not fall within the spirit and meaning of section 685 of the Code, we are impelled to hold that, by the plain terms of the act, it is in the power of a creditor to defeat the operation of "any conveyance of its property, whether absolutely or upon condition, in trust or by way of mortgage executed by any corporation" by the commencement of proceedings to enforce his claim within 60 days after the registration of said deed. This section must be interpreted in connection with all of chapter 16, of which it is a part. And section 668 of the same chapter provides means by which any creditor of an insolvent corporation may have the effects of said corporation put in the hands of a receiver, and settled under the direction of the court. There might be reasons why some creditor should prefer that the court should, by its officers, take charge of the settlement of the affairs of the corporation,

with the security of bonds, and under its own supervision, rather than that they should be administered by trustees selected by the corporation. As to the contention that the Wilson Cotton Mills, plaintiff, is estopped from taking this step by the act of its attorney, we think the evidence is convincing that the attorney was sent with specific instructions, and that no authority was given him to agree to the assignment on the part of his client.

We come now to the very interesting question raised by the eighth exception of defendants,—whether the taking of judgments upon the account due by defendant company to the plaintiff cotton mills, especially those judgments covering the sum of \$2,992.82, for which said defendant had given him acceptance, and the splitting up of the account in order to bring it within the jurisdiction of a justice, were a fraud upon the said jurisdiction, and whether such judgments may be attacked in this proceeding, and set aside, to prevent the taking by said plaintiff of an unconscientious advantage over the other creditors. In 1890, defendant company was indebted in a large sum to plaintiff cotton mills, and on November 14th accepted the draft of the plaintiff, at 30 days, for \$2,992.82, in part payment of said account. Many of the aggregated items of said account exceed the sum of \$200 for a particular day. Said plaintiff, through its attorney, after the execution of the deed of assignment, obtained judgments for all of the open account, including that part of it for which the acceptance had been given, by splitting it up so as to bring the amounts claimed within the jurisdiction of a justice, and so has obtained a preference or priority over the other creditors. That the sum of \$2,992.82, included in the draft, was merged into it, and while said draft was in existence, and not delivered up to the acceptor, the said draft amounted to a judgment and satisfaction, if it was so intended, of so much of the open account, is well established. *Mauney v. Coit*, 86 N. C. 463; *Spear v. Atkinson*, 1 Ired. 262; *Wilson v. Jennings*, 4 Dev. 90. It is equally clear that an account may not thus be split in order to get the same under the jurisdiction of a justice, except as to all items constituting one transaction. *Caldwell v. Beatty*, 69 N. C. 365, the leading case. It is also well settled that such objection must be made before the justice; otherwise it cannot be made in the superior court on appeal. *Blackwell v. Dibbrell*, 103 N. C. 270, 9 S. E. 192. But can these judgments be attacked in this proceeding upon the ground that, under the circumstances, it is unconscientious and inequitable on the part of the plaintiff in this action to assert such rights? This is a creditors' bill, brought under the statute, sections 668 and 685 of the Code. Its object is to set aside an assignment attempted to be made by an insolvent corporation, and to bring about the settlement of the affairs of the corporation under the direction of the court by its receiver, and

for the benefit of all the creditors, and upon the doctrine that the corporate assets are a trust fund for the benefit of all the creditors. But the great principle of this jurisdiction is that, when the court takes hold of the property, it will make an equitable distribution thereof in the interest of all the creditors respecting priorities theretofore acquired. The other controlling principle is that he who seeks equity must do equity. Although there is no jurisdiction to vacate the judgment unless it be a direct proceeding to set it aside for fraud, yet, when the plaintiff comes into court seeking its equitable jurisdiction, and joining all other creditors who may make themselves parties and contribute to the expenses of the suit, they may be heard to assert the want of equity on the part of the plaintiff, and the injustice of securing to it the payment of its judgments in full, because those judgments were obtained by deceit and to their detriment. It was held in *Grantham v. Kennedy*, 91 N. C. 148, that while courts of equity refuse aid in cases where their action would be tantamount to the exercise of appellate jurisdiction, or simply for error in law, they will protect a party against an unconscientious advantage secured by fraud, surprise, accident, or mistake, when it clearly appears that it would be iniquitous, and against conscience, to enforce a judgment so as to give priority over other creditors.

This is the first opportunity given the other defendants besides the defendant corporation to be heard in opposition to the enforcement of this preference, and they have quickly taken advantage of it. We are bound by the findings of fact. The twentieth finding of fact of the referee will show that the plaintiffs' attorney, who at that time was a trustee in the deed of assignment, had access to the books of defendant corporation to compare the accounts of his client, the Wilson Cotton Mills, with the account stated in defendants' books; that he split up said account against defendant, a large part of which had been settled by acceptance; that he represented that by so doing, and reducing the same to judgment, he only desired to reduce the Wilson Cotton Mills claims to judgment, in order to put them on an equal footing with the indebtedness due banks, and to prevent their running out of date. It is found in sections 24 and 25 that, while the representations made to Sharpe were not made with the intent that they should be communicated to defendant's president, they were so communicated, and no defense was made to the actions before the justice. While the law of North Carolina does not hinder preferences being made by insolvent corporations before proceedings for the appointment of receivers have been begun under the statute, and while it permits the vigilant to reap the fruits of their watchfulness (*Merchants' Nat. Bank v. Newton Cotton Mills*, 20 S. E. 765, at this term), the courts, in administering their equity jurisdiction, will distribute equity in its true

spirit, and, while not setting aside judgments which might have been reversed for error in law, will not permit them to have a preference in their payment over other creditors in the bill, when it appears that unconscientious advantage will be taken in the obtaining of said judgments.

It follows that the judgment of the court below should be so modified as to require that the fund shall be distributed ratably among the creditors, without preference to the plaintiff, the Wilson Cotton Mills, by reason of its judgments. Error. Modified.

(115 N. C. 568.)

**FERGUSON v. WRIGHT et al.**

(Supreme Court of North Carolina. Dec. 27, 1894.)

**EJECTMENT—WRIT OF POSSESSION—WHEN STAYED.**

Issuance of a writ of possession cannot be stayed upon application of one not entitled to, nor in actual possession of, the land described in the writ.

Appeal from superior court, Cherokee county; McIver, Judge.

Action by Mary E. A. Ferguson against Samuel Wright and others to recover possession of land. There was a judgment for plaintiff, and Iowa George and others moved to stay the writ of possession, and from an order overruling the motion they appeal. Affirmed.

J. W. Cooper, for appellants. F. I. Osborne, for appellees.

CLARK, J. It is the duty of the plaintiff who recovers judgment for possession to point out at his peril the land which he has recovered. *Johnson v. Nevill*, 65 N. C. 677; *Davis v. Higgins*, 87 N. C. 298. The defendants in this action have not objected to the description of the land as set out in the complaint, which in fact would seem really sufficient, to wit: "Lying on the waters of Peach Tree creek, in Cherokee county, and more particularly described as follows: 'Part of No. 39 in District No. 1; part of tract No. 41 in Dist. No. 1, and part of tract No. 33 in Dist. No. 1,—being the lands on which the defendants now live, and adjoining the lands of the old Ammons place, the Jesse White old place, the Leatherwood old place, the Reddix old place, and the widow place, and others, containing about 700 acres, more or less.'" The plaintiff recovered verdict and judgment to be let into possession with the defendants as tenants in common of one undivided eighth of the lands described as above in the complaint. It does not appear that the petitioners, who are not parties to the action and judgment therein, are in possession of any of said land. They merely aver that they are owners, and are now, and have been for more than 21 years, in actual adverse possession of parts of tracts Nos. 41 and 33, and fear that plaintiff may be put in possession of their part. As the plaintiff, by virtue

of his judgment and writ of possession, has a right to be put into possession only of his undivided interest in such parts of said tracts Nos. 41 and 33 as he names, and further describes as being in possession of the defendants, the fear is hardly well founded that he will go outside, and take possession of land in possession of the petitioners. If he did, it would not be by virtue of said writ of possession, and the petitioners would then have their remedy. They have no right to stay the issuance or execution of the plaintiff's writ of possession for the lands described in the complaint as being in possession of defendants. If it clearly appeared that plaintiff had recovered judgment for possession of a tract of land when it, or a part of it, was in actual possession of a person not made a party to the action, but who claimed to hold adversely to the defendants, as well as the plaintiff, then the court would have power to suspend the issuance of the writ until, in an action, possession is recovered against such party also. *Judge v. Houston*, 34 N. C. 108. This is still so under the present Code. *Springs v. Schenck*, 99 N. C. 551, 556, 6 S. E. 405. But this is not the case here. No error.

GREEN'S ADM'R v. GRIFFIN'S ADM'R.<sup>1</sup>  
(Supreme Court of Appeals of Virginia. Dec. 22, 1894.)

CLAIM AGAINST DECEDENT'S ESTATE—LACHES.

In 1859, G.'s executor settled his accounts, showing a balance due the estate by him. The executor died in 1860, and an administrator d. b. n. c. t. a. of G.'s estate was appointed. In 1875, in a creditors' suit against the executor's estate, such claim was reported favorably, as a just debt owing by the executor's estate; and thereafter the same report was repeatedly made, and confirmed by the court. *Held*, there was no laches in asserting said claim.

Appeal from circuit court, Fauquier county.

Suit by one Hamilton against Green's administrator. A claim against the estate of said Green in favor of J. M. Griffin, as administrator d. b. n. c. t. a. of A. W. Griffin, deceased, was sustained, and Green's administrator appeals. Affirmed.

Green Bros., for appellant. G. D. Gray, for appellee.

FAUNTLEROY, J. The petition of J. Ambler Brooke, administrator d. b. n. c. t. a. of John O. Green, deceased, complains of a final decree of the circuit court of Fauquier, rendered on the 13th April, 1892, in a chancery cause therein pending, under the style of "Hamilton, Assignee, Complainant, against Green's Ex'r," etc., which said decree confirms the master commissioner's report, allowing as a debt or liability of the estate of appellant's testator, John O. Green, deceased,

a claim of J. M. Griffin, administrator d. b. n. c. t. a. of A. W. Griffin, deceased. The said decree is founded primarily upon the last recorded settlement of John C. Green, executor of the said A. W. Griffin, made in the year 1859, showing an indebtedness of the said executor John C. Green to the estate of his testator, A. W. Griffin, of a large amount.

The sole question is the defense of laches. The circuit court held that, under the proofs in the cause and all the circumstances in the case, the plea or defense of laches could not properly be set up and allowed to defeat the claim of the appellee in this case, and, by the decree appealed from, ordered that John F. Rixey, commissioner, out of any money now in his hands, or hereafter received by him from the sales of the lands reported in this cause, pay to J. M. Griffin, administrator d. b. n. c. t. a. of A. W. Griffin, deceased, or G. D. Gray, his attorney, the sum of \$2,016.57, with interest on \$447.47, the principal, from December 1, 1891, according to the report of Commissioner Turner, confirmed by the said decree of January 15, 1892. It appears conclusively, by the record in this case, that John C. Green settled his accounts as personal representative of A. W. Griffin, deceased, showing a balance due from him as such personal representative to the estate of the said A. W. Griffin, deceased, of \$1,823.38, in 1859. John C. Green died in 1860, and J. W. Green qualified as administrator d. b. n. c. t. a. of the said estate of A. W. Griffin, in October, 1860. In 1875, in the general creditors' suit of Hamilton against John C. Green's estate, and also on account of the administration of J. W. Green on the estate of John O. Green, deceased, various reports were made and recommitting. In 1886 the administrator of A. W. Griffin came into this pending suit, and proved his debt by the record due by J. C. Green, a former administrator of A. W. Griffin, to the estate of A. W. Griffin.

The claim was reported by Commissioner Stallard, in 1886, and reaffirmed and reported again and again, with all the light that could be brought to bear upon its investigation, the last time in 1890; and these reports were again reaffirmed by Commissioner Turner in 1891, which last said report was confirmed by the decree of the circuit court appealed from.

The said master commissioners to whom the investigation was referred, over and over again, approved, allowed, and reported the claim of the appellee as a just record debt against the estate of J. C. Green, and that there was nothing to justify the exclusion of the said claim from payment out of the assets of the said estate under the control of the court; and in this opinion the court concurred. We concur with the opinion of the circuit court that the defense of laches, which is the only defense set up against the payment of this admitted record debt, ought not

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

and shall not be allowed in this case. There is no error in the decree appealed from, and the same is affirmed.

LACY, J., absent.

(90 Va. 820)

**BARKER v. COMMONWEALTH.<sup>1</sup>**

(Supreme Court of Appeals of Virginia. Dec. 22, 1894.)

**PROSECUTION FOR SEDUCTION — EVIDENCE — INSTRUCTIONS — PRESUMPTION OF INNOCENCE — CHASTITY OF PROSECUTRIX — SUMMONING OF JURY — VENIRE FACIAS.**

1. On a prosecution for seduction under promise of marriage, under Code 1887, § 3677, it cannot be proved by general reputation that the house at which the prosecutrix resided was of ill repute, but this must be established by proof of particular facts.

2. A question asked a witness on a prosecution for seduction as to whether, from facts within his own knowledge, the prosecutrix resided at a bawdy house, was properly excluded as being too general and calling for a conclusion.

3. No compromise between the parties bars a criminal prosecution for a seduction under promise of marriage.

4. On a prosecution for seduction, it was proper to charge that if the jury believed from the evidence, beyond a reasonable doubt, that the prosecutrix was an unmarried female, of previous chaste character, at the time of her alleged seduction, and she was seduced by the prisoner under promise of marriage, they should find him guilty.

5. An instruction that the prisoner comes to trial presumed to be innocent, and this presumption extends to the end of the trial, and the jury should endeavor to reconcile all the evidence with this presumption, was properly refused as misleading.

6. The following instruction was correct: Although the jury may believe from the evidence, beyond a reasonable doubt, that the prisoner had illicit connection with the prosecutrix under promise of marriage, and may have thought at the time that she was a female of previous chaste character, yet they must find him not guilty if they believe she was unchaste at the time of said seduction.

7. On a prosecution for seduction, the female is presumed to be chaste, and it lies on the prisoner to prove the contrary.

8. On a prosecution for seduction, where the record fails to show that the jury were brought in under a writ of venire facias, a judgment of conviction will be reversed.

**Error to Henry county court.**

One Barker was convicted of seduction, and brings error. Reversed.

S. A. Anderson and W. H. Gravely, for plaintiff in error. Atty. Gen. R. Taylor Scott, for the Commonwealth.

LEWIS, P. The prisoner was indicted and committed, under section 3677 of the Code, for the seduction, under promise of marriage, of the prosecutrix, an unmarried female of previous chaste character. Numerous exceptions were taken to rulings of the court during the progress of the trial, which, so far as it is necessary to notice them, will be con-

sidered in the order in which they are presented.

1. The first relates to the exclusion of evidence offered by the defendant to show the character of the house—whether as a house of ill or good repute—at which the prosecutrix resided prior to her alleged seduction. It is contended that the evidence ought to have been received as relevant to the question of the previous chaste character of the prosecutrix, which was directly in issue. But we are of opinion that the character of the house could not be shown by general reputation, but only by proof of particular facts. *Kenyon v. People*, 26 N. Y. 203.

2. At a subsequent stage of the trial, a witness for the defendant was asked to state to the jury, from facts within his own knowledge, whether the house was a "bawdy house or a house of respectability"; whereupon the attorney for the commonwealth objected, and the court sustained the objection, but said the witness might be asked to state whether any one visited the prosecutrix at her mother's house, or anywhere else, for the purpose of prostitution or lewdness. Counsel for the prisoner declined to ask the latter question, and excepted to the ruling of the court. We are of opinion that the exception is not well taken. The first question was altogether too general. The witness ought to have been asked to state facts, and not his conclusions.

3. The subject of the next assignment of error is the action of the court in instructing the jury that no compromise between the prosecutrix and the prisoner, or any one else, could bar a prosecution by the commonwealth for the crime charged in the indictment. There was no error in this instruction. *State v. Deltrick*, 51 Iowa, 467, 1 N. W. 732.

4. The court also instructed the jury that if they believed from the evidence, beyond a reasonable doubt, that the prosecutrix was an unmarried female, of previous chaste character, at the time of her alleged seduction, and that she was seduced by the prisoner by having illicit connection with her under promise of marriage, they should find him guilty. This instruction is substantially in the language of the statute, and propounds the law correctly. Illicit connection accomplished by means of a promise to marry, in a case like the present, constitutes the offense charged in the indictment and made punishable by the statute. *Kenyon v. People*, 26 N. Y. 203; *Boyce v. People*, 55 N. Y. 644; *State v. Heatherton*, 60 Iowa, 175, 14 N. W. 230.

5. Among the instructions offered by the prisoner was the following, viz.: "The court instructs the jury that the prisoner comes to trial presumed to be innocent, and this presumption extends to the end of the trial; and the jury should endeavor to reconcile all the evidence with this presumption." In lieu of this, the court instructed the jury that "the prisoner comes to trial presumed to be innocent, and this presumption continues until it is rebutted by the commonwealth beyond a

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Chburg bar.

reasonable doubt; and the jury cannot convict unless they can reconcile from the evidence the guilt of the prisoner with all the necessary allegations of the indictment." There was no error in this ruling. The instruction offered by the prisoner was calculated to mislead the jury. It was the duty of the jury to weigh the evidence carefully, and to pass upon it dispassionately, and to give the prisoner the benefit of any reasonable doubt; but it was no more their duty to endeavor to acquit him than to convict him.

6. Nor was there judicial error in giving, in lieu of another instruction offered by the prisoner, the following instruction, viz.: "Although the jury may believe from the evidence, beyond a reasonable doubt, that the prisoner had illicit connection with the prosecutrix under promise of marriage, and may have thought at the time that she was a female of previous chaste character, yet they must find him not guilty if they believe she was unchaste at the time of said seduction." It was argued at the bar in this connection that it devolved upon the commonwealth to prove affirmatively, in order to convict the prisoner, that the prosecutrix was of previous chaste character, and that the jury ought to have been so instructed. But such is not the law. On the contrary, chastity is presumed, and the burden was on the prisoner to impeach it. *People v. Clark*, 33 Mich. 112; *Polk v. State*, 40 Ark. 482; *State v. McClintic*, 73 Iowa, 663, 35 N. W. 696; *Wilson v. State*, 73 Ala. 527. In *People v. Brewer*, 27 Mich. 134, Judge Cooley, speaking for the court, said: "The last error we shall notice is that the court erred in instructing the jury that the law presumes a woman to be chaste until the contrary is shown. We believe this instruction to be correct. The presumption of law should be in accordance with the general fact; and whenever it shall be true of any country that the women, as a general fact, are not chaste, the foundation of civil society will be wholly broken up. Fortunately, in our country an unchaste female is comparatively a rare exception to the general rule; and whoever relies upon the existence of the exception in a particular case should be required to prove it." The statute, however, provides (section 3679) that no convictions shall be had upon the testimony of the female seduced, unsupported by other evidence; and it was earnestly contended at the bar that the conviction in the present case is not warranted by the evidence. The statutes of the several states generally require that the evidence of the woman be corroborated before a conviction can be had; but the statutes and decisions differ as to the extent of the corroboration necessary. In some jurisdictions every material fact must be corroborated, while in others it is sufficient if the corroboration extends to the promise of marriage and to the intercourse, or to the promise alone. In New York, whose statute is similar to ours, the established rule is that the corroboration need

extend only to the promise and the intercourse, and that the supporting evidence need be such only as the character of these matters admits of being furnished. 21 Am. & Eng. Enc. Law, p. 1051, tit. "Seduction"; *Kenyon v. People*, 28 N. Y. 203; *Armstrong v. People*, 70 N. Y. 38. In *Hausenfuck's Case*, 85 Va. 702, 8 S. E. 683, it was said that, to convict the accused, the woman must be corroborated, but to what extent was not decided, because in that case there was, in fact, corroborating evidence on every point. And it is unnecessary to decide the question or to review the evidence in the present case, because, as was pointed out at the bar, it is not shown by the record that the jury that tried the case were legally summoned,—that is to say, that they were brought in under a writ of venire facias,—for which essential defect in the record the judgment must be reversed, and the case sent back for a new trial; the case in this particular being ruled by what was decided in the recent case of *Myers v. Com. (Va.)* 20 S. E. 152. Judgment reversed.

LACY and FAUNTLEROY, JJ., absent.

(90 Va. 843)

#### LEWIS v. COMMONWEALTH.<sup>1</sup>

(Supreme Court of Appeals of Virginia. Dec. 22, 1894.)

##### SALE OF LIQUOR—REQUIREMENT OF LICENSE.

1. Instructions not applicable to the evidence should not be given.

2. Code 1887, § 534, requiring a license for the sale of liquor, is not restricted to persons who are engaged in the business of selling liquor, as a single sale violates the law.

Error to circuit court, Accomac county.

One Lewis was convicted of selling liquor without a license, and from a judgment entered on the verdict he brings error. Affirmed.

Quinby & Quinby and Blackstone & Burdick, for plaintiff in error. R. Taylor Scott, Atty. Gen., for the Commonwealth.

HINTON, J. The court is of opinion that there is no error in the judgment of the circuit court rendered in this case. The defendant was tried upon an indictment containing ten counts, charging him with unlawfully selling wine, ardent spirits, malt liquors, and a mixture thereof, to be drunk at the place where sold, without first having obtained a license therefor, according to law; and each of these counts, except the fifth and sixth, which are not involved in this appeal, charges a sale to different persons, and constitutes a separate and distinct offense. The counts are couched in the usual formal language adopted in such cases, and informed the defendant fully of the specific charges he was called upon to answer, and the demurrers thereto were properly overruled.

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

The evidence which is certified clearly establishes the charge set out in the third count of the indictment; but it is argued that the circuit court erred in sustaining the county court in its refusal to grant two instructions asked by the defendant. This, however, is not so. There is no evidence in the record to which either of the instructions is applicable, and they should not have been given.

The law requiring a license for the sale of liquor is not restricted to persons who are engaged in carrying on the business of selling liquor, for a single sale violates the law, and renders the party liable to punishment. Nor is there anything in *Piedmont Club v. Com.*, 87 Va. 540, 12 S. E. 963, which countenances a different view. The judgment of the circuit court of Accomac is affirmed.

LACY and FAUNTLEROY, JJ., absent.

#### BURCH v. COMMONWEALTH.<sup>1</sup>

(Supreme Court of Appeals of Virginia. Dec. 22, 1894.)

##### CRIMINAL PROSECUTION—DEGREE OF PROOF.

A conviction of felony should be set aside when the evidence makes a case only of suspicion or probability of guilt.

Error to Louisa county court.

Edward Burch was convicted of a felony, and brings error. Reversed.

Pettit & Leake, B. A. Henson, and W. E. Bibb, for plaintiff in error. R. Taylor Scott, Atty. Gen., for the Commonwealth.

FAUNTLEROY, J. This is a writ of error to a judgment of the county court of Louisa county, rendered at the July term, 1893, of the said court, by which the plaintiff in error, Edward Burch, was tried and convicted of a felony, and was sentenced to confinement in the penitentiary for the term of three years. The only bill of exceptions is to the refusal of the trial court to set aside the verdict, and grant the prisoner a new trial, on the ground that the verdict is contrary to the law and the evidence. The evidence is certified, and not the facts, and therefore the review of the evidence by this court is restricted to the evidence of the commonwealth. A careful consideration of the evidence which was adduced on the trial by and for the commonwealth (excluding the evidence which was offered by the prisoner) shows that it is not sufficient to warrant the verdict of the jury and the judgment of the court. At most, it makes a case of suspicion or probability of guilt against the prisoner, but it falls far short of that satisfactory measure of proof of guilt which the law requires, to exclude the reasonable presumption of the innocence of the accused, which

can only be overcome by clear and sufficient testimony. In this record there is no direct proof to establish the guilt of the prisoner. It is not only altogether circumstantial, but it is vague and violently conjectural, withal. This disposes of the case, and renders it unnecessary to discuss other points presented and pressed in argument.

We are of opinion that the evidence adduced by the commonwealth upon the trial is wholly insufficient to warrant the verdict, and that the county court of Louisa county erred in refusing to set aside the verdict, and to grant the prisoner a new trial. The verdict of the jury is set aside, the judgment rendered thereon is reversed and annulled, and the case will be remanded to the county court of Louisa county for a new trial. Reversed.

#### CAREY et al. v. COFFEE-STEMMING MACH. CO. et al.

(Supreme Court of Appeals of Virginia. Dec. 22, 1894.)

##### SUIT AGAINST CORPORATION—STOCKHOLDERS AS PLAINTIFFS—SUFFICIENCY OF BILL—MULTIFARIOSITY—EQUITY JURISDICTION—FRAUD.

1. A bill against a corporation and its directors alleged fraud in obtaining the stock subscriptions of the plaintiffs and failure to comply with the corporate charter, stated that plaintiffs' stock had been issued to them and fully paid for, and asked a return of money so paid. Held, that the bill was not demurrable on the ground that plaintiffs sued as stockholders and not as stockholders at the same time.

2. A bill by a number of stockholders against a corporation, alleging fraud in obtaining subscriptions, etc., is not multifarious because each complainant sets forth a different claim.

3. Equity has jurisdiction where the relief asked for involves accounts, commissioners, questions of fraud, and cancellation of subscription to stock of a corporation.

Appeal from circuit court, Bedford county; Dupuy, Judge.

Bill by John B. Carey and others against the Coffee-Stemming Machine Company and others to cancel subscriptions to the capital stock of defendant corporation because of fraud, etc. A demurrer to the bill was sustained, and plaintiffs appeal. Reversed.

Goggin & Rucker, for appellants. M. P. Burks, for appellees.

FAUNTLEROY, J. The petition of John B. Carey, H. M. Turner, H. T. Patterson, T. S. Bolling, Ida F. Bolling, executrix of W. H. Bolling, deceased, and Minnie C. Nichols represents that they were aggrieved by a decree of the circuit court of Bedford county, pronounced on the 21st day of June, 1892, in a cause pending in said court wherein they are complainants, and the Coffee-Stemming Machine Company and others, the directors of said company, are defendants. The bill of complainants sets forth the incorporation of the defendant company; the purposes of its creation; the subscription to the stock of the

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

said company by the petitioners, and the payment of their said subscription money; the misrepresentations by the said company, its officers and agents, as to the capacity, efficiency, and success of the machine proposed to be manufactured; the failure of said company to fulfill its charter conditions in respect to the minimum capital prescribed by their said charter; and the misapplication of the funds arising from said subscriptions to other purposes than those contemplated and authorized by the said charter,—all of which said acts and delinquencies the bill charges as violative of and in fraud of the rights of complainants, and as breaches of trust, confidence, and good faith. The bill further charges that the defendant company is insolvent, and prays for all necessary and proper accounts, and, if the assets of the said defendant company should prove insufficient to reimburse or return to complainants each the sum of money, with interest thereon, by them respectively subscribed and paid in, as alleged, then and in that event that the said individual directors defendants be decreed to pay the same, or any deficiency shown by said accounts in the assets of the said defendant company. The said defendants, at the May term of the said circuit court, filed their joint demurrer and answer to the said bill; and upon the hearing the said demurrer was sustained, and the bill of complainants was dismissed.

The merits of the case are not involved in this appeal. All investigation or proof of the case made and charged in the bill was cut off by the demurrer, which admits the truth of the facts charged, but avers that, though true, they are not such as entitle the complainants to the relief they ask in equity. The bill is demurred to generally. No ground for demurrer is specified; but the circuit court sustained the demurrer, and dismissed the bill, with costs. In the brief of appellees it is set out that grounds of demurrer are misjoinder, multifariousness, and want of jurisdiction in equity.

It is argued that the complainants sued as shareholders and as nonshareholders. Their bill shows, in the beginning, that they are shareholders, and can be nothing else. They became such by the act of the company in accepting their money for their respective subscriptions, and in issuing to them certificates of stock when the subscriptions were fully paid up. It appears by the record that the appellants paid up their respective subscriptions in full, to the aggregate amount of 75 shares,—\$4,625,—for which they received certificates of shares of capital stock, and became stockholders in said corporate company. Their bill sets out these facts, showing that they are stockholders, and they sue in that character; the only character they could assume, under the facts set forth in their bill and admitted by the demurrer. The relief they ask for is what shareholders

only can ask for, and what they are entitled to have upon proof of the charges. Their statement of facts shows conclusively that they are shareholders, and as such seek redress for wrongs. This ground for demurrer was wrongfully sustained.

Multifariousness is charged because demurrants claim that each complainant sets forth a claim independent of the others. This ground of demurrer is untenable. In every corporate company the shareholders' claims are distinct in the individual, but common in the remedy, and in the party from whom redress is sought. In the bill there is a community, a unity running through all the interests and putting them on one string. The interest of each is that of all. They have a common wrong, by a common wrongdoer, and a common remedy. Their claims are not diverse, resting on different grounds, nor to be righted by diverse remedies. If the facts stated in the bill are multifarious, and justify the dismissal of the bill, then there can be no relief in equity by two or more stockholders against directors for misconduct, nor against the company, even though they be subscribers to the common stock of the same company, and hold their evidence of ownership from a common seal, and though their subscription moneys have passed into a common treasury, and constitute one fund; and they have a common interest in the questions to be determined in the suit, constituting them members of one class, having a common interest centering in the point at issue. See *Lord Cottenham in Campbell v. Mackay*, 1 Mylne & C. 603; *Blanton v. Fertilizing Co.*, 77 Va. 335; *Alexander v. Alexander*, 85 Va. 353, 7 S. E. 335; *Lock Co. v. Hockaday* (Va.) 16 S. E. 877; 1 Pom. § 269; *Judge Staples in Segar v. Parrish*, 20 Grat. 672; *Almond v. Wilson*, 75 Va. 613.

Want of jurisdiction in equity is argued to sustain the demurrer and the dismissal of the bill. Common law does not afford a plain, complete, and adequate remedy in this case presented by the bill, nor is such a cause and issue to be tried by a jury. It involves accounts, commissioners' reports, and questions of law and equity. Fraud is charged; and the bill presents such a case as is specially and peculiarly within the jurisdiction of a court of equity. Much law and numerous authorities are cited; but the face of the pleadings shows that the demurrer should have been overruled, and the cause proceeded in to a decision on its merits.

The circuit court of Bedford county erred in sustaining the demurrer, and in dismissing the bill, with costs; and the decree appealed from is erroneous, and the same is reversed and annulled; and the case will be remanded for trial on the merits of the case made in complainants' bill.

LACY, J., absent.

(90 Va. 813)

RONALD et al. v. BANK OF PRINCETON.<sup>1</sup>  
(Supreme Court of Appeals of Virginia. Dec.  
22, 1894.)

EQUITY PLEADING—ANSWER—PRACTICE ON AP-  
PEAL.

1. A denial in an answer of all knowledge concerning facts alleged in the bill is sufficient to put those facts in issue.

2. A submission of a case for hearing cures all defects at rules.

3. A point not raised in the court below will not be considered on appeal.

Appeal from circuit court, Montgomery county.

Bill by Charles A. Ronald and others against the Bank of Princeton to enjoin a sale under a deed of trust. Decree for defendant, and complainants appeal. Affirmed.

Hansbrough & Hansbrough, for appellants.  
Phlegar & Johnson, for appellee.

LEWIS, P. This was a suit for an injunction to prohibit the sale of certain real estate under a deed of trust which was given to secure to the Bank of Princeton a note for \$950, made by Charles A. Ronald, payable to the order of Sallie A. Ronald, and indorsed by her. The bill states that Charles A. Ronald was indebted to one Spindle, and that the note was placed in his hands for the sole purpose of being discounted by the bank, and the proceeds applied to the satisfaction of the Spindle debt, and that the sum of \$147 was thereupon paid by Spindle to the complainants Ronald and wife, the debt being that much less than the amount of the note. The bill then states that the complainants supposed the note had been discounted, but that Spindle, instead of having it discounted, had, without the knowledge or consent of the complainants, deposited it with the bank as collateral, and that the trustee in the deed of trust had advertised the trust property (which is the separate estate of the female complainant) for sale. An injunction according to the prayer of the bill was awarded, which was afterwards dissolved by the decree complained of.

The appellants contend that the case is ruled by *Solenberger v. Gilbert*, 86 Va. 778, 11 S. E. 789, where it was held that a note delivered for one purpose could not be validly used, without the consent of the parties, for another and different purpose; and such a case is alleged in the bill in the present case, but the case, as thus stated, is not established by proof. The record shows that the note was used by Spindle as collateral, but the averment that it was originally delivered for the sole purpose of being discounted is not proved. The note itself does not show it, and the deed of trust, though given "to secure the bank," does not show it, for non constat it was not given to strengthen the collateral.

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

It is assigned as error that the circuit court erred in overruling the plaintiffs' exceptions to the answer of the bank, on the ground, among others, that no notice is taken in the answer of the allegation in the bill that "the trust deed was executed to secure the note only in the event that it should be discounted by the bank." But the answer distinctly avers that "the respondent knows nothing of the matters alleged in the bill as occurring or existing between the complainants and Spindle, and does not admit any of the equities alleged in the bill," which is a sufficient answer to the appellants' objection on this point.

It is also insisted that the proceedings at rules were irregular, but the record states that "the cause was regularly matured at rules, and set for hearing"; and, further, that it was submitted for hearing by consent, which cured all previous irregularities, if any there were. The note contains a collateral promise to pay in addition to the amount of the note, in the event of a suit thereon, 5 per cent. collection fees, and \$50 attorney's fee, in addition to the attorney's fee taxed or allowed by law; and it is contended in the appellants' brief that this provision brings the case within the ruling in *Rixey v. Pearre*, 89 Va. 113, 15 S. E. 498, where a similar stipulation in a note was held to be a penalty, and, as such, not enforceable. But no such point was made in the court below, and it is now too late to raise it.

It is also contended that such a provision destroys the negotiability of the note, but, if this were conceded, the concession would not help the appellants' case; since, as already stated, the allegation in the bill that the note was made and delivered for the sole purpose of being discounted is not established by proof, and the onus was on the appellants to prove it.

The result of these views is that the decree must be affirmed.

LAOY and FAUNTLEROY, JJ., absent.

(90 Va. 846)

SLATER v. SLATER.<sup>1</sup>

(Supreme Court of Appeals of Virginia. Dec.  
22, 1894.)

CUSTODY OF CHILDREN—RESPECTIVE RIGHTS OF  
PARENTS.

1. In contention among relatives for the custody of infants, the future welfare and interests of the child are the paramount consideration, even as against the claim of either or both of its parents, and notwithstanding a statute recognizing the superior rights of the father.

2. A man and his wife, not living together happily, became involved in a dispute over their children. The evidence showed that she was a most affectionate mother, but dependent on her parents for support, and that he, though not a very affectionate person, was a sober and successful business man, providing for the spiritual and personal wants of his family, but given to

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.



outbursts of temper when thwarted by his wife. *Held* that, as the future welfare of the children would be better consulted by giving them to the father, they should be awarded to him.

Error to circuit court, York county.

Habeas corpus proceeding by Charles H. Slater to obtain the custody of his infant children, as against their mother, Anne E. B. Slater. The children were directed to be delivered to their father, and their mother brings error. Affirmed.

J. F. Hubbard, for plaintiff in error. C. A. Branch and E. B. Slater, for defendant in error.

HINTON, J. The record of this case shows that on the 27th day of August, 1890, Charles H. Slater obtained from the Honorable W. G. W. Farthing, judge of the county court of York county, a writ of habeas corpus *ad subjiciendum*, commanding the respondent, his wife, Anne E. B. Slater, to appear before the said judge, at Williamsburg, on the 3d of September, and bring with her the bodies of their three infant children, Grace E., Charles H., and W. B. Slater, together with the cause of their detention, etc. The said judge, having fully heard the matter, on the 26th of September, 1890, entered a judgment directing that the said children be remanded to the custody of the said Anne E. B. Slater, and that the writ be dismissed at the cost of the relator. The case was heard in vacation, and during the trial several bills of exception were taken by the relator, none of which need be referred to, as, in our opinion, the case turns not on an inquiry as to what are the facts, but what is the conclusion to be drawn from the facts which sufficiently appear, whether the certificate of facts or the certificate of evidence, or both, be looked at. From the judgment of the county judge an appeal was taken to the circuit court, which court reversed the judgment of Judge Farthing, and directed the children to be delivered up to the said Charles H. Slater; and from this last-mentioned judgment the case has been brought here.

It clearly appears by the record that the parents have lived unhappily almost from the time of their marriage, and that this condition of things was brought about by the refusal of the wife to cohabit with the husband, and a suspicious disposition on the part of the husband. While such have been the relations of the parents, it also appears that Mrs. Slater has been a most affectionate and devoted mother, and that Mr. Slater has been a sober and successful business man, providing for the wants of his family, but given to outbursts of temper when thwarted by his wife. He seems to have broken up his home, but both he and the grandparents of the children, with whom they are residing, are able and willing to provide for these infants, who at the time of the institution of this proceeding were respectively, six, four, and two years old. Under these circumstan-

ces, should the children be left with the mother, or restored to the father, whose treatment of his wife has been at times both harsh and injudicious?

In 9 Am. & Eng. Enc. Law, p. 243, it is said: "Rights of father to the custody of his children are not so absolute in this country as they were in England. Where each is blameless, the father is usually entitled to the custody of his children. But the courts adopt the equitable principle that this right must yield to considerations affecting the welfare of the children. \* \* \* The later and better doctrine, now generally recognized, with respect to contentions among relatives for the custody of infants, is that the future welfare and interest of the child is the paramount consideration, even as against the claim of either or both of its parents; and notwithstanding a statute recognizing generally the superior rights of the father." Now, this being, in brief, the law applicable to the case, the only question is whether the interests of these infants will best be subserved by committing these children to the care and custody of their father, who is their natural guardian, and who, if he is not shown to be an extremely affectionate person, is shown to be a thoughtful and provident person, solicitous for the personal and spiritual welfare of his family, and able to provide for them, or by leaving them in the custody of their mother, who is herself dependent on her parents for her support. Upon this point we think there can be but one answer, and that in favor of committing them to their father. In the opinion of this court, the judgment of the circuit court is right, and must be affirmed.

LAOY, J., absent.

JOLLIFFE v. CHESAPEAKE & O. RY. CO.<sup>1</sup>  
(Supreme Court of Appeals of Virginia. Dec. 22, 1894.)

SURFACE WATER—ACTION AGAINST RAILROAD COMPANY.

A declaration alleging that a railway company, by choking up the ditches on its right of way, and the drains and ditches leading therefrom, caused water to flow on plaintiff's land, the latter being on the plaintiff's own land, is demurrable, it not being the duty of the company to keep unobstructed the ditches on property not owned by it.

Error to circuit court, Botetourt county.

Action by one Jolliffe against the Chesapeake & Ohio Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Edmund Pendleton, for plaintiff in error. W. T. Wickham, W. I. Robertson, and R. L. Parrish, for defendant in error.

LEWIS, P. This was an action of trespass on the case to recover damages for in-

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

jury to the plaintiff's land by the alleged wrongful obstruction by the defendant company of the flow of surface water. The declaration states, in substance, that the plaintiff is seised and possessed of a certain described tract of farming land, through which the company has constructed and is operating a railroad, and that, by the negligence of the company, its track, roadbed, and ditches, and the ditches and drains leading from the same, have been allowed to become obstructed and choked up with sand and rock, so as to cause the water naturally flowing from the plaintiff's land to accumulate in large quantities, and to flow back thereon, etc.

There was a demurrer to the declaration, which the circuit court sustained, and, as we think, correctly. There is great conflict in the American decisions in regard to the obstruction and repulsion of surface water, where there are two adjoining estates, one of which is lower than the other. Some of the states follow in this respect the civil law, which creates a natural easement or servitude on the lower in favor of the superior estate, while many others, including Massachusetts and New York, have adopted what is generally spoken of as the "common-law rule." According to that rule, no such easement or servitude exists, and the owner of the lower estate may obstruct or repel the flow of surface water thereon at his pleasure, without rendering himself liable in damages therefor. A leading case in support of this rule is *Gannon v. Hargadon*, 10 Allen, 106, where Bigelow, C. J., said: "Where there is no water course by grant or prescription, and no stipulation exists between coterminal proprietors of land concerning the mode in which their respective parcels shall be occupied and improved, no right to regulate or control the surface drainage of water can be asserted by the owner of one lot over that of his neighbor"; and consequently that the obstruction of surface water, or an alteration in the flow of it, affords no cause of action, in behalf of a person who may suffer loss or detriment therefrom, against one who does no act inconsistent with the due exercise of dominion over his own soil. The weight of authority seems to be in favor of the common-law rule. 24 Am. & Eng. Enc. Law, 896; *Abbott v. Railroad Co.*, 20 Am. & Eng. R. Cas. 108, 115, and cases cited. The question is unsettled in England, as it is in Virginia, and it is unnecessary to decide it in the present case, because according to neither rule, nor any recognized principle, can the declaration be sustained. According to the averments of the declaration, the injury complained of was caused, not merely by the choking up of the ditches on the company's right of way, but by the choking up of the ditches and drains leading therefrom; thus, in effect, charging that it was the duty of the company, not only to keep its own ditches clear and unobstructed, but those leading therefrom as well, which latter are on the

plaintiff's own land. There is no law imposing any such duty on a railroad company, and the judgment sustaining the demurrer must therefore be affirmed.

LACY and FAUNTLEROY, JJ., absent.

(20 Va. 89)

# ALEXANDER v. COMMONWEALTH.<sup>1</sup>

(Supreme Court of Appeals of Virginia. Dec. 22, 1894.)

## INDICTMENT FOR LARCENY—DUPLICITY—EVIDENCE OF FELONY.

1. It is not duplicity to charge in a single count in an indictment the larceny of the goods of several different owners, taken at the same time, though the value and owner of each article must be set forth.

2. Where an indictment alleges the larceny of six hogs, of a value exceeding \$50, and the evidence shows the larceny of only two, of below that value, a conviction for a felony is erroneous.

Error to Clarke county court.

One Alexander was convicted of grand larceny, and brings error. Reversed.

Blackburn Smith, for plaintiff in error. R. Taylor Scott, Atty. Gen., for the Commonwealth.

LEWIS, P. Alexander, the plaintiff in error, was indicted in the county court of Clarke county for larceny. The indictment contains a single count, and charges "that the accused, on the 28th day of October, 1893, in the said county, two hogs of the value of \$15.62 each, and two hogs of the value of \$10 each, the goods and chattels of J. Frank Gallaway, and two hogs of the value of \$15 each, the goods and chattels of Aaron Price, then and there being, feloniously did take, steal, and carry away," etc. A motion by the prisoner to quash the indictment was overruled, and, having been put upon his trial, he was found guilty, and sentenced, in accordance with the verdict, to five years' confinement in the penitentiary.

There are two assignments of error, viz. (1) That the trial court erred in overruling the motion to quash the indictment; and (2) in afterwards overruling the motion for a new trial.

It is contended in support of the first assignment that the indictment is bad for duplicity, in that it charges in one count not only two offenses, but offenses of different grades, viz. a felony and a misdemeanor. But this is a mistaken view. The authorities are abundant in support of the contention of the attorney general that where several articles of property are stolen at the same time and place, though the stolen goods belong to different persons, the stealing is regarded as one transaction, and therefore as one offense, which may be charged in a single count. Hence, whether in a case like

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

the present, the indictment is double, depends upon whether it charges more than one larceny or taking, and not on the number of articles taken, or their ownership. Lord Hale lays it down that if the accused at the same time steals goods from A. to the value of sixpence, goods of B. to the value of sixpence, and goods of C. to the value of sixpence, being per chance in one bundle, or upon a table, or in one shop, this is grand larceny at common law, because it is one entire felony, done at the same time, though the persons had several properties, and therefore, in one indictment, they make grand larceny. 1 Hale, P. C. 531. In the twelfth volume of the American & English Encyclopedia of Law (page 825), where the subject is discussed, and many of the cases are collated, it is said that, while an indictment is bad for duplicity if it charges two or more offenses in a single count, it is not duplicity to charge in one count the larceny of the goods of several different owners, taken at the same time, though the value and owner of each article must be specifically set forth. So, in conformity with this rule, it was said in Sprouse's Case, 81 Va. 374, that a man may be indicted in one count for the battery of two or more persons at the same time, or for a libel upon two or more persons, when the publication is one single act. And in Early's Case, 86 Va. 921, 11 S. E. 795, it was recognized as an established rule of pleading, as well in criminal as civil cases, that no matters, however multifarious, will operate to make a pleading double that together constitute but one connected charge, or one transaction. Now, in the present case, the indictment charges a larceny of six hogs,—four the property of Gallaway, the other two the property of one Price; and, upon the face of the indictment, it was all one united, continuous act, or one transaction, and therefore one offense, although the hogs alleged to have been stolen belonged to several different persons, and the names of the owners and the value of the hogs, respectively, are specifically set forth. We are constrained, therefore, to hold that the indictment is good, and that the motion to quash on the ground of duplicity was rightly overruled.

But, on the second point made in the petition for the writ of error, it is equally clear that the case is with the accused; that is to say, that the motion for a new trial on the ground that the verdict was not warranted by the evidence ought to have been granted. The evidence, viewed in the most favorable light possible for the prosecution, cannot be fairly said to show the larceny of more than two of the six hogs mentioned in the indictment; and, as the aggregate value of those two is less than \$50, the conviction of the accused of a felony cannot be sustained. The judgment must therefore be reversed, and the case remanded for a new trial.

LACY and FAUNTLEROY, JJ., absent.

WITZ et al. v. MULLIN'S PERSONAL REPRESENTATIVE.<sup>1</sup>

(Supreme Court of Appeals of Virginia. Dec. 22, 1894.)<sup>2</sup>

EQUITY JURISDICTION—CLAIM FOR DAMAGES—ANCILLARY RELIEF.

1. A firm made a deed of trust to secure all their liabilities, many of which were recited, but nothing was said about debts merely sounding in damages. The plaintiffs had a claim against the grantors for a failure to deliver certain stock, and filed a bill to enforce the deed of trust, and at the same time to secure damages for the above claim. *Held*, that equity did not have jurisdiction, but that the plaintiffs should first have their damages ascertained at law, and then equity would enforce the claim.

2. The question of the jurisdiction of a court of equity over a certain suit may be raised for the first time in the appellate court, although the point was not made in a bill for review.

Appeal from circuit court, Shenandoah county.

Bill by Mullen's personal representative against Witz, Biedler & Co. to secure damages for a failure to deliver certain stock, and to administer a deed of trust. Decree for complainant, and respondents appeal. Reversed.

R. T. Barton and Walton & Walton, for appellants. Marshall McCormick, for appellee.

LEWIS, P. The only question we deem it necessary to consider is whether the circuit court, sitting as a court of equity, had jurisdiction to pass upon so much of the Mullen claim as is involved in this appeal. That claim consisted of three items, viz.: Board bill, \$125; (2) promissory note, \$5,566.69; and (3) the value of 250 shares of the Valley Land & Improvement Company, \$25,000. The controversy in this case extends only to the latter item. It is conceded that the claim, as respects this item, sounds in damages. It grows out of an alleged breach of contract on the part of Kagey & Marshall to deliver to Mullen 250 shares of stock in the said company, which contract was evidenced by writing. It is certainly a proposition not to be disputed that a claim to damages for a breach of contract merely sounding in damages is not a fit subject for the jurisdiction of a court of equity. It is contended, however, by the appellee that it was competent for the circuit court to take cognizance of the claim to grant relief by way of damages, because such relief is merely incidental to the main object of the bill, and *Nagle v. Newton*, 22 Grat. 814, and *Campbell v. Rust*, 85 Va. 653, 8 S. E. 664, are relied upon in this connection. In those cases it was held to be the settled doctrine that when a court of equity has jurisdiction of a case, and it is a case proper for specific performance, such court may, as ancillary to specific performance, decree compensation or damages. But the present is not a case of

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

<sup>2</sup> Rehearing denied.

that sort. The object of the suit was the administration of a trust fund; in other words, to enforce a deed of trust, in respect to which only those persons secured in the deed were interested. That deed was executed in December, 1890, by D. F. Kagey & Co. and by S. W. Miller & Co., and secures all "the debts and liabilities" of those firms and of the individuals composing them, many of which debts are specifically mentioned in the deed. No mention is made of any debt merely sounding in damages, and we find nothing in the deed—a copy of which is exhibited with the bill—to warrant the conclusion that any such claim was intended to be secured. The term "liabilities" was evidently used synonymously with "debts," for, after specifically mentioning many debts, it was added: "And all other debts or liabilities of D. F. Kagey & S. W. Miller individually and as partners, etc., without any preference or priority to any of the debts hereinbefore set forth or referred to," etc.; and then, after providing that the trustees in the deed should settle their accounts every six months before a commissioner or commissioners of accounts, there follows a provision requiring notice of the time and place of such settlements to be given to all "creditors above referred to," thus showing that only creditors were intended to be secured, and not those having a right to sue to recover damages for an alleged breach of a contract to do some collateral thing, as to deliver shares of stock. Webster defines "creditor" as "one who credits, believes or trusts; one who gives credit in business matters, and hence one to whom money is due." We are constrained, therefore, to hold that the third item in the claim before mentioned was not secured in the deed of trust, and hence that the circuit court, sitting as a court of equity, ought not to have taken cognizance of it, but ought to have left the parties to their remedy at law. Until a judgment is obtained, the relation of debtor and creditor cannot be said to exist, and when a judgment shall have been obtained it can then be set up in the present suit. *Paxton v. Rich*, 85 Va. 378, 382, 7 S. E. 531. It need only be added that the fact that objection to the jurisdiction was not made in the court below does not affect the appellants' right to raise the objection in this court, the matter in controversy not being proper for any court of equity; and in such a case objection to the jurisdiction may be made at the hearing, or even for the first time in the appellate court. *Green v. Massie*, 21 Grat. 356; *Buffalo v. Town of Pocahontas*, 85 Va. 222, 225, 7 S. E. 238. It follows that the court below erred in refusing leave to the appellants to file a bill of review (although the jurisdictional question was not specifically raised in the bill of review), and that the decree must be reversed, and the cause remanded for further proceedings in conformity with this opinion.

LAOY and FAUNTLEROY, JJ., absent.

GRUBB et al. v. SHARKEY et al.<sup>1</sup>  
(Supreme Court of Appeals of Virginia. Dec. 22, 1894.)

EQUITY JURISDICTION — SPECIFIC PERFORMANCE — CLAIM FOR DAMAGES.

1. A tract of land was purchased by defendants for the purpose of erecting an ore washer, and they covenanted that, in case a stream which flowed through their land into land of the vendors became unfit for cattle to drink, they would construct a pipe line from another stream, so as to conduct clear water into the vendor's field. *Held*, that equity had jurisdiction of a bill to compel defendants to specifically perform the contract.

2. As auxiliary to its authority to decree specific performance, a court of equity may award damages for a breach of the contract, to be assessed either by an issue of quantum damnicatus, or by a master, at its discretion.

3. A bill was filed to compel defendants to specifically perform a contract, and asking for damages occasioned by a delay to carry out their agreement. Subsequently, they completed their contract, and the court directed its commissioner to ascertain the amount of the damages. *Held* that, equity having acquired jurisdiction, it could proceed to a complete adjudication, even to the extent of establishing legal rights.

4. A nonresident who appears and defends a case submits himself to the jurisdiction of the court, and a personal judgment against him is good.

Appeal from circuit court, Botetourt county.

Bill by one Sharkey and others against one Grubb and others. Decree for complainants, and defendants appeal. Affirmed.

Benj. Haden and John H. Lewis, for appellants. J. H. H. Figgatt and O. M. Lunsford, for appellees.

LEWIS, P. This was a suit for specific performance. In April, 1887, the appellees conveyed to the appellants a tract of land containing about 19 acres, adjoining the lands of the Lynchburg Iron Company, situate in Botetourt county. Below and contiguous to this land is a grazing farm owned by the appellees, which, at the time of the conveyance to the appellants, was mainly, if not solely, watered by a stream flowing through both tracts. The land was purchased by the appellants for the purpose of erecting and operating thereon an ore washer. It was accordingly covenanted in the deed of conveyance that if the said stream should be made continuously muddy by the proposed ore washing, so as to render the water therein unfit for stock, the appellants would lay a  $\frac{3}{4}$ -inch pipe from a certain spring branch above, so as to conduct a supply of clear water over the land to a designated point on the appellees' farm, and there erect a trough for the use of stock. The bill, which was filed in October, 1889, after setting out substantially the foregoing facts, alleges that this covenant has not been observed by the defendants (the appellants here); that they have not laid a pipe and erected a trough, as they covenanted to do, notwithstanding the water in the said stream

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

has been continually muddy and unfit for stock, in consequence of washing ores on the land, since the date of the conveyance, and although they have often been requested so to do. The bill also states that the complainants have been compelled, in consequence of the defendants' default, to drive their stock a considerable distance to water, whereby they have been greatly inconvenienced and damaged. And the prayer of the bill is that the defendants be required to specifically perform their covenant, and to make proper compensation to the complainants for the damage sustained by them, etc.

The defendants being nonresidents, there was an order of publication. An attachment was also sued out, which was levied on the said 19 acres of land. At the May term, 1890, a decree was entered for the specific performance of the contract, with a further provision that the defendants pay to the complainants \$750 damages for the breach of the contract. At the ensuing October term, the defendants appeared, and filed their petition, praying that the decree be set aside, and that they be allowed to make defense. They thereupon, with the leave of the court, demurred to the bill, and also answered. In their answer they stated, among other things, that since the commencement of the suit they had laid the pipe and erected a trough as they had agreed to do, and that this was done before the decree was entered. The cause was then referred to a commissioner, with directions to ascertain and report, among other things, what damages, if any, the complainants had sustained by reason of the alleged breach of the contract, in obedience to which the commissioner subsequently reported that they had been damaged to the amount of \$900. This finding was afterwards, upon exceptions to the report, reduced by the court to \$750, and by the same decree it was ordered that "performance of said contract be confirmed to the complainants."

1. A number of objections have been urged to this decree, none of which, in our opinion, are well founded. In the first place, the case stated in the bill is undoubtedly within the jurisdiction of a court of equity. The contract therein sought to be enforced is not one requiring personal labor, or the exercise of any peculiar skill or judgment, or involving the performance of continuous duties and supervision. On the contrary, it is such a contract as could be readily performed by almost any ordinary workman, and its nature is such that the remedy at law for its breach is inadequate. This brings the case within the general rule that a court of equity has jurisdiction to enforce specific performance of a contract by a defendant to do defined work upon his own property, in the performance of which the plaintiff has a material interest, and which is not capable of adequate compensation in damages; as, for example, an agreement on the part of a railway company to make an archway under its

tracks, or to construct a siding at a particular point for the convenience of an adjoining landowner. 1 Story, Eq. Jur. § 721a; *Storer v. Railway Co.*, 2 Younge & C. Ch. 48; *Greene v. Railway Co.*, L. R. 13 Eq. 44. It is, moreover, well settled that, as auxiliary to its authority to decree specific performance, a court of equity may award damages for a breach of the contract, to be assessed either by an issue of quantum damnificatus or by a master, at its discretion. *Phillips v. Thompson*, 1 Johns. Ch. 131; *Nagle v. Newton*, 22 Grat. 814; *Campbell v. Rust*, 85 Va. 653, 8 S. E. 664. This, indeed, is not disputed. But the appellants contend that their performance of the contract in question before the entry of the decree, although subsequent to the filing of the bill, left nothing to be specifically enforced, and consequently that the auxiliary power to decree damages was likewise at an end. In other words, the contention is that, after the pipe was laid and the trough erected, the suit was nothing more than a suit to recover damages, of which equity has not jurisdiction. But this is a mistaken view. The court having acquired jurisdiction of the case upon equitable ground, no subsequent act of the defendants could oust that jurisdiction. It is a familiar principle, as laid down by Judge Staples in *Walters v. Bank*, 76 Va. 12, that, when a court of equity has once acquired jurisdiction of a cause it may go on to a complete adjudication, even to the extent of establishing legal rights and granting legal remedies, which would otherwise be beyond the scope of its authority. That is a very strong case. The object of the suit was to subject the estate of a married woman to the payment of a certain negotiable note, upon which the appellant was indorser, or to require the appellant to pay it. In the progress of the case, it appeared that there was no separate estate, whereupon it was insisted that, as the supposed existence of a separate estate was the sole ground for going into equity, the court could proceed no further, and that the bill should be dismissed. But this view was rejected, and a decree rendered against the appellant for the debt, which this court affirmed, on the principle above stated. So it has been held that where the complainant was originally entitled to a specific performance, but pending the suit the subject-matter of the litigation is established or destroyed, he will not be turned round to his remedy at law, but compensation or damages will be decreed him. 2 Story, Eq. Jur. § 794; *Nelson v. Bridges*, 2 Beav. 239; *Chapman v. Railroad Co.*, 6 Ohio St. 119.

2. As to the further point made by the appellants in the petition for appeal, upon the authority of *Pennoyer v. Neff*, 95 U. S. 714, that state courts have no power to render judgments or decrees in personam against nonresident defendants, who are summoned merely by publication, it is

enough to say that here the defendants, after rendition of the decree of the May term, 1890, appeared and defended on the merits, thus submitting themselves to the jurisdiction of the court; so that the case stands upon the same footing, so far as the power and jurisdiction of the court are concerned, as if they had been personally served with process at the commencement of the suit.

3. Both sides complain of the amount of damages awarded; the appellants contending that the amount is excessive, while the appellees insist that the sum reported by the commissioner, viz. \$900, ought to have been allowed, and that the circuit court erred in reducing the amount to \$750. Without reviewing the evidence before the commissioner, we deem it sufficient to say that we see no reason to disturb the decree on this or any other point. It is therefore affirmed. Decree affirmed.

(43 S. C. 86)

PEOPLE'S BANK v. JACKSON et al.  
(Supreme Court of South Carolina. Jan. 19, 1895.)

USURY—WHEN A DEFENSE.

1. Under Gen. St. 1882, § 1288, forbidding the charging of a greater rate of interest than 7 per cent. on "any contract for the hiring, lending or use of money or other commodity," a charge of a greater rate in a note taken for the price of land is illegal.

2. Where the grantees of land give a note signed by all, and secured by a mortgage on the land, for the price, and one of the grantees purchases the interest of the others in the land, he may, in an action to foreclose the mortgage, plead the defense of usury to the full extent of the note, and not merely to the extent of his original interest in the land.

Appeal from common pleas circuit court of Fairfield county; Ernest Gary, Judge.

Action by the People's Bank against Adam Jackson and others to foreclose a mortgage. From a judgment for defendant A. Jackson, on his plea of usury, plaintiff appeals. Affirmed.

McDonald, Douglass & Obear, for appellant. Ragsdale & Ragsdale, for respondent.

GARY, J. This action was brought for a foreclosure of a mortgage of realty, executed by Adam Jackson, James Jackson, and Albert Gladney to Calvin Brice and John A. Brice, and assigned by them to the plaintiff herein after maturity. The mortgage was given to secure the payment of a note which had been executed by the defendants for the purchase money of the mortgaged premises. It was the joint note of all the defendants for the sum of \$1,595, with interest from date at 10 per cent. per annum, and was dated the 1st day of January, 1883. Before the commencement of this action James Jackson and Albert Gladney had conveyed their interests in the mortgaged premises to Adam Jackson, and he alone answered the complaint. His answer interposed the defenses of payment and usury. The referee

to whom the case was referred filed a report adverse to the defendant. The case came on for trial before his honor R. C. Watts, presiding judge, on exceptions to the report of the referee. His honor modified the report by sustaining the plea of usury and in other respects not material here. The plaintiff appealed to this court on the following exceptions: "(1) For that his honor erred in holding that the plea of usury was applicable to the note set forth in the complaint, and that the plaintiff could not recover anything except the principal of said note, without costs. (2) Because his honor erred in not holding that the said note was given for the purchase money of the tract of land described in the mortgage, and for that reason the interest mentioned and charged therein was not usurious. (3) For that his honor erred in not holding that the note, having been given for the purchase money of land, was not a 'contract arising in this state for the hiring, lending, or use of money or other commodity,' and therefore the plea of usury should not have been sustained. (4) For that his honor erred in not holding that the plea of usury, even if applicable, could only affect said note and mortgage to the extent of the interest of Adam Jackson in the land at time said note and mortgage were executed."

This case is ruled by the principle laid down in the case of Thompson v. Nesbit, 2 Rich. Law, 78, the facts of which are as follows: To an action of assumpsit on a note for \$1,300, credited by \$750 paid at various times, the defendant pleaded usury. The note was given for a negro sold by the plaintiff to the defendant. The plaintiff asked \$1,000 for the negro. The defendant was willing to purchase at that price, but could not pay the cash. The plaintiff was willing to give any time that the defendant wanted if he could have the price increased by the addition to the \$1,000 of 10 per cent. per annum until payment should be made. After consultation with several persons as to the best means of carrying out their bargain so as to steer clear of usury, it was agreed that the defendant should fix the time, and the plaintiff the price. The defendant said he must have three years; the plaintiff said he must have \$300 more. Whereupon the bill of sale was drawn, expressing the consideration to be \$1,000, and the note was drawn in the following words: "Three years after date I promise to pay H. Thompson or bearer thirteen hundred dollars, to be paid at such times as I please, and to deduct 10 per cent. per annum off of the amount paid at each payment. 11th Nov., 1839. Samuel Nesbit." The intention was that 10 per cent. per annum should be added to each payment from the time it was made until the note became due, so that the defendant should have the right of paying as he pleased within three years, and upon every payment should have interest calculated in the same manner as it

had been done on the \$1,000. His honor left it to the jury to say whether there was a bona fide sale of the negro at \$1,300 upon credit, with a stipulation of advantage to the defendant upon payments anticipated, or whether there was forbearance of \$1,000 upon usurious terms. The court in that case said: "The effect of the agreement is precisely the same as if the note had been taken for \$1,000, the price of the negro, with usury at 10 per cent. per annum. \* \* \* No proof of a corrupt agreement is necessary, for the contract may be usurious, though the parties did not know that it was against law." The court also held that "the jury should have been instructed that the uncontradicted state of facts submitted to them presented a case of usury, and that they should find for the plaintiff only that balance." The plea of usury was sustained. The case of *Wheeler v. Marchbanks*, 32 S. C. 594, 10 S. E. 1011, does not conflict with the case just mentioned. Chief Justice Simpson, in delivering the opinion of the court in *Wheeler v. Marchbanks*, says: "It is sufficient for us to say that the question involved is whether the transaction between the parties, and which gave rise to the action below, was a loan of money by the plaintiff to the defendant, or was a sale of land to said defendant by said plaintiff." In that case the circuit judge found that the facts made out a sale of the land; whereas, in the case at bar, interest, *eo nomine*, at a greater rate than was allowed by law was charged in the note secured by the mortgage.

We do not think there is force in the fourth exception of appellant. The defendant was liable on the note to the full extent, and had the right to plead usury to such extent. The purchase by the defendant from his comortgagors of their two-thirds interest in the land did not relieve him from liability on the note, and therefore should not affect his defense of usury. It is the judgment of this court that the judgment of the court below be affirmed.

McIVER, C. J. (concurring). If the question whether the contract evidenced by the note set out in the complaint was such a contract as would fall under the usury law, under the undisputed evidence in the case, were an open question, I should feel bound to hold that the usury law did not apply to such contract. The contract here sought to be enforced, having been entered into on the 1st day of January, 1883, before the act of 1882, approved 21st December, 1882, went into effect, the 20 days not having expired, must be governed by the law which was in force at the time the contract was entered into. That law will be found in the act of 1877 (16 St. at Large, p. 325), incorporated in Gen. St. 1882 as section 1288. That statute forbids the taking or charging interest, at greater rate than 7 per centum per annum, "upon any contract arising in this

state for the hiring, lending or use of money or other commodity." It will be observed that the statute does not forbid the taking or charging of interest at a greater rate than 7 per cent. per annum upon any contract for the payment of money, but only upon any contract for "the hiring, lending or use of money or other commodity." Hence, when the question is whether a given contract falls within the provision of the statute, the inquiry must necessarily be whether it is a contract for "the hiring, lending or use of money or other commodity." If it is, then the statute applies; but if it is not, then the statute does not apply. If the legislature intended that the usury law should apply to any contract for the payment of money, it would have been very easy and most natural for them to have said so. But they did not use any such general language, and, on the contrary, expressly confined the operation of the statute to contracts of a particular and specified character, to wit, contracts "for the hiring, lending or use of money or other commodity." Now, in this case the undisputed evidence is that the contract here in question was a contract to pay the purchase money of a certain tract of land, and not a contract for the hiring, lending, or use of money, or other commodity. It seems to me, therefore, that under a proper construction of the statute the contract here sought to be enforced is not a contract to which the usury law applies; and I would so hold, in the absence of controlling authority to the contrary. But in the case of *Thompson v. Nesbit*, 2 Rich. Law, 73, cited by Mr. Justice GARY in the leading opinion, and fully and fairly there set forth, requires a different construction; and yielding to the authority of that case, as I am bound to do, I must concur in the conclusion reached by Mr. Justice GARY. It is true that the case just cited arose under the act of 1830 (6 St. at Large, p. 409), and not under the statute which was in force at the time the contract in question was made; but the language of the two statutes, so far as relates to the particular question here under consideration, is, in my judgment, substantially the same, and therefore the construction placed by the former court of appeals upon the language of the act of 1830 must be regarded as authoritative construction of similar language in the act of 1877. It is also true that in the previous case of *Coleman v. Garlington*, 2 Speer, 238, it is plainly intimated by O'Neill, J., who cites the case of *Beete v. Bidgood*, 14 E. C. L. 206, that the usury law (act of 1830) did not apply to a contract to secure the payment of the purchase money of property sold. But I do not understand that that was a point decided in that case. At all events, the case of *Thompson v. Nesbit*, *supra*, was subsequently decided, and is therefore the controlling authority; and especially when we find that Judge O'Neill, who had prepared the opinion of the court in *Cole-*

man v. Garlington, subsequently concurred in the decision in the case of Thompson v. Nesbit. As to the other question, I do not deem it necessary to add anything to what has been said by Mr. Justice GARY.

(43 S. C. 80)

**FLENNIKEN v. MARSHALL et al.**

(Supreme Court of South Carolina. Jan. 10, 1895.)

**LIABILITY OF STOCKHOLDERS—CLAIM FOR PERSONAL INJURIES.**

1. Act 1882, p. 876, § 4, incorporating the Columbia Street Railway Company, and providing that the personal liability of each stockholder shall not exceed 10 per cent. in addition to the amount of shares held by him, fixes the liability of stockholders at 10 per cent. in addition to the amount of their shares.

2. The word "dues," as used in Const. art. 12, § 4, providing that "dues from corporations shall be secured by such individual liability of the stockholders \* \* \* as may be prescribed by law," includes damages for personal injuries.

Appeal from common pleas circuit court of Richland county; T. B. Fraser, Judge.

Action by David R. Flenniken against J. Q. Marshall and others, stockholders of the Columbia Street Railway Company, to recover a proportionate part of a judgment rendered against the company for personal injuries. Judgment was rendered for defendants, and plaintiff appeals. Reversed.

J. S. Muller and Andrew Crawford, for appellant. Sloan, Lyles & Muller, for respondents.

GARY, J. The questions submitted to the court below upon this case were as follows: (1) Are the said J. Q. Marshall, W. H. Lyles, W. G. Childs, W. A. Clark, and James Woodrow liable to the said David R. Flenniken, and, if so, to what extent? (2) What judgment or judgments, if any, should the said David R. Flenniken have against said parties? In other words, can the stockholders of the Columbia Street Railway Company be made liable for an assessment of 10 per cent. or any other amount, upon their holdings of stock, in satisfaction of a claim against that company for damages for personal injury by the negligence of the employees of the company? This claim, of course, is founded upon a tort. The provisions of the constitution relative to the liability of stockholders of corporations are found in article 12, §§ 4, 5. Section 4 is as follows: "Dues from corporations shall be secured by such individual liability of the stockholders and other means as may be prescribed by law." Section 5 is as follows: "All general laws and special acts passed pursuant to this section shall make provisions therein for securing the personal liability of stockholders under proper limitations," etc. The reference, in the act incorporating the Columbia Street Railway Company,<sup>1</sup> to the

liability of the stockholders, is found in section 4, which provides "that the personal liability of each stockholder shall not exceed 10 per cent., in addition to the amount of shares which he or she holds." Section 22 of the general incorporation act of 1886 (19 St. at Large, 546) is as follows: "The following provisions shall constitute a part of the charter of every corporation, other than railroad and banking corporations, already in existence under act of the assembly of this state, either general or special, passed since the adoption of the present constitution, or which may be at any time hereafter created under or by virtue of any act of assembly, general or special, to wit: (a) That each stockholder in any such corporation shall be jointly and severally liable to the creditors thereof in an amount, besides the value of his share or shares therein, not exceeding five per cent. of the par value of the share or shares held by such stockholders, at the time the demand of the creditor was created: \* \* \* provided, further, that the liability enforced in this provision shall not apply to any corporation whatever in this state, in the charter of which a different liability shall have been, or shall be imposed." It will be observed that the constitution in section 4 says, "Dues from corporations shall be enforced"; and in section 5, "All general laws and special acts passed pursuant to this section shall make provision therein for fixing the personal liability of stockholders under proper limitations." These words are mandatory. It must be presumed that the legislature in passing the special act incorporating this company, and the general act of incorporation of 1886, intended to carry out the requirements of the constitution touching the liability of stockholders, and that the language used is to be construed in connection with the words of the constitution bearing upon that subject.

It is argued on the part of the defendants that they are not liable under the act incorporating the company, because said act simply fixes a limitation beyond which the liability of the stockholders shall not extend, but does not make provision as to the amount for which they could be made liable. This objection, if tenable, would apply equally to the general incorporation act of 1886, because it provides that the stockholders shall be liable in an amount "not exceeding five per cent. of the par value," etc., but does not provide as to the amount for which they shall be made liable. In the case of *Bird v. Calvert*, 22 S. C. 297, the court decides that the provision in a special act of incorporation as to the liability, which is identical with that in the general act of incorporation of 1886, made the stockholders liable for the 5 per cent. therein mentioned. The court said: "The individual liability of the stockholders is made as direct and unconditional for the 5 per cent. as for the subscribed stock itself." In the case of *Hall v. Clinck*, 25 S. C. 351, Chief Justice McIver quotes from the case

<sup>1</sup> Act 1882, p. 876.



of *Terry v. Little*, 101 U. S. 217, as follows: "The individual liability of stockholders in a corporation is always a creature of statute. It does not exist at common law. The first thing to be determined in all such cases is, therefore, what liability has been created? There will always be difficulty in attempting to reconcile cases of this class, in which the general question of remedy has arisen, unless special attention is given to the precise language of the statute under consideration. \* \* \* The form and extent of a statutory liability of this kind depend upon the particular phraseology of the statute which creates the liability." There is nothing in the constitution nor acts of the legislature making the liability of the stockholders of a penal nature, and therefore demanding a strict construction. They are to be interpreted by the ordinary rules of construction applicable to a remedial statute. In the case of *Sullivan v. Manufacturing Co.*, 14 S. C. 499, Chief Justice McIver, in behalf of the court, says: "They—both corporation and directors—have violated the same right of plaintiff to have payment of his debt, and the cause of action against both is, in fact, the same. The legal wrong done to the plaintiff is done alike by the directors and the corporation. The same remark will apply to the cause of action growing out of the account. It is urged, however, that the liability of the directors under the charter does not rest upon contract, but is for a tort, or in the nature of tort, while that of the corporation confessedly grows out of contract. We cannot concur in this view. The language of the act is that, on the contingencies named therein, the directors 'shall be jointly and severally liable for all debts,' etc. This language is not appropriate to the purpose of imposing a penalty, but rather conveys the idea that, on the contingencies mentioned, the directors shall be regarded as having assumed the payment of the debts of the company. It does not declare that they shall forfeit a certain sum of money, or the amount of their stock, or that they shall pay a certain penalty, but they shall become liable for the payment of the debts; that is, they shall assume the payment of them. When these defendants accepted the position of directors of a company organized under an act declaring that, in certain contingencies, they should become liable for the debts of the company, they must be regarded as having agreed that, if such contingencies should happen, they would pay the debts of the company." When the constitution and act incorporating the company are construed together, they impose a liability on the stockholders of 10 per cent. in addition to the amount of the shares which they hold. *Sutherland on Statutory Construction* (page 422, § 334) says: "That which is implied in a statute is as much a part of it as that which is expressed."

This brings us to a consideration of the meaning of the word "dues." There is no case

in our Reports directly in point. The constitution of Ohio has words identical with those in article 12, § 4, of our constitution. This provision of the Ohio constitution was construed in 1892 by the supreme court of that state in the case of *Rider v. Fritchey*, 49 Ohio St. 295, 30 N. E. 692. The argument of the court is convincing, and we rely principally on that case for the conclusion reached by us as to the meaning of the word "dues." The court in that case says: "The provision (section 3, art. 13) is: 'Dues from corporations shall be secured by such individual liability of the stockholders and other means as may be prescribed by law; but in all cases each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock.' The question turns upon the import of the word 'dues.' It has been contended that provisions creating individual liability on the part of the stockholders are in derogation of the common law, and are therefore to be construed strictly. Authorities in support of this rule are not wanting, and in so far as such liability is attached by way of penalty for the omission of some act required by the statute, as in some of the states, it is probable that the weight of authority favors the proposition. But all concede that this is a remedial provision, and to hold that there must be applied to it the same test as if it were a penal law is to hold that all remedial laws must be so construed; for every remedial law must, of necessity, be in derogation of the common law. Where the provision is simply remedial, though it does impose an obligation that did not attach at common law, we see no reason to insist upon what is called a 'strict construction,' but believe that the ordinary rule, which requires the court to inquire simply as to the intent of the lawmakers, reading the provisions as they were intended to be read, will best attain the ends of justice. This leads us to look to the intent of the section quoted. Speaking in general terms, it must be manifest that the intent was to provide that those who derive advantage from the authority of the state, given by our incorporation laws, shall, at the same time, assume responsibility for the acts of the artificial creature which they have called into legal being, affecting the rights of others. Having in mind this general intent, and the provision being remedial, it should, we think, be construed with a view to remove the evil and extend the benefit proposed. \* \* \* It would seem to be the undoubted duty of the court to give the word 'dues,' as found in the section quoted, such construction as will secure the apparent object of the constitution makers in its adoption. Constitutions are necessarily couched in terse language, and we look there for the use of words in a broad, comprehensive sense. \* \* \* It is difficult to see any reason why the framers of the constitution

should intend to afford one who gives credit for goods or money to a corporation a right to demand compensation of the stockholders in case of insolvency, and deny a like right to one who intrusts it with the care of his person, as in the case of a passenger, or to one, even a stranger, who, without fault on his part, is injured by the negligence of the corporation's agents. It may well be asked, are the rights of things more sacred than the rights of person? Is there any rule of public policy which would justify the protection of rights arising ex contractu which would not equally call for protection of rights arising ex delicto, or any claim for unliquidated damages?" We are of the opinion that the word "dues" is comprehensive enough in its meaning to include a demand against the stockholders arising ex delicto, and that the defendant stockholders are personally liable to the amount of 10 per cent. on the shares held by them. It is the judgment of this court that the judgment of the circuit court be reversed, and the cause remanded to the court of common pleas for Richland county for such further proceedings as may be necessary to carry out the view herein announced.

(42 S. C. 547)

**FLADGER v. BECKMAN et al.**

(Supreme Court of South Carolina. Jan. 16, 1895.)

**APPEALABLE ORDER.**

An order denying a motion to require plaintiff to make his complaint more definite is not appealable before final judgment.

Appeal from common pleas circuit court of Charleston county; Ernest Gary, Judge.

Action by E. T. Fladger against James O. Beckman and others. From an order denying a motion to require plaintiff to make her complaint more definite, defendants appeal. Appeal dismissed.

Lord & Burke, for appellants. Mordecai & Gadsden and A. M. Boozer, for respondent.

McIVER, C. J. This is a motion to dismiss the appeal of defendants (appellants) from the order of the circuit judge refusing the motion of the defendants to make the complaint of the plaintiff more definite by alleging the consideration, if any, for which the amount of the indebtedness alleged in the complaint was incurred by defendants' testator, upon the ground that said appeal has been prematurely taken, the order appealed from being such an intermediate order as, if appealable, is not properly appealable until final judgment.

After hearing argument by Mr. Mordecai, in behalf of respondent, for the motion, and Mr. Burke, in behalf of appellants, contra, it is adjudged by the court that the objection is well taken; and it is therefore ordered that the said appeal be dismissed, without preju-

dice to the appellants, upon final judgment, to appeal from such order, if the same be appealable.

(43 S. C. 17)

**STANDARD SEWING MACH. CO. v. HENRY et al.**

(Supreme Court of South Carolina. Jan. 8, 1895.)

**ACTION ON NOTE—EVIDENCE—SHAM ANSWER—MOTION TO STRIKE.**

1. In an action on a note dated August 10, 1893, in which defendants denied that the note was due or unpaid, a letter by one of the defendants to one who is not shown to be connected with plaintiff as payee of the note, and which asks for a holding over for 10 days after maturity of a note therein referred to as falling due on July 26, 1892, is inadmissible in the absence of evidence that the note in suit was a renewal of such note.

2. Where plaintiff served notice of motion to strike out the answer as sham and irrelevant, a further notice that plaintiff will not rely solely on what appears on the face of the answer in support of the motion, but will introduce other matter, is merely supplementary to the first notice.

3. It was error to strike out as sham and frivolous an answer which admitted the execution of the note in suit, but denied all the other allegations of the complaint, including the allegation of plaintiff's ownership.

Appeal from common pleas circuit court of Marion county; W. C. Benet, Judge.

Action by the Standard Sewing-Machine Company against John E. Henry and another. There was a judgment for plaintiff, and defendants appeal. Reversed.

The decree and exceptions referred to in the opinion are as follows:

**Decree**

"This is a motion made by the plaintiffs herein to strike out the answer of the defendants on the ground that it is sham and irrelevant; and on the further ground that it is frivolous, and intended merely for delay. It appears that the motion came on to be heard at the April term of the court, before Judge Aldrich; but that when the fact was developed that copies of certain affidavits and letters, upon which plaintiffs partly relied, had not been served upon the defendants, the circuit judge continued the case on the docket, without, however, refusing the motion. Subsequently, on 14th June, 1894, the following was served by plaintiffs upon the defendants: '[Title of cause.] The defendants, or their attorneys, Johnson & Johnson, will take notice that plaintiffs will not only rely upon what appears on the face of defendants' answer, in support of plaintiffs' motion, of which notice was given you on the 7th March, 1894, but will rely further on an original letter of defendants to S. B. Lucy, plaintiffs' manager, in the handwriting of defendant, J. E. Henry, dated Latta, S. C., July 22, 1892, and also on affidavit of W. W. Sellers of our firm, copies of both of which are herewith furnished. Sellers & Sellers, Plaintiffs' Attorneys.' At the summer term of

the court it is objected by the defendants that the original notice of motion is no longer of force, and that the foregoing paper is not a new notice of motion, nor sufficient as a notice of motion. On this point I hold that, although the foregoing paper is not a new notice of motion, it is sufficient as a supplemental notice, and that the original notice is still of force; the motion not having been heard and decided by Judge Aldrich, but simply continued with the whole case. The supplemental notice refers, in terms, to the original notice, and, in effect, incorporates it. The defendants, therefore, could not, and in fact did not, plead surprise. The objection is overruled. I have examined with care the complaint and the answer, and have considered the affidavit and the letters, copies of which were served on the defendants, and I have come to the conclusion that the motion of plaintiffs should be granted, and that the answer of the defendants should be stricken out as sham and frivolous. The answer is as follows: '[Title of cause.] The defendants, answering the complaint herein by Johnson & Johnson, their attorneys, say that they admit the execution of the note sued on, but they deny each and every other material allegation of the complaint. Wherefore,' etc. The New York rule has been affirmed in this state, namely, that the court has no power to strike out as sham an answer which makes a general denial. *Ransom v. Anderson*, 9 S. C. 439. But the answer herein does not quite make a general denial. It admits the execution of the note upon which the suit is brought, and then it denies 'each and every other material allegation,' leaving it to be afterwards settled as to what are or are not 'material' allegations. Besides the execution of the note,—which the answer admits,—the complaint alleges nonpayment after the note was due and payable, and that the plaintiffs, who are the legal owners and holders thereof, are duly incorporated under and by the laws of the state of Ohio, and that the defendants are copartners trading under the firm name of J. E. Henry & Co. Not one of these allegations is specifically or indirectly denied by the answer. It is well settled that the defense of payment must be specifically pleaded. *McElwee v. Hutchinson*, 10 S. C. 438. This the answer has not done, and the plaintiffs' allegation of nonpayment of the debt due has not been denied. The plaintiffs having alleged that they are suing in their corporate capacity, if the defendants desired to question their legal capacity to sue they should have raised the objection by demurrer. Failing this, they have waived their right to object, and the complaint is not denied as to this allegation. *Daniels v. Moses*, 12 S. C. 130; *Banking Co. v. Turner*, 8 S. C. 111; *Lumber Co. v. Risley*, 25 S. C. 309; *Steamship Co. v. Rodgers*, 21 S. C. 34. Similarly as to the allegation that the defendants are copartners. This also stands undenied. But, in addition to what is thus manifest on

the face of the pleadings, it was satisfactorily shown by a letter of one of the defendants, and by the affidavit of one of the plaintiffs' counsel, that the debt sued on was a bona fide claim which the defendants had admitted, but which they said they did not intend to pay if they could help it. To this the defendants filed no counter affidavits nor denial of any sort. I am therefore constrained to hold that the answer is sham, manifestly false, and intended only for delay, and must be stricken out. But, even if the above ground be not tenable, I hold that the answer must be stricken out on the ground that it is frivolous. Our supreme court has said that 'an answer may be said to be frivolous when it fails to deny any of the allegations of the complaint, or to state any new matter by way of defense.' *Machine Co. v. Hill*, 27 S. C. 165, 3 S. E. 82. I have already given my reasons for holding that the answer before me fails to deny any of the allegations of the complaint, and it is manifest that it states no new matter by way of defense. I cannot evade the just conclusion that the answer is frivolous, and framed merely for delay, and I must grant plaintiffs' motion. It is therefore ordered and adjudged that the answer of the defendants herein be stricken out, as being sham and frivolous. It is further ordered and adjudged that the plaintiffs have judgment, as in cases by default, in accordance with the terms of the note sued on. It is further ordered and adjudged that the plaintiffs have judgment also for ten dollars, as their costs for this motion."

#### Exceptions.

"Defendants (appellants) except to the order of his honor, Judge W. C. Benet, of date July 5th: First. Because, while holding that the notice, affidavit of W. W. Sellers, and alleged letter served on defendants' attorneys 14th June do not constitute a new notice of motion, his honor holds that said papers are a sufficient supplemental notice, and erroneously, it is submitted, considers and decides the original notice and this second notice and papers annexed together, whereas the original notice was the moving paper, and the real hearing was to be on it and according to its face, without supplement. Second. Because it was error to consider the alleged letter of defendants without proof of its genuineness. Third. Because his honor erred, it is submitted, in holding that 'not one of these allegations (meaning all the allegations except the one as to the execution of the note) is specifically or indirectly denied by the answer,' for it is submitted that all of the material allegations of the complaint, except the execution of the note sued on, were denied in the answer. Fourth. Because his honor errs, it is submitted, in holding that 'the defense of payment must be specifically pleaded,' without any qualification of that doctrine, such as that the complaint must, when that doctrine applies, be an ordinary

complaint on a plain note, without peculiarity, while the complaint in this case is very peculiar in its terms and allegations, and the general denial here controverts the allegation of nonpayment as one of the other material allegations of the complaint. Fifth. Because his honor ignores the fact that the material allegation that plaintiffs are, at the commencement of the action, the owners and holders of the note, is denied by the answer, and that no proof to sustain that allegation was offered, and the original note was not shown so as to exhibit its custody by plaintiffs at the hearing. Sixth. Because it was error in his honor in holding that the allegation of the partnership of defendants is not denied, saying, in effect, that partnerships stand similarly with corporations in pleadings, whereas, it is submitted, the rule is different, and that the general denial in this case puts the question of defendants' alleged partnership in issue, and that there is no proof to sustain it. Seventh. Because his honor commits error in not only considering the unproved alleged letter of one of the defendants, but on it and on the affidavit of plaintiffs' counsel, both relating to a time previous to the commencement of the action, decrees, in effect, that no change occurred thereafter and before suit brought, and that, while the answer denies nothing material, yet it is 'false' and sham. Eighth. Because his honor erred, further, in ordering in said decree of 5th July not only that the answer is sham, but frivolous on its face, and that it be stricken out. Ninth. Because his honor ordered, further, in said decree of 5th July, 'that the plaintiffs have judgment as in cases by default, in accordance with the terms of the note sued on,' whereas the action proper had not been reached on the docket, court had adjourned, and defendants (appellants) desired to interpose an oral demurrer to this peculiar complaint. Tenth. Because his honor ordered, further, in the decree of July 5th, 'that the plaintiffs have judgment also for ten dollars, as their costs for this motion.' Eleventh. Defendants (appellants) except to the intended order for judgment of his honor, Judge Benet, indorsed on the back of the complaint, because defendants (appellants) had given notice of appeal to the supreme court prior thereto, and his honor had no jurisdiction to indorse said order, especially since it was done without notice and ex parte. Twelfth. Because his honor committed error in receiving the papers from the clerk's office after they had been finally filed by him, and after notice of appeal, and in granting any order thereon, especially without notice to defendants' counsel, and in fixing counsel fees without reference or notice, and in ordering judgment for a certain sum on a note not exhibited in court. Thirteenth. Defendants (appellants) except to and appeal from the alleged judgment, signed and entered by D. F. Miles, C. C. P., because the said order of 2d August, 1894, on which said judgment

purports to be based, is void, and the clerk had no authority to enter up such judgment."

Johnson & Johnson, for appellants. Sellers & Sellers, for respondents.

McIVER, C. J. This was an action to recover the amount alleged to be due on a negotiable promissory note. The allegations in the complaint are substantially as follows: That on the 10th day of August, 1893, the defendants made their promissory note in writing, whereby they promised to pay to the plaintiffs, or order, at the Merchants' & Farmers' Bank of Marion, four months after the date thereof, the sum of \$1,226.06, together with a stipulation that, if the note has to be collected by suit, the defendants would pay all costs, including 10 per cent. attorney's fee; that although the said note became due and payable before the commencement of this action, yet the defendants have not paid the same; that plaintiffs are now the lawful owners and holders of the said note; that the plaintiffs have been duly incorporated under the laws of the state of Ohio; and that defendants are copartners in trade, under the name of J. E. Henry & Co. The defendants answered, admitting the execution of the note sued on, but denying each and every other material allegation in the complaint. Upon the service of the answer, the plaintiffs, on the 7th day of March, 1894, served a notice on defendants' counsel of a motion "to strike out the defendants' answer in the above case as sham and irrelevant"; and, falling in that, plaintiffs will move for judgment on the ground that "the answer is frivolous, and intended merely for delay." This motion came on to be heard by his honor, Judge Aldrich, at the April term of the court, but, when the fact was developed that copies of certain papers (letter and affidavit) had not been served upon the defendants, Judge Aldrich continued the case on the docket, without, however, refusing the motion. Subsequently, to wit, on the 14th day of June, 1894, plaintiffs served a further notice on defendants, that plaintiffs "will not only rely upon what appears on the face of defendants' answer in support of plaintiffs' motion, of which notice was given you on the 7th March, 1894, but will rely further on an original letter of defendants to S. B. Lucy, plaintiffs' manager, in the handwriting of defendant J. E. Henry, dated Latta, S. C., July 22, 1892, and also on affidavit of W. W. Sellers, of our firm, copies of both of which are herewith furnished." The letter thus referred to, a copy of which is set out in the "case," purports to be a letter of the date mentioned, addressed to Mr. S. B. Lucy, Richmond, Va., without anything in it to show that said Lucy was in any way connected with plaintiffs, in which it is claimed that the defendants, referring to a note "which falls due on the 26th inst." (July, 1892), ask that the bank be instructed to hold said note

for ten days after maturity, when defendants would pay it. The affidavit of Mr. Sellers, a copy of which is likewise set out in the "case," is to the effect that, on the day upon which his firm received for collection the note mentioned in the complaint, he wrote the defendant J. E. Henry, informing him of the same; that two days thereafter both of the defendants appeared at the office of Messrs. Sellers & Sellers, to see about the matter; that they both admitted the execution of the note, and that it was unpaid; "that it was a renewal note (think he said it was a second or third renewal); that he offered to plaintiffs to return the property purchased for which the note was given, and to pay one hundred dollars besides the return of the property; said he did not intend to pay a dollar of it if he could help it; that he had no property that could be made liable to it; that he owed other debts; that he had secured them, and then had the papers in his pocket." Upon these papers the motion came on to be heard by his honor, Judge Benet, who filed his decree, 5th of July, 1894, in which he held that the answer was both sham and frivolous, and that plaintiffs "have judgment, as in cases by default, in accordance with the terms of the note sued on," and also for \$10 costs of this motion. Defendants, having been served with notice of the filing of this decree, gave due notice of appeal therefrom. After the service of this notice of appeal, the original summons and complaint were returned to Judge Benet, who on the 2d day of August, 1894, made the following indorsement on the complaint: "The answer of defendants having been stricken out as sham and frivolous, it is ordered that plaintiffs have leave to enter up judgment against defendants for twelve hundred and eighty 89/100 dollars debt, and interest at ten per cent., one hundred and twenty-eight 08/100 dollars, fees for collections by suit, according to the terms of the note sued on, and ten (\$10) dollars attorney's fees for the motion, aggregating fourteen hundred and eighteen dollars and ninety-seven cents (1,418.97), and for all other legal costs." In pursuance of this order, judgment was entered, in accordance with the terms thereof, on the 8th of August, 1894, and the defendants gave due notice of appeal from the order for judgment above set out, as well as from the judgment entered in pursuance thereof. We do not deem it necessary to set out in extenso the several exceptions upon which the appeal is based, as we propose only to consider the questions which they present which we regard material; but think the decree of the circuit judge, as well as the exceptions, should be incorporated with the report of the case.

We agree with the circuit judge that the notice of the 14th June, 1894, was but supplementary to the original notice of the motion served on the 7th of March, 1894, and simply designed to indicate to defendants

what papers, in addition to the answer, would be relied upon to sustain the motion, which had been continued at the previous term. It seems to us, however, that the circuit judge erred in receiving and considering the letter purporting to have been written by defendants to S. B. Lucy without some evidence of its genuineness, which we are unable to find in the "case." In addition to this, that letter could not possibly have referred to the note which constituted the basis of the present action, for that letter bears date on the 22d July, 1892, and, by its terms, refers to a note which fell due on the 26th of that month, more than a year before the note mentioned in the complaint was given. Moreover, that letter was addressed to S. B. Lucy, who is not shown by any competent evidence to have had any connection of any kind with the plaintiffs. It is true that it is stated in the notice of the 14th of June, 1894, that Lucy was plaintiffs' business manager; but that is a mere statement of counsel, and certainly constitutes no legal evidence of the fact. In the affidavit of Mr. Sellers, which is in evidence, there is no statement to that effect, and nothing to show any connection between the note referred to in the letter and the note mentioned, except the general statement that the note mentioned in the complaint was a renewal; but of what note it was a renewal there is no evidence. It seems to us, therefore, that the circuit judge erred in receiving and considering the alleged letter of the defendants to the said S. B. Lucy.

We think, also, that the circuit judge erred in holding that the answer should be stricken out as sham and frivolous. The rule, as we understand it, is that an answer which denies any material allegation in the complaint cannot be stricken out, on motion, as either sham or frivolous. If the defendant, by his answer to an action on a money demand, puts in issue any material allegation in the complaint, he has a right to have such issue tried by a jury. See *Ransom v. Anderson*, 9 S. C. 438; *Machine Co. v. Hill*, 27 S. C. 164, 3 S. E. 82. Now, in this case, the defendants, by their answer, did put in issue at least one of the material allegations of the complaint, to wit, that the plaintiffs were the legal owners and holders of the note. While we agree with the circuit judge that the cases which he cites do show that the corporate capacity of the plaintiffs was not put in issue by the general denial in defendants' answer, yet we are not prepared to admit that the same rule would apply to the allegation that the defendants were copartners. But as it is alleged in the complaint that the defendants, who are named as copartners in the title of the complaint, "made their promissory note in writing," etc., and the defendants, in their answer, "admit the execution of the note sued on," this, we suppose, might be regarded as an admission that the note was executed by them as copartners. *Walter v. Godshall*, 32 S. C. 187,

10 S. E. 951. Under this view of the case, it becomes necessary to consider those of the exceptions which impute error to the circuit judge in indorsing the order for judgment on the complaint, after the filing of his decree, and after notice of appeal therefrom, and the entry of judgment in accordance with such order; for if, as we have seen, there was error in striking out the answer as sham and frivolous, no judgment could properly be ordered or entered until the issue presented by the pleadings had been tried by the jury. It may be as well, however, to notice that both in the order for judgment indorsed on the complaint, and in the judgment entered in pursuance of such order, \$10 are awarded to plaintiffs' attorneys as their fees for the motion to strike out the answer, in disregard of the act of 1892, entitled "An act to repeal all acts in relation to attorneys' costs." 21 St. 30. The judgment of this court is that the order and judgment of the circuit court be reversed, and that the case be remanded to that court for trial.

(43 S. C. 11)

**Ex parte BOARD OF COM'RS OF FLORENCE GRADED SCHOOLS.**

In re McDUFFIE, School Commissioner.  
(Supreme Court of South Carolina. Jan. 8, 1895.)

**SCHOOL FUND — WARRANT FOR — MANDAMUS TO COMPEL—CONSTITUTIONALITY OF STATUTE—WHEN DECIDED.**

1. Act 1894 (21 St. at Large, p. 635), constituting the board of commissioners of the Florence Graded Schools, provides that the county treasurer shall hold the constitutional and poll tax to which the said school district is entitled subject to the warrant of the board of school commissioners of said school district. Rev. St. 1893, § 1089, provides that all moneys disbursed by any county treasurer on account of school funds or poll tax shall be paid on orders of the boards of school trustees, countersigned by the county school commissioner, or "as otherwise directed in this chapter." *Held*, that the board of commissioners of the Florence Graded School district cannot maintain mandamus to compel the county school commissioner to draw his warrant in their favor on the county treasurer for a balance of the constitutional and poll tax in the hands of the treasurer, alleged to be held for the benefit of such district, such act being unnecessary.

2. A court will not pass on the constitutionality of a law, unless necessary to the determination of the case in which the question is presented.

Appeal from common pleas circuit court of Florence county; D. A. Townsend, Judge.

Petition by the board of commissioners of the Florence Graded Schools against D. McDuffie, school commissioner. There was a judgment for defendant, and petitioners appeal. Affirmed.

McNeill & Hursey, for appellants. W. F. Clayton, for respondent.

McIVER, C. J. This was an application for a mandamus addressed to his honor Judge Townsend. The petition alleges, in its

first paragraph, that the persons therein named "constitute the board of commissioners of the Florence Graded Schools, created by an act of the general assembly entitled 'An act to provide for the establishment of a new school district in the [then] county of Darlington, and to authorize the levy and collection of a local tax therein,' approved December 24, 1883, and an act amendatory thereof, approved January 4, 1894." In the second paragraph the allegations are as follows: "That D. McDuffie is the school commissioner of the county of Florence, and as such has under his control the sum of two hundred and nineteen and 60-100 dollars, being a balance of the constitutional tax and poll tax apportioned according to law to said school district, and which has been long since subject to his warrant for the benefit of said school district; and although demands have been made upon the said D. McDuffie, school commissioner as aforesaid, for the warrant in accordance with your petitioners' rights in the premises, he refused and still refuses to issue the said warrant." The prayer of the petition is that a writ of mandamus may issue requiring the said D. McDuffie, as school commissioner of Florence county, to issue his warrant for the payment of the sum of \$219.60 to your petitioners for the purposes set forth. The respondent, in his return, admits the allegations contained in the first paragraph of the petition, but he denies all of the allegations contained in the second paragraph of the petition, except so much thereof as alleges that he is school commissioner of Florence county. The respondent, as a further reason why the writ prayed for should not issue, alleges "that the Florence Graded Schools, as organized and managed by the petitioners, are not public schools, within the contemplation of the constitution of the state of South Carolina and the acts of the legislature passed in pursuance thereof"; for he alleges that if the acts of the general assembly above referred to, to wit, the act of 1883 and the amendatory act approved 4th January, 1894, confer upon the petitioners the authority claimed and exercised, the same are in conflict with the constitution, especially sections 4 and 10 of article 10 of that instrument. Respondent also submits certain affidavits, copies of which are set out in the "case," tending to show that the board of commissioners of the Florence Graded Schools require the payment of tuition fees, except from those unable to pay the same. Upon these papers, thus briefly stated, the case was heard by the circuit judge, who, after argument, "ordered that the writ of mandamus prayed for be refused, for the reason that the act of the legislature incorporating the graded schools makes them pay schools, inasmuch as it empowers the commissioners to impose a tuition fee on each pupil. Whether they exercise this power or not does not alter the case; it is the power vested in them by the act which determines

the character or kind of the school. This is contrary to the spirit of the free-school system, provided for by the constitution. Under that system, as I understand it, the schools are open to all, without restriction, until the free-school fund is exhausted. The two-mill constitutional tax can only be used for the maintenance of free public schools, and the school commissioner has no legal authority to apply it for any other purpose. Return shows that fees are charged in this school as authorized by the act."

From this judgment the petitioners have appealed upon the several grounds set out in the record, which, under the view we take of the case, it will not be necessary to state. While we concur in the conclusion reached by the circuit judge, that the prayer for a writ of mandamus should be refused, we do not agree with him in the grounds upon which he rested his conclusion. There are, at least, two reasons why the mandamus should have been refused. In the first place, it does not appear that there are any funds in the hands or under the control of the respondent to which petitioners are entitled; for it will be observed that the allegation to that effect in the second paragraph of the petition is distinctly denied by the return, and there is no evidence in the "case" containing the return. In the second place, even if it did appear that the sum of money mentioned in the second paragraph of the petition was "a balance of the constitutional tax and poll tax appointed according to law" to the school district of the city of Florence, we see no reason why the same could not be drawn from the county treasurer by the warrant of the board of school commissioners of said school district; for by the fifth section of the act approved 4th January, 1894 (21 St., at page 635), it is provided "that the county treasurer shall hold the constitutional tax and poll tax to which the said school district is entitled under the general provision of law, subject to the warrant of the board of school commissioners of said school district"; for while it is true that section 1089 of the Revised Statutes of 1893 does provide that "all moneys disbursed by any county treasurer on account of school funds, or taxes, or poll tax, shall be paid on the orders of [the] boards of school trustees, countersigned by the county school commissioner, or as otherwise directed in this chapter," yet as the act of 4th January, 1894, above quoted, which appropriately belongs to "this chapter," does otherwise direct, to wit, that school funds in the hands of the county treasurer, after they have been apportioned to the Florence school district, shall be subject to the warrant of the board of school commissioners of said school district, without any requirement that such warrant shall be countersigned by the school commissioner, we see no necessity for any such countersigning. It will be observed that the words which we have italicized in the foregoing quotation of section 1089 of the Revised Statutes were not

in the section as it originally appeared in the General Statutes of 1882, but were added thereto as a special amendment by the act of 1883 (18 St., at page 537); showing that the legislature did not intend in every instance that school funds should be paid out only on warrants countersigned by the school commissioner. But, be this as it may, it is sufficient, for the purpose of this case, to say that this is not an application to require the school commissioner to countersign a warrant drawn by the board of commissioners of the Florence school district, but the application here is to compel the school commissioner to draw his warrant for the fund in question.

For these reasons we think the judgment below must be affirmed. But we desire to add that, in affirming the judgment, we are not to be understood as indorsing the soundness of the reasoning employed by the circuit judge to sustain his judgment. We do not think that the question of the constitutionality of so much of the act of 4th January, 1894, as authorizes the board of commissioners of the Florence Graded Schools to assess upon each scholar supplementary tuition fees, except in certain cases, can properly be considered or determined in this proceeding, for two reasons: (1) It is a well-settled and most salutary rule that a court should never undertake to pass upon the constitutionality of an act of the legislature—an ordinate branch of the government—unless it is necessary to the determination of the case in which such a question is presented; and, as we have seen, it is not necessary to determination of this case that we should pass upon the constitutionality of so much of the act of 4th January, 1894, as empowers the board of commissioners of the school district of the city of Florence "to assess upon each scholar, as supplementary tuition fees, such sum or sums as may be necessary to the expenses of said schools," accompanied with a proviso that such tuition fees shall not be exacted from those unable to pay the same; for, as is said in Cooley, Const. Lim. (2d Ed.), at page 163: "Neither will a court, as a general rule, pass upon a constitutional question, and decide a statute to be invalid, unless a decision upon that very point becomes necessary to the determination of the cause. \* \* \* In any case, therefore, where a constitutional question is raised, though it may be legitimately presented by the record, yet if the record also presents some other and clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, that course will be adopted, and the question of constitutional power will be left for consideration until a case arises which cannot be disposed of without considering it, and when, consequently, a decision upon such question will be unavoidable." But, in addition to this, it seems to us more than questionable whether it is competent for respondent to raise the constitutional question in this case; for, as is said in Cooley, Const. Lim.,



at pages 163, 164: "Nor will a court listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it. . . . The statute is assumed to be valid until some one complains whose rights it invades. Prima facie, and on the face of the act itself, nothing will generally appear to show that the act is not valid; and it is only when some person attempts to resist its operation, and calls in the aid of the judicial power to pronounce it void as to him, his property or his rights, that the objection of unconstitutionality can be presented and sustained. Respect for the legislature, therefore, concurs with well-established principles of law in the conclusion that such an act is not void, but voidable only; and it follows, as a necessary legal inference from this position, that this ground of avoidance can be taken advantage of by those only who have a right to question the validity of the act, and not by strangers." In this case it appears that the petitioners are doing nothing more than what they are expressly authorized to do by the sixth section of the act of 4th January, 1894, from which the preceding quotation has been made; and if it is claimed that such provision is unconstitutional, and invades or infringes upon the constitutional rights of any citizen, it is for such citizen to raise the question by some proper proceeding against the petitioners, and not for this respondent, whose constitutional rights, so far as we can discover from anything appearing in this case, have neither been invaded nor infringed upon by said act or by the action of the petitioners thereunder. We must therefore decline to indicate any opinion as to the constitutional question, resting our affirmance of the judgment below solely upon the grounds herein above stated, and not upon the grounds presented in the circuit decree. The judgment of this court is that the judgment of the circuit court be affirmed.

(43 S. C. 29)

**AIKEN v. McDONALD et al.**  
(Supreme Court of South Carolina. Jan. 8, 1896.)

**BREACH OF COVENANT OF WARRANTY — MEASURE OF DAMAGES — PARTIAL BREACH.**

1. Liability for breach of a covenant of warranty must be determined by the laws in force when the contract of warranty was made.

2. Act 1824, § 4, p. 24, provides that, in an action on a covenant, the measure of damages shall be the amount of the purchase money at the time of the alienation, with legal interest. *Held*, that where, in an action for breach of warranty, it appears that a life estate was conveyed to the grantee, and enjoyed by him and his grantees, the value of the life estate should be deducted from the damages, though the grantee who brought the action enjoyed but a small portion of such life estate.

Appeal from common pleas circuit court of Fairfield county; R. C. Watts, Judge.

Action by Margaret J. Aiken against James

E. McDonald and another, executors of Thomas W. Rabb, deceased, for breach of covenant of warranty. There was a judgment for plaintiff, and defendants appeal. Reversed.

Alston & Patton, for appellants. Ragsdale & Ragsdale, for respondent.

McIVER, C. J. On the 27th day of December, 1869, defendants' testator, by a deed containing full covenants of warranty, conveyed a certain tract of land containing 74 acres in fee simple to one William Bell, in consideration of the sum of \$450. On the 31st day of August, 1885, all the right, title, and interest of the said William Bell, by several intermediate conveyances, became vested in the plaintiff herein. It is conceded that the testator, Thomas W. Rabb, was not seised of an estate in fee in the said land, but only of an estate for the life of one Mary Marion, and that such estate passed by the deed of 1869 to the said William Bell and those claiming under him by the said several successive intermediate conveyances, and finally became vested in the plaintiff herein. This life estate terminated by the death of Mary Marion on the 21st of January, 1886. It seems that, although the life estate of Mary Marion fell in on the day last mentioned, the plaintiff herein was not disturbed in her possession of the premises until the 6th of February, 1890, when the remainder-men commenced their action against the plaintiff herein to recover possession of the same, of which action the defendants received due notice. That action resulted in a judgment in favor of the remainder-men, under which judgment the plaintiff herein has been evicted. Thereupon this action was commenced to recover damages for the breach of the warranty contained in testator's deed to the said William Bell, wherein it is claimed that the plaintiff is entitled to recover the sum of \$450 (the consideration mentioned in the deed from Thomas W. Rabb to William Bell), with interest thereon from the date of said deed, to wit, December 27, 1869, after deducting certain payments admitted to have been made by defendants before the commencement of this action; it being also admitted that the costs of the action under which plaintiff had been evicted by the remainder-men had been paid by the defendants. The defendants, in their answer, as a first defense, while admitting all the material allegations of fact in the complaint, take issue with the plaintiff as to the legal measure of damages therein claimed. For a second defense they plead satisfaction of plaintiff's claim by payment before the commencement of the action. In the "case" we find the following agreed statement of facts: "It is agreed by counsel in this case that Miss Mary Marion died on the 21st day of January, 1886; that Thomas W. Rabb had a valid estate in the premises in question for the term of her life, and that



his deed passed this estate to his grantee, and by due course of conveyance to the plaintiff; that the value of the use of the estate was the annual sum of \$75; that these facts be considered as duly pleaded, and that they be given whatever consideration they may be entitled to; and that a jury trial be waived." The circuit judge, in his decree, held that the true measure of damages which the plaintiff was entitled to recover was the purchase money mentioned in the deed from Thomas W. Rabb to William Bell, —\$450,—with interest thereon from the date of said deed, viz. 27th December, 1869; and as it was admitted that the defendants had paid the costs of the action under which plaintiff was evicted, and had also made certain other payments to the plaintiff, aggregating the sum of \$505.45, he rendered judgment in favor of the plaintiff for the said sum of \$450 and interest, less the sum of said payments. From this judgment, defendants appeal upon the several grounds set out in the record, which need not be specifically stated here, as, with the exception of the first, they make the single question as to what is the true measure of damages in this case.

The circuit judge held that the law which was in force (the act of 1824) at the time of the making of the contract upon which this action is based must govern, and that it could not be affected by the act of 1879, and the first ground of appeal imputes error to the circuit judge in so holding. The plaintiff bases her action upon the ground that she is the assignee of the covenants contained in the deed of 27th of December, 1869, and upon well-settled principles we think it clear that the contract for the breach of which she sues must be governed by the law which was in force at the time such contract was made. But as the very intelligent counsel, who so ably argued the other point in the case, while not abandoning the first ground, did not press it, we need not pursue the subject further. We come, then, to the main question in this case, which may be thus stated: In an action to recover damages for the breach of a covenant of warranty contained in a conveyance of real estate, is the same measure of damages to be applied to a case where there has been only a partial breach of the warranty as would be applied where there has been a total breach of the warranty? It seems to us that to the question thus stated there can be but one answer. It would be contrary to the plainest principles of justice that one who has lost only a portion of the thing purchased should be entitled to just as much damages as if he had lost the whole of the thing purchased. It is, however, contended by the counsel for respondents, and the circuit judge so held, that under the act of 1824, as construed in the case of Lowrance v. Robertson, 10 S. C. 8, the measure of damages adopted by the circuit judge is fixed by statute, and cannot be departed from. This

is undoubtedly true where there has been a total breach of the warranty; but it by no means follows that the same measure must be applied where there has been only a partial breach of the warranty. In the case of Earle v. Middleton, Cheves, 127 (decided in 1840), the action was upon a covenant of warranty in a deed from Middleton to Earle, purporting to convey 1,020 acres of land, and the breach assigned was the loss of 131 acres by paramount title in a third person. Plaintiff recovered judgment for the value of the 131 acres, and the judgment was affirmed. In that case O'Neill, J., used the following language: "The A. A., 1824, § 4, p. 24, enacts in affirmance of the rule as laid down in *Furman v. Elmore*, 2 Nott & McC. 189 (decided in 1812), *Bond v. Quattlebaum*, 1 McCord, 584 (decided in 1822), and the other cases decided at law, 'that in any action or suit at law or in equity for reimbursement or damages, upon covenant or otherwise, the true measure of damages shall be the amount of the purchase money at the time of the alienation, with legal interest.' Testing the case before us by this act, or by the rule of law settled long before it was enacted, there can be no doubt that the jury adopted the true measure of damages in giving to the plaintiff the proportion of the purchase money which the land recovered bore to the whole tract, with interest from the date of his deed." The same doctrine was recognized and applied in the cases of *Wallace v. Talbot*, 1 McCord, 466, and *Crawford v. Crawford*, 1 Bailey, 128, where there was only a partial breach of the warranty by a deficiency in the number of acres of the land sold. The fact that these cases arose prior to the passage of the act of 1824 cannot make any difference, if, as O'Neill, J., supra, said (what is undoubtedly the fact), the act of 1824 was but an affirmance of the rule which had been settled in this state ever since the case of *Furman v. Elmore*, supra. In addition to this, we have two cases in this state, which arose since the passage of the act of 1824,—*Lewis v. Lewis*, 5 Rich. Law, 12, and *Jeter v. Glenn*, 9 Rich. Law, 374,—in which there was a partial breach of warranty by outstanding estates of dower, and in which the same rule for the measurement of damages was applied. If, then, the rule requires that in case of a partial breach of the warranty by a failure of title to a portion of the thing conveyed there shall be an apportionment of the measure of damages fixed by the statute, based upon the relative values of that portion to which title fails and of that portion to which the title proves to be good, we do not see why, upon the same principle, there should not be a similar apportionment in a case where there is a partial breach of the warranty by reason of a failure of the title to a portion of the estate conveyed. In this case it is conceded that Thomas W. Rabb had a valid estate in the land for the life of Mary Marlon, and that such estate passed by

his conveyance to William Bell, and the same was enjoyed by him and his grantees for the term of 16 years, and that such estate was of the annual rental value of \$75. It seems to us that this life estate must be regarded as representing a portion of the purchase money mentioned as the consideration of the deed to William Bell, and that upon the plainest principles of law and justice the estate of the testator can only be held liable for so much of the purchase money (with the interest thereon) as represented the balance of the estate which did not pass by his deed to Bell, to wit, the estate in remainder after the termination of the life estate of Mary Marion. As the sum of \$450, mentioned as the consideration of the deed to Bell, must be regarded as the value of the fee in the land, in order to arrive at the true measure of damages occasioned by the partial breach of the covenants of warranty it will be necessary to ascertain the relative value of the life estate of Mary Marion, assuming that the sum of \$450 was the value of the fee; and the value of the life estate, ascertained upon this basis, should be deducted from the said sum, and the balance, with interest thereon from the date of the deed from Rabb to Bell, will constitute the true measure of the plaintiff's damages, from which all payment made by defendants to plaintiff must, of course, be deducted.

While no case has been cited, and we have been unable to find any, in which the precise point made by this appeal has been decided in this state, yet we think that the analogies afforded by the cases which we have cited not only warrant, but necessarily require, us to adopt the conclusion which we have reached. Even the case of *Lowrance v. Robertson*, supra, so strongly relied upon by counsel for respondent, is not only not in conflict with our view, but, inferentially at least, supports it. In the first place, that was not a case of a partial breach of warranty, but was a case of a total breach; and the language used in that case in vindication of the rule there adopted indicated very plainly that the court there had in mind only a case where there was a total breach of warranty. Among other things it is there said: "For if a person sells land, for which he has no title, to another, there is certainly no injustice, so far as he is concerned, in taking from him the purchase money and interest for the time for which he has had the money, for it is simply taking from him that which, in equity and good conscience, was never his, and which he ought never to have had." This language, while very appropriate to a case where there has been a total breach of the warranty, would be so wholly inapplicable to a case where there had been only a partial breach of the warranty as to be not only untrue, but absurd. Take the present case as an illustration. It could not, with any propriety or truth, be said that the testator, Rabb, sold land for which he had no title,

for it is conceded that he did have a good and valid title for the life of Mary Marion, which, as the event proved, inured to the benefit of his grantees for the term of 16 years. Nor could it be said that there was no injustice in taking from him money which, in equity and good conscience, was never his, for it cannot be denied that so much of the purchase money as represented the value of the life estate was his, both in equity and good conscience, obtained by parting with an estate of the annual rental value of \$75, which inured to his grantees' benefit for the term of 16 years. The fact that the plaintiff enjoyed the benefits of the life estate for only a small portion (about 5 months) of the 16 years during which the successive grantees of Rabb enjoyed that estate cannot affect the question, for she can only maintain this action as assignee, and she cannot stand in any higher or better position than her assignors. But while, as we have said, there is no case, in our own state, so far as we are informed, which is precisely in point, the research of appellants' counsel has furnished us with abundant authority from standard text writers and decisions in other states which fully support our view. See, also, the case of *Brooks v. Black* (Miss.; 8 South. 332) 24 Am. St. Rep., at page 267, where Mr. Freeman, the learned editor of that valuable publication, has collected in a note a number of cases in support of the view which we have adopted.

Counsel for appellants has asked this court, in the event this appeal is sustained, to go on and fix the value of the life estate, and thus ascertain whether the plaintiff is entitled to recover anything; claiming that, after deducting the admitted payments, there will be really nothing due. Inasmuch as the question of the value of the life estate was not considered or passed upon by the court below, we doubt the propriety of this court undertaking to do so, and therefore, without intimating any opinion as to the proper rule for ascertaining such value, we will simply reverse the judgment, and remand that question to the circuit court. The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial, in order that the views herein announced may be carried into effect.

(38 S. C. 52)

#### STATE v. FAILE.

(Supreme Court of South Carolina. Jan. 9, 1895.)

PROSECUTION FOR MURDER—DYING DECLARATIONS—AMENDMENT OF INDICTMENT—WAIVER OF CONSTITUTIONAL RIGHTS—ANIMUS OF DECEASED—UNCOMMUNICATED THREATS.

1. The dying declarations of a murdered person are admissible to establish the identity of the murderer, when it is proven that (1) the death of deceased was imminent at the time the declarations were made; (2) that the deceased was so fully aware of this as to be without hope or recovery; and (3) that the subject

of the charge was the death of the declarant, and the circumstances of the death were the subject of the declaration.

2. An error in an indictment found by a grand jury may be waived by the consent, in open court, of the defendant or his attorney to an amendment thereof, though this involves the waiver of defendant's rights under Const. art. 1, §§ 13, 19, to a description of the crime and a presentment by the grand jury.

3. On a trial for murder, uncommunicated threats of the deceased against defendant are admissible to show the animus of deceased towards defendant at the time of the meeting, as evidence that he was the aggressor, but not to show the quo animo of defendant.

Appeal from common pleas circuit court of Lancaster county; Ernest Gary, Judge.

John A. Faile was convicted of murder, and appeals. Reversed.

Hough & Hough and Jones & Williams, for appellant. H. H. Newton and W. S. Blakeney, for the State.

GARY, J. At the October, 1893, term of the court of general sessions for Lancaster county the defendant John A. Faile, with William C. Faile and Dunbar Robertson, was tried for the murder of John L. Baker, alias James L. Baker, alias Buster Baker. The jury acquitted William C. Faile and Dunbar Robertson, but found the defendant John A. Faile guilty, who was thereupon sentenced to be hanged on the 12th day of January, A. D. 1894. At a previous term of said court an order was granted appointing H. H. Newton and W. S. Blakeney solicitors to prosecute this case in the place of M. J. Hough, solicitor, who was disqualified by reason of having been paid a retainer fee by the defendants before he was elected solicitor. In the indictment, as found by the grand jury, the deceased was described as "John L. Baker." At the commencement of the trial H. H. Newton and W. S. Blakeney, acting solicitors, amended the indictment by adding after the words "John L. Baker" the words, "alias James L. Baker, alias Buster Baker," without sending the indictment back to the grand jury. The following entry appears upon the sessions journal during the October, 1893, term of said court: "Before the grand jury was discharged Messrs. Newton & Blakeney, acting solicitors in the case of The State vs. John A. Faile, William C. Faile, and Dunbar Robertson, arose and announced to the court that, with the consent of Messrs. Hough & Hough, attorneys for the defense in said case, they would amend the indictment in said case by inserting after the name of John L. Baker, wherever the same appears in said indictment, the words, 'alias James L. Baker, alias Buster Baker.' Messrs. Hough & Hough being present and consenting, it was ordered that the indictment be so amended." A motion for new trial was made by the defendant John A. Faile upon several grounds, which will be set forth in the report of this case. The motion was refused. The defendant John A. Faile appealed to this court on the grounds stated in

his motion for a new trial, and on the additional ground "that the indictment, as found by the grand jury, contained the name of John L. Baker alone as having been murdered by John A. Faile, Wm. C. Faile, and Dunbar Robertson, and the aliases, to wit, the words, 'alias James L. Baker, alias Buster Baker,' were inserted in the indictment in open court, after said finding of the grand jury, and without warrant of law." Also upon the additional ground that his honor, the presiding judge, erred in excluding testimony as to the alleged uncommunicated threats by the deceased; this court upon motion having allowed the defendant, in *favorem vite*, to except to such ruling.

Appellant's attorneys did not argue the first, second, and third grounds. There is nothing in the case showing that any questions but those of fact are involved in them, and, under the numerous decisions in this state, they cannot, therefore, be reviewed by this court. The first three exceptions are overruled.

The fourth exception raises the question as to the admissibility of the dying declarations. The rule governing the admissibility of dying declarations is stated by Chief Justice McIver in *State v. Banister*, 35 S. C. 290, 14 S. E. 678, as follows: "To render these declarations admissible, it was only necessary that the trial judge should be satisfied (1) that the death of deceased was imminent at the time the declarations were made; (2) that the deceased was so fully aware of this as to be without hope of recovery; (3) that the subject of the charge was the death of the declarant, and the circumstances of the death was the subject of the declarations." There was in this case a compliance with all these requirements. The deceased was shot on Sunday night, and died the succeeding Monday night, only surviving after the difficulty about 24 hours. He was wounded by two balls. One went directly through the upper part of the thigh, striking the femur. The other ball glanced off the crest of the ilium, curved, and came through the intestines, and through the left lobe of the liver, striking against the ninth rib on the same side, and falling down in the cavity of the bowels. The last mentioned was the fatal ball. The doctor was asked: "Well, doctor, what have you to say about the cause of death on that man whom you examined?" He answered: "Well, that ball that made that curve was the fatal ball. It penetrated the bowels in several places, and went through the lower left lobe of the liver, which would have been necessarily fatal. I found the contents of the bowels all loose in the cavity when I cut into it. I found the contents of the bowels all run out, and the mesenteric membranes were wounded." The dying declarations were made on the night of the homicide. The doctor testified that the mind of the deceased was clear, and he said he was killed. Doc Baker, his brother, testified he said: "Doc, I hate to tel"

you; I am bound to die;" also that the deceased said he was shot in the bowels, and that Buster had no hope of recovery. A. F. Harris testified that Buster said he was a dying boy, and could not live. E. J. Lowry testified that he heard deceased say he was a ruined boy, and was bound to die. Deceased said to George Hunnington: "George, I am bound to die; I am bound to die; I am killed." The deceased stated that night that John A. Falle shot him, and gave the details as to the shooting. There was some testimony as to the conduct of the deceased next day, when he appears to have been in a sinking condition, but we do not regard it as material. This exception is therefore overruled.

We will next consider the exception relative to the amendment of the indictment. Section 13, art. 1, of our constitution, provides: "No person shall be held to answer for any crime or offense, until the same is fully, fairly, plainly, substantially, and formally described to him; or be compelled to accuse or furnish evidence against himself; and every person shall have a right to produce all proofs that may be favorable to him, to meet the witnesses against him face to face, to have a speedy and public trial by an impartial jury, and to be heard in his defense by himself or by his counsel, or by both as he may elect." Section 19, art. 1, provides that "no person shall be held to answer for any higher crime or offense unless on presentment of a grand jury, except in cases arising in the land and naval services, or in the militia when in actual service in time of war or public danger. The court in the case of *State v. Blakeney*, 33 S. C. 111, 11 S. E. 637, uses this language: "If the indictment had been defective in the particular alleged by the appellant, to wit, in failing to state the place of the death of the deceased, then we think the grounds of appeal would demand a reversal of the judgment below. We suppose that it can hardly be necessary to cite authority to the fact that it is absolutely essential in an indictment like that here that the place of the death of the party killed should be alleged therein, and that, in the absence of such allegation, such indictment is fatally defective, and should be quashed on motion made, and we think, further, that such a defective indictment is beyond the reach of amendment. True, under section 5, p. 830, Act 1887, much of the useless phraseology which characterized indictments in former times may be dispensed with, and omissions of mere forms may be cured by amendments; but this act has neither dispensed with essential allegations, nor has it attempted to cure their omissions by allowing amendments to that end. Indeed, we may say that we do not think that the general assembly would have the power to provide for the amendment of indictments to the extent claimed here, and in a matter so vital as the place of the death of the party killed, which is absolutely necessary to be alleged, in

a jurisdictional point of view, and must be passed upon by the grand jury in accordance with the constitutional rights of the accused. We do not think, therefore, that the act in question was intended to reach thus far. We concur, too, in the position that, had the indictment been defective in the matter complained of, it would have been error to have allowed the trial to proceed on the indictment as amended, because, as contended, this would have jeopardized the accused upon an indictment not found by the grand jury, and in violation of his constitutional rights. So, too, for the same reason, there would have been error in refusing the motion in arrest of judgment." This principle is also sustained by the cases of *Ex parte Bain*, 7 Sup. Ct. 781, and *Com. v. Mahar*, 16 Pick. 120. The question in this case, however, is not whether such amendment is against the constitutional right guaranteed to the prisoner for his protection, but whether he has waived his right to insist upon such constitutional provision. These provisions of the constitution are for the protection and benefit of the prisoner, and can be waived by him when in his judgment it is to his advantage to do so. 2 Herm. Estop. p. 954, says: "Waiver is voluntary, and implies an election to dispense with something of value, or forego some advantage, which the party waiving it might at his option have demanded or insisted upon. A waiver takes place where a man dispenses with the performance of something which he has a right to exact. A party may waive a constitutional as well as a statutory provision for his benefit, as a trial by jury, though that mode is guaranteed to him by the constitution; and, when waived by such party, he will be estopped from setting them up or claiming them." The same author, at page 958, says: "A defendant has a constitutional right to a speedy trial, yet he may waive this provision by obtaining a continuance. He may plead guilty, which generally dispenses with a jury trial, and it is thereby waived." Although the constitution confers upon the accused the right to meet the witnesses against him face to face, it is an unquestioned practice for the accused to waive such right, and consent to the introduction in evidence of testimony taken upon a former trial. The constitution confers upon the prisoner the right to be tried by an impartial jury, yet he waived such right by failing to object at the proper time. In the case of *State v. Stephens*, 11 S. C. 319, the court, in speaking of objections to the drawing, summoning, and impanelling of the petit jury, says: "It is too late to allege such defects either in the panel or in individual jurors after the swearing of the jury,"—citing a number of authorities. The case of *State v. Thompson*, Cheves, 31, shows that objection to a defective indictment may be waived by failing to interpose such objection at the proper time. In that case the court quotes with approval the following rule from 1 Chit. Cr. Law, 202, to wit: "The name and addi-

tion of the party indicted ought regularly to be truly inserted in every indictment; but whatever mistake may be made in these respects, if the defendant appears and pleads not guilty, he cannot afterwards take advantage of the error." The court then proceeds as follows: "It was observed that there was no hardship in the rule, for the prisoner lost no advantage or privilege by it on his trial, and, if he had need afterwards to resort to a plea of *autrefois* convict, he would be allowed to show that he was the same person heretofore convicted by the name of William Foster." The syllabus of the case of *State v. Quarrel*, 2 Bay, 150, in which the accused was convicted of murder, is as follows: "If an alien is drawn and impaneled as a juror, it is a good cause of challenge before trial; but, if permitted to be sworn by the prisoner, it is too late after trial and conviction to make it a ground for a new trial." It might work a great hardship on the prisoner not to be allowed to waive even a constitutional right. He may be influenced to consent to such waiver because his witnesses are present, and he may fear that he will not be able to secure their attendance at a future term of the court, or he may prefer to have his case tried by the jurors at that term of the court, or he may be influenced to such action by numberless other considerations. Mr. Justice Brewer, in speaking for the court in the case of *Ex parte Wilson*, 11 Sup. Ct. 870, uses the following language in meeting an objection to the alleged unconstitutionality of the grand jury, which found a true bill on the indictment under which the prisoner was convicted: "Indeed, it may be considered doubtful, at least, whether such defect is not waived if not taken advantage of before trial and judgment. In the case of *U. S. v. Gale*, 109 U. S. 65, 3 Sup. Ct. 1, a question as to the competency of the grand jury was presented for the first time on a motion in arrest of judgment, and from the decision of the trial court came to this court on a certificate of division. The objection was that in the organization of the grand jury the court, under the authority of section 820, Rev. St., excluded from the panel persons otherwise qualified, who voluntarily took part in the Rebellion. The unconstitutionality of this section was asserted, but this court declined to pass upon that question; holding that the defendants, by pleading to the indictment and going to trial without making any objection to the grand jury, waived any right of subsequent complaint on account thereof. Mr. Justice Bradley, delivering the opinion of the court, reviews the authorities at length, and shows that they clearly sustain the conclusion announced. The opinion is carefully guarded, and does not reach to the precise question here presented, but its implication and the drift of the authorities referred to are that a defect in the constitution or organization of a grand jury, which does not prevent the presence of 12 competent jurors, by whose votes the indict-

ment is found, and which could have been cured, if the attention of the court had been called to it at the time, or promptly remedied by the impaneling of a competent grand jury, is waived if the defendant treats the indictment as sufficient, pleads not guilty, and goes to trial on the merits of the charge. There is good sense in this conclusion. The indictment is the charge of the state against the defendant, the pleading by which he is informed of the fact, and the nature and scope of the accusation. When that indictment is presented, that accusation made, that pleading filed, the accused has two courses of procedure open to him. He may question the propriety of the accusation, the manner in which it has been presented, the source from which it proceeds, and have these matters promptly and properly determined; or, waiving them, he may put in issue the truth of the accusation, and demand the judgment of his peers on the merits of the charge. If he omits the former, and chooses the latter, he ought not, when defeated on the latter,—when found guilty of the crime charged,—to be permitted to go back to the former, and inquire as to the manner and means by which the charge was presented,"—citing an array of authorities. The facts in this case show that not only was the waiver made by the prisoner's attorneys at the commencement of the case, but, when Dr. Dozier was on the stand, he was asked, "What other name besides Buster did he have? Ans. I think he signed his name J. L. Baker. Q. You don't know whether it was James or John? Ans. No, sir. Mr. Hough: We make no question as to his name." The prisoner must necessarily have been present when this statement was made, and yet no objection was interposed. The deceased was called "John Baker" in the affidavit of Fannie Hair, used by the prisoners in their application for bail. The deceased was called "John L. Baker" in the testimony of Dunbar Robertson. In cross-examining Fannie Hair she is questioned as to "John Baker" by defendants' attorney. The prisoner has in no way been prejudiced by the amendment, and this exception is overruled.

The last exception raises objection to the ruling of the trial judge in regard to uncommunicated threats made by the deceased. In the case of *State v. Bodie*, 33 S. C. 130, 11 S. E. 624, the court says that there may be cases in which uncommunicated threats might be competent, and cites *Wiggins v. People*, 93 U. S. 465. In that case the court says: "Although there is some conflict of authority as to the admission of threats of the deceased against the prisoner in case of homicide, where the threats had not been communicated to him, there is a modification of the doctrine in more recent times, established by the decisions of courts of high authority, which is very well stated by Wharton in his work on Criminal Law (section 1027): 'Where the question is as to what was

deceased's attitude at the time of the encounter, recent threats may become relevant to show that this attitude was one hostile to the defendant, even though such threats were not communicated to defendant. The evidence is not relevant to show the *quo animo* of the defendant, but it may be relevant to show that at the time of the meeting the deceased was seeking defendant's life." In *People v. Scoggins*, 37 Cal. 677, the rule is well expressed as follows: "If a deadly encounter occurs between two persons, in which one is killed, and if the survivor claim that he acted in self-defense, the evidence of those who witnessed the transaction may leave it in doubt which of the two was the assailant. There may even be very slight proof that the deceased was the aggressor, and yet if it be established that, shortly before the affray, the deceased armed himself with a deadly weapon, declaring, with apparent sincerity and earnestness, that he had procured it with a fixed determination to take the life of his adversary on sight, it cannot be denied that this would tend in some degree to corroborate whatever other evidence there was tending to show that the deceased was the assailant. Of itself, and unsupported by other facts, it might and probably would be deemed wholly insufficient to establish the fact proposed. Nevertheless, it would constitute an item of proof tending, it might be slightly, but still in some degree, towards the conclusion proposed to be established. The weight to be attached to it is for the jury to consider, in connection with the other proofs; and it would be the duty of the court to explain to the jury, carefully, that the proof was admitted only as tending to corroborate whatever other evidence there was that the deceased was the assailant, and for no other purposes. It is alleged, however, that in this case there was an entire absence of proof that the deceased was the assailant, and that evidence of the previous threats ought not to be admitted, because there was, in fact, no proof whatever that the defendant acted in self-defense. But, without attempting to analyze the proofs, it is enough for us to say, on this point, that Mrs. Lowery was the only witness immediately present at the time of the encounter, and, though she testified she had the pistol in her lap at the moment when her husband was shot, and had not parted with it from the time when she received it from Crouch, it was for the jury to decide upon her credibility." In the case of *Little v. State* (Tenn.), reported in *Cases of Self-Defense* by *Horriگان & Thomson*, at page 490, this language is used: "The prisoner offered proof of other threats made against him by the deceased, but which had not been communicated to the prisoner, and the proof was likewise rejected. The true rule upon this question we apprehend to be this: Previous threats of the deceased, communicated to the prisoner, tend to show the state of mind of the prisoner,

the apprehension under which he was acting, and tend to illustrate his conduct and motives, in connection with the other facts and circumstances of the case. Previous threats of the deceased against the prisoner, but not communicated to him, do not furnish the same evidence of the motives brought to bear upon the prisoner's mind, and are not admissible for the same purpose. But, in all cases where the acts of the deceased in reference to the fatal meeting are of a doubtful character, then evidence which may tend to show that he sought the meeting or began or provoked a combat is admissible. And in this view, previous threats by the deceased, though not communicated to the prisoner, may yet tend to show the animus of the deceased, and to illustrate his conduct and motives, and in some cases might be important, in the absence of more direct evidence, to show which party began or provoked the fight. Threats of this character are in proper cases admissible, but for a different purpose from the former class of cases,"—citing quite a number of authorities. This principle is also discussed with approval in the cases of *Stokes v. People*, 53 N. Y. 174; *Keener v. State*, 18 Ga. 194; *Campbell v. People*, 16 Ill. 18; *Holler v. State*, 37 Ind. 57; *People v. Arnold*, 15 Cal. 476. When the plea of self-defense is relied upon, and there is conflict of testimony as to who was the aggressor in bringing about the difficulty, uncommunicated threats made by the deceased against his slayer are competent evidence to show the attitude of the deceased towards the prisoner, but not for the purpose of showing the *quo animo* of the prisoner. The testimony of *Dunbar Robertson* was to the effect that the deceased made the first assault upon the defendant *John A. Falle* at the time of the homicide. After he testified, the defendants' attorneys attempted to prove by the witness *Hennie Craig* that about two weeks before the homicide, when the deceased was loading his pistol, he made threats against the parties indicted for the murder of the deceased, when he heard them making a boisterous noise up the road towards *Taxahaw*. The presiding judge ruled as follows: "Q. by Atty.: What did he say? (Mr. Solicitor objects to the declarations of *Buster Baker*.) The Court: I think if the threats were communicated to one of the defendants it would be competent. Q. by Atty.: Did you tell anybody about it? (Mr. Solicitor objects upon the ground that, unless the threat was throughout the community, it is not competent.) The Court: Unless the threat that was made was generally known throughout the community, it is not competent." Although there are cases sustaining the ruling of the presiding judge, we prefer to adopt the rule announced in the cases from which we have quoted. We therefore think there was error in excluding testimony as to the uncommunicated threats. It is the judgment of this court that the judg-

ment of the circuit court be reversed, and that the cause be remanded to the circuit court for a new trial.

(43 S. C. 63)

### HAYGOOD v. BONEY.

(Supreme Court of South Carolina. Jan. 9, 1895.)

#### FACTS CONSTITUTING COUNTERCLAIM—JURISDICTION OF JUSTICE.

1. Where plaintiff sues to recover a balance due under a contract to serve defendant as a farm laborer, and to take good care of the latter's stock, a counterclaim may properly be based upon an allegation that he cruelly killed a horse while working it.

2. A justice is deprived of jurisdiction by a counterclaim for an amount exceeding \$100.

Appeal from common pleas circuit court of Fairfield county; R. O. Watts, Judge.

Action in a justice court by G. C. Haygood against O. B. Boney. From an order of the circuit court reversing a judgment for plaintiff, plaintiff appeals. Affirmed.

Buchanan & Hanahan, for appellant.  
Obear & Douglass, for respondent.

GARY, J. The plaintiff sued the defendant in a trial justice's court to recover the sum of \$66.95, the balance alleged to be due for services as a farm laborer during the year 1893. The defendant answered, setting up—First, a denial of any indebtedness to the plaintiff; second, that plaintiff failed to perform his contract to labor for and faithfully serve the defendant, and caused him great loss by his negligence; and, third, by way of counterclaim, the damages alleged to have been sustained, to the amount of \$125, by reason of the killing of his horse, through the careless and cruel conduct of the plaintiff. The plaintiff worked the horse, in pursuance of his contract to serve the defendant as a farm laborer, and take good care of the stock, until the death of the said horse, in June of the year 1893. At the hearing the trial justice ordered, on plaintiff's motion, that the counterclaim be stricken from the answer. The jury rendered a verdict for the plaintiff for \$66.95. The defendant appealed to the circuit court, and the judgment was reversed, and a new trial ordered.

The plaintiff appealed from the said order, and, by his exceptions, raises practically two questions: First. Did the facts alleged in the answer constitute a counterclaim to plaintiff's action? Second. Did the trial justice have jurisdiction of the counterclaim when the amount claimed exceeded \$100? The defendant served notice that he would ask that the order of his honor, Judge Watts, be sustained upon the additional grounds therein set forth, showing that the judgment of the trial justice should be reversed. These additional grounds will, however, not be considered by this court, as we do not propose to set aside so much of the order of his

honor, Judge Watts, as reverses the judgment of the trial justice and grants a new trial.

Without going into a discussion of the nice distinctions in a number of the authorities as to the judicial construction to be placed on the words "arising out of the contract or transaction," and "connected with the subject of the action," we are satisfied that the facts alleged in the answer constitute a counterclaim in this action. A part of plaintiff's obligation was to take good care of the stock, and to be at all times a faithful, diligent, and careful employé. The answer alleges that, while working a horse under said contract, he cruelly killed it. If these facts are established, we do not see how there can be any question about their constituting a proper counterclaim in this action. The amount, however, claimed in said counterclaim, exceeded \$100, and the trial justice was without jurisdiction. Subdivision 2, § 71, of the Code provides that trial justices shall have jurisdiction "in actions for damages, for injury to rights pertaining to the person or the personal or real property, if the damages claimed do not exceed one hundred dollars." Subdivision 4, § 88, of the Code provides that "the answer may contain a denial of the complaint, or any part thereof, and also a notice, in a plain and direct manner, of any facts constituting a defense or counterclaim." The manner in which a counterclaim is regarded in this state appears by the following language in the case of *Plyer v. Parker*, 10 S. C. 466: "The plaintiff or plaintiffs against whom the claim is set up must be such as would be entitled to seek a several judgment against the defendant or defendants setting up the claim, and the said defendants must show a cause of action which would entitle them to a several judgment against the plaintiff or plaintiffs; for in pleading the counterclaim the defendant becomes the actor, and is governed by the same rule which would apply were he the plaintiff in a separate action on the cause set up in the defense." The defendant had the right to give jurisdiction to the trial justice by claiming in his counterclaim an amount that did not exceed \$100. It is the amount claimed that determines the question of jurisdiction. *Catawba Mills v. Hood* (S. C.) 20 S. E. 91. The counterclaim set up in the answer herein could not have been interposed as a set-off under the practice prevailing in this state before the adoption of the Code. In the case of *Beckham v. Peay*, 1 Bailey, 121, it is held that, if the defendant in summary process have a discount which exceeds the summary jurisdiction, the court, on being satisfied of its merits, will order the plaintiff to declare in the higher jurisdiction, to enable the defendant to set up his discount. Whatever may be the practice in other states, we are satisfied a trial justice has not jurisdiction where the amount set up in a counterclaim exceeds

**\$100.** It is the judgment of this court that, for the reasons herein set forth, the order of the circuit court be affirmed, and that the case be remanded to the circuit court for such further proceedings as may be necessary to carry out the views herein announced, with leave to the defendant to amend his counterclaim by claiming an amount not exceeding \$100, within 20 days after notice of the remittitur herein.

(43 S. C. 5)

**HEWITT et al. v. DARLINGTON PHOSPHATE CO. et al.**

(Supreme Court of South Carolina. Jan. 8, 1895.)

**ACCEPTANCE OF ASSIGNMENT—AUTHORITY OF ATTORNEY.**

1. Where an assignment for the benefit of creditors requires the creditors to accept it, and release the debtor within a certain time, an acceptance, not under seal, stating that the creditor "agrees" to accept the assignment in discharge of his claim, is sufficient.

2. A letter from a creditor to his attorney in reference to an assignment by his debtor, stating that he authorizes the attorney to represent him at a creditors' meeting, and directing the attorney to do what will best advance the creditor's interest, authorizes the attorney to accept the assignment and release the debtor.

Appeal from common pleas circuit court of Darlington county; W. O. Benet, Judge.

Action by O. W. Hewitt, as assignee, and another, against the Darlington Phosphate Company and others, for the settlement of the estate of the assignor. From the decree George W. Steffens & Son and others appeal. Reversed.

The letter referred to in the opinion was as follows: "Mr. C. M. Ward, Darlington, S. C.—Dear Sir: We inclose you a notice from Mr. O. W. Hewitt, assignee for Joye & Sanders, asking us to attend a meeting of the creditors of the said firm, to be held in your place on the 28th of Oct., 1893. We also inclose you a copy of our reply to Mr. Hewitt, saying that you were authorized to represent our interest in the said meeting of creditors. Please do this, and take such steps as you think best for your interest and ours. The note which you turned over to us of the above firm is for \$697.50, due Nov. 10th—18th, 1893, and the said note was sent by us to the Bank of Darlington, where it is still held. We have already advised you that several of the notes you sent us, maturing on the 15th—18th of this month, have not been paid. We think it highly important to your interest and ours that you be vigilant in looking after our mutual interest. Please let us hear from you in regard to them. Awaiting your prompt reply, we are yours, truly, S. W. Travers & Co."

Abney & Thomas, Dargan & Thompson, and W. F. Dargan, for appellants. Nettles & Nettles, for respondents.

GARY, J. On the 17th day of October, 1893, T. S. Joye and J. H. Sanders executed

a deed of assignment to O. W. Hewitt for the benefit of their creditors. The assignment provided, first, for the payment of the claims of those creditors "who shall, at or before 12 o'clock meridian on the 27th day of November, '93, accept in writing the terms of this assignment, and in consideration thereof execute a release or releases of their claims against us," etc. In due time, the following were filed:

"Charleston, S. C., Nov. 24th, 1893. O. W. Hewitt, Esq., Assignee Joye and Sanders, Darlington, S. C.—Dear Sir: We hereby accept terms of assignment of estate Joye and Sanders, and agree to accept any dividends accruing under same in full payment of our account. Respectfully, George W. Steffens and Son."

"To O. W. Hewitt, Assignee of Joye and Sanders, and E. O. Woods, Agent of the Creditors: We agree to accept the terms of the assignment in full settlement and release of our claims. Witness our hands and seals this November 15th, 1893. C. Schepflin and Co. [L. S.] Christian Schepflin. [L. S.] Peter Schultz. [L. S.]"

"We, the undersigned, accept the terms of the assignment made by Joye and Sanders for the benefit of their creditors of date Oct. 17th, 1893, and in consideration of the payment of our pro rata of their assets hereby release our claims against them or either of them. S. W. Travers and Co., per C. M. Ward, Atty. in Fact.

"Attest: Geo. W. Brown."

His honor, Judge Benet, decided upon circuit that the foregoing instruments of writing were null and void as acceptances and releases under the deed of assignment. The presiding judge relied upon the cases of Jaffray v. Steedman, 85 S. C. 38, 14 S. E. 632; Burgess v. Westmoreland, 38 S. C. 427, 17 S. E. 56; and Armstrong v. Hurst (S. C.) 18 S. E. 150. Mr. Justice McGowan, in behalf of the court, in the case of Jaffray v. Steedman, 85 S. C. 38, 14 S. E. 632, says: "It is manifest that the purpose of their assignment was to give the same rights to all the creditors. It is true, it classified the creditors, leaving it, however, to themselves to elect under which class they would come in,—those to be first paid who shall, at or before a given time, accept in writing the terms of the assignment, and in consideration thereof execute a release or releases of their claims against the parties of the first part; and then and next to pay all other creditors in full or pro rata without requiring release, etc. This did not violate the law against preferences. Trumbo v. Hamel, 29 S. C. 527, 8 S. E. 83. It seems that all the creditors gave notice in writing of their acceptance of the terms of the assignment before the time limited for that purpose, but that none of them executed 'releases' of their claims except the plaintiffs, who executed and delivered a formal release of the balance of their claim against the debtors; and they now insist that they alone



of all the creditors complied with the terms of the agreement as to the class of creditors provided for in paragraph No. 2, and that, therefore, they are entitled to be first paid. The circuit judge so ruled, and the only question in the case is whether that ruling was error. All agree that plaintiffs are entitled to stand in class No. 2, but it is insisted that all the other creditors who accepted in time the terms of the assignment are, notwithstanding they executed no releases, also entitled to be ranked in that class, on the grounds that the assignment did not require the release to be executed within the time fixed for its acceptance, and, indeed, may be still executed, but, if not, that there really was no necessity for the execution of the former release, as the written acceptance itself operated as a satisfaction in full of the balance of the accepting creditors' claims, and therefore in fact and in law constituted a 'release' in the sense of the statute, and of the assignment, which is in the same terms. The words of the assignment are very clear and positive,—'shall, at or before [a day and hour named] accept in writing the terms of the assignment, and in consideration thereof execute a release or releases of their claims,' etc. Two things were required—acceptance and release—upon the same subject-matter, one the supplement of the other, and coupled together by the word 'and' in the same sentence. It seems to us that from the mere reading it must be obvious that the intention was that both the acceptance and release should be within the time indicated. But it is further contended that the acceptance in writing alone should be regarded as tantamount to a release, and that the clause expressly requiring the execution of releases may be regarded as surplusage. The court has no dispensing power, and we do not think we are at liberty to expunge the clause by construction. If acceptance alone was, to all intents and purposes, a release, we do not see why the requirement as to releases should have been superadded." Mr. Justice McGowan, in delivering the opinion of the court in *Burgiss v. Westmoreland*, 38 S. C. 428, 17 S. E. 56, says: "Neither the assignment act nor the deed of assignment makes any mention of a seal, and we think it manifest that the only object of requiring the execution of a release was to secure, under certain conditions, the absolute discharge of the debtor as to the portion of the debt not paid by the pro rata under the assignment, and, as a consequence, that a paper which is sufficient for that purpose is a substantial compliance with the requirement, although not a technical release under seal. As the instruments executed in time, with or without seals, would discharge the debtor, it would seem very technical to hold that a creditor should be deprived of all benefit under the assignment, simply because his relinquishing paper is without a seal. Although, in general, a creditor, who sepa-

ately agrees to take less than his entire demand, is not legally bound by such agreement, for want of adequate consideration, yet where several creditors, on the faith of other stipulations, enter into an agreement of that nature, whether by deed or unstamped memorandum, each is legally bound by it, and he cannot either privately receive or sue his debtor for a larger dividend than the rest. Chit. Prom. Notes, 279." In the case of *Armstrong v. Hurst* (S. C.) 18 S. E. 150, it appears that on the 26th of January, 1892, Messrs. Perry & Heywood, as attorneys for certain of the creditors therein named, filed with the assignee a notice, of which the following is a copy: "To Mr. J. C. Rogers, Assignee, Greenville, S. C.: Take notice that the creditors whose names appear upon the list hereto attached, with their respective claims against the firm of Dacus and Jordan, hereby accept the terms of the assignment made to you by the firm of Dacus and Jordan—N. C. Dacus and M. M. Jordan—on the 27th day of November, A. D. 1891, and offer releases of their said claims, respectively, as required by said assignment." The court, in speaking of a case similar to the one just mentioned, in which the acceptance and release were held to be null and void under the assignment, says: "The reason of this ruling doubtless was that, the object being to fix the rights of the parties at the time specified, a mere offer, which might be withdrawn before it was accepted and acted upon, would not be sufficient." We think the conclusion at which the presiding judge arrived was perhaps due to the fact that he was not aware that in the case of *Burgiss v. Westmoreland*, upon which he principally relied, only three of the defendant creditors appeared; and the rights of Darman & Cannon and Arnold & McCord were not before the supreme court for adjudication when that decision was rendered. This fact does not appear in the opinion of the supreme court, but does appear on page 11 of the "case."

The foregoing cases show: (1) That in accepting the terms of an assignment made for the benefit of creditors, and executing releases of claims, neither a seal nor any particular form of release is necessary. (2) That it is sufficient if the writing shows an intention to accept the terms of the assignment, and to release in praesenti the debtor from all liability except under the deed of assignment. (3) That a mere offer to release, being executory in its nature, and subject to withdrawal by the creditor, is not sufficient. (4) That a mere acceptance of the terms of an assignment, without the execution of a release is not sufficient. The three acceptances and releases in this case show: (1) That it was the intention of the creditors executing them to accept the terms of the assignment. (2) That it was the intention of the creditors executing them to release the debtors from all future liability on their claims. (3) That it was the intention of

such creditors that the acceptances and releases should take effect in praesenti. Such being the case, they are all valid under the assignment.

Objection has been urged against the validity of the acceptance and release executed by S. W. Travers & Co., per O. M. Ward, on the ground that O. M. Ward had no authority to act in the premises. The letter to him from S. W. Travers & Co., which will be set out in the report of the case, authorized such action. The omission of the word "release" in the acceptance of release of S. W. Travers & Co. is manifestly a mere clerical error. It is the judgment of this court that the judgment of the court below be reversed, and that the case be remanded to the court of common pleas for Darlington county for such further proceedings as may be necessary to carry out our views herein announced.

(43 S. C. 70)

**CAVENY v. NEELY et al.**

(Supreme Court of South Carolina. Jan. 9, 1895.)

**CARRIERS — INJURIES TO PASSENGERS — INSTRUCTIONS.**

1. In an action against a carrier for personal injuries caused by the negligence of defendant's servant in driving the coach into a post, thereby causing the horses to run away, evidence of negligence on the part of the servant in deserting the coach after the collision is admissible.

2. The failure to charge, where not requested to do so, will not support an exception.

3. A carrier of passengers for hire is required to furnish suitable vehicles, skillful servants, and suitable appliances for conduct of his servant.

Appeal from common pleas circuit court of York county; James Aldrich, Judge.

Action by W. J. Caveny against J. Harvey Neely and another for personal injuries. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Wilson & Wilson, for appellants. Hart & Hart and Finley & Brice, for respondent.

**GARY, J.** This was an action for damages, brought against the defendants by the plaintiff, who fell or was thrown from defendants' hack while being driven from the business part of Rock Hill to Oakland Park, on the outskirts of the city. Paragraph 4 of the complaint alleges negligence, as follows: "That soon after said vehicle began its trip, and while in the streets of said town, owing to the carelessness and negligence of defendants' servant conducting the same, it was allowed to come in collision with, and driven against, a post standing near the street, causing the breaking of the pole or tongue of said hack, and causing the horses drawing the same to become frightened and to run, and the agent and servant driving and conducting the horses thereupon abandoned the hack, and left the horses drawing

the same without control; that thereafter said hack was drawn at a rapid rate by the uncontrolled horses, at great peril to plaintiff and the other passengers therein, and was overturned and broken; that the plaintiff fell or was violently thrown therefrom during the flight of the horses, and just before the upsetting of the vehicle, whereby he received severe and dangerous injuries to his person, to wit," etc. The jury rendered a verdict for the plaintiff in the sum of \$500. The defendants appealed to this court on the following exceptions: "(1) For that his honor erred in admitting testimony, over defendants' objections, going to prove acts of carelessness or negligence on the part of defendants' servant after the vehicle came in collision with the post, except as going to show what damage resulted. (2) Because he refused and failed to charge the jury that the defendants could only be held responsible for the carelessness and negligence of defendants' servant in allowing the vehicle to come in collision with, and to be driven against, a post standing near the street. (3) Because he charged that a master must provide suitable appliances for conduct of his servants, and that they (carriers of passengers for hire) are bound to furnish good vehicles and skillful servants."

The first exception cannot be sustained, because: (1) The testimony objected to was in response to the allegations of the complaint. (2) It was admissible for the purpose of showing that the injury alleged was the proximate and natural result of the negligence and carelessness of the defendants set forth in the complaint. *Harrison v. Berkley*, 1 Strob. 549, 551. In that case the court says, "The defendant cannot complain that an agent which his own act naturally brought into operation has occurred to produce the result."

The second exception cannot be sustained, because: (1) There is nothing in the case showing that the presiding judge refused to charge as therein set forth, and a failure to charge, unless requested, will not support an exception to this court. (2) It would have been error on the part of the presiding judge to have charged the jury in the manner requested by the defendants. *Harrison v. Berkley*, *supra*.

There was no error on the part of the presiding judge in charging the jury as alleged in the third exception, because: (1) The doctrine was correctly stated by him. (2) The testimony showed that the doctrine therein contained was applicable to this case, in that there was testimony introduced upon the trial showing that the vehicle was not a suitable one to convey as large a crowd as defendants' servant allowed to enter it, and there was testimony tending to show that the driver was not skillful. It is the judgment of this court that the appeal be dismissed, and the judgment of the circuit court be affirmed.

(43 S. C. 72)

INTERSTATE BLDG. & LOAN ASS'N v.  
MCCARTHA et al.(Supreme Court of South Carolina. Jan. 12.  
1895.)SALE OF MORTGAGED PROPERTY—CONSTRUCTIVE  
NOTICE.

Mortgaged land in the hands of a bona fide purchaser, without notice of a stipulation in the mortgage bond to pay attorney's fees in case of suit, is not liable for those fees, where the stipulation of the bond was not mentioned in the recorded mortgage, although the bond was "referred to" in, and "made a part" of, the mortgage.

Appeal from common pleas circuit court of Richland county; T. B. Fraser, Judge.

Suit by the Interstate Building & Loan Association against J. P. McCartha and the Loan & Exchange Bank of South Carolina to foreclose a mortgage. From a decree adjudging the land not subject, in the hands of the defendant bank, to the payment of counsel fees for foreclosure of the mortgage, plaintiff appeals. Affirmed.

Robertson, Moore & Thomson, for appellant. Allen J. Green, for respondents.

McIVER, C. J. This was an action to foreclose a mortgage of real estate given by the defendant McCartha to the plaintiff to secure the payment of a bond, to which the defendant bank has been made a party, as a purchaser of the mortgaged premises subsequent to the execution of the mortgage. Copies of the bond and mortgage are set out in the "case," and should be incorporated in the report of the case. It is sufficient to say here that, among numerous other stipulations in the bond, it contains, in the last paragraph thereof, the following provision: "I waive, relinquish, and renounce, for myself and family, all claim, right, and benefit of any homestead or exemption under the laws of the United States or of this state in any property which I now or may hereafter own, in favor of the payment of this obligation, and for such an amount as may be found to be due under the same; and I further agree to pay the additional sum of ten per cent. on the amount due, as counsel fees, should this bond be collected by suit." The mortgage recites the date, the penalty, and the condition of the bond, and invests the mortgagee with power to sell the mortgaged premises upon default in the performance of the conditions and stipulations contained in the bond, "which is hereby referred to and made a part hereof," and, out of the proceeds "of such sale, pay all expenses of the same, including all attorney's fees, then whatever sum may be due said association, and the balance, if any, pay over to me." But the mortgage did not contain any stipulation for the payment of 10 per cent. counsel fees in case the bond should be collected by suit. This mortgage having been duly recorded, the defendant bank very properly conceded the liability of the mortgaged premises

for the amount due and collectible under the terms of the mortgage, but denied that the 10 per cent. counsel fees for foreclosure by proceedings in court constituted any proper charge on the mortgaged premises in its hands as a subsequent purchaser for valuable consideration, without notice of any such charge. It was conceded that the defendant bank had no notice of this alleged claim or charge upon the mortgaged premises for 10 per cent. counsel fees, except that which it is claimed arose from the record of the mortgage. So that the only question presented to the circuit judge was whether the land covered by plaintiff's mortgage was liable, in the hands of the defendant bank, as a subsequent, bona fide purchaser, for these counsel fees; and, he having held that it was not, the plaintiff appeals upon the several grounds set out in the record, which need not be repeated here, as they substantially make the single question whether the circuit judge erred in holding that the mortgaged premises, in the hands of the defendant bank, were not liable for the 10 per cent. counsel fees.

It seems to us that the object of the registry laws was to afford persons proposing to purchase real estate a ready and easy means of ascertaining whether the property proposed to be purchased is incumbered, or is subject to some claim superior to that of the proposed vendor. Hence, it has long been well settled that, whether these means thus provided by law for the purpose indicated are resorted to or not, the record of a deed or mortgage shall operate as constructive notice to all the world of everything contained in such record. In this case, however, it is insisted that the record of the mortgage operated as constructive notice, not only of what was contained in the mortgage, as it was spread upon the record, but also of what was contained in the bond, which was not spread upon the record. In other words, the proposition is that the doctrine of constructive notice, arising from the record of a paper required to be recorded, must be so extended as to affect a purchaser with notice of whatever would appear in any paper referred to in the registry of the recorded instrument; thus making it obligatory upon the inquirer, in addition to searching the records of the proper office, also to extend his inquiries into the contents of papers not to be found in the place appointed by the law as the source of information. Such an extension of the doctrine of constructive notice would materially hamper the transfer of property, and work material injury to the business interests of the country. It not unfrequently happens that a single mortgage is given to secure the payment of several bonds or notes, instances of which may be found in our own judicial records. *Lynch v. Hancock*, 14 S. C. 60, and *Anderson v. Pilgram*, 30 S. C. 499, 9 S. E. 587. And where these bonds or notes have passed into the hands of several different persons, as often is the case, if a purchaser, who,

though he has examined the record of the mortgage, should be compelled to examine into the terms contained in each one of the several bonds and notes, before he could safely buy, it would very seriously interfere with the ready transfer of property. Take this very case as an illustration. Here the purchaser, upon examining the record of the mortgage, found that it was given to secure the performance of an obligation, the terms and conditions of which were set out with unusual minuteness and particularity, among which was a provision for the payment of counsel fees in an event which did not occur, but which contained no hint that the mortgaged premises were to be subject to the payment of 10 per cent. counsel fees in the event which did not occur. It seems to us that it would be a hard and unreasonable doctrine to hold that the purchaser should be affected with constructive notice of a fact which only appeared in the bond, which may or may not have been in the hands of a foreign corporation, whose place of business was in another state. Indeed, the great particularity with which the terms and conditions of the bond were set forth in the mortgage, and the special mention of the provision for the payment of counsel fees in an event which did not occur, and the omission of any such provision in the event which did occur, was well calculated to mislead a purchaser, and induce him to pay more for the property than he would otherwise have done.

These views are well supported by authority. In 2 Pom. Eq. Jur. § 654, it is said: "By the policy of the recording acts, such a party [alluding to a subsequent purchaser] is called upon to search the records, and he has a right to rely upon what he finds there entered as a true and complete transcript of any and every instrument affecting the title to the lands with respect to which he is dealing. A record can only be a constructive notice, at most, of whatever is contained within itself. Finally, the record will not be a notice unless it, and the original instrument of which it is a copy, correctly and sufficiently describe the premises which are to be affected, and correctly and sufficiently state all the other provisions which are material to the rights and interests of subsequent parties." In the case of *Frost v. Beekman*, 1 Johns. Ch. 288, it was held that the registry of a mortgage given to secure the payment of \$3,000, but, by a mistake of the recording officer, registered as a mortgage to secure the payment of \$800, is notice to a subsequent, bona fide purchaser to the extent only of the sum expressed in the registry. In delivering the opinion of the court, Chancellor Kent used the following language: "The true construction of the act appears to be that the registry is notice of the contents of it, and no more, and thus the purchaser is not to be charged with notice of the contents of the mortgage, any further than they may be contained in the reg-

istry. \* \* \* The act, in providing that all persons might have recourse to the registry, intended that as the correct and sufficient source of information; and it would be a doctrine productive of immense mischief to oblige the purchaser to look, at his peril, to the contents of every mortgage, and to be bound by them, when different from the contents as declared in the registry. The registry might prove only a snare to the purchaser, and no person could be safe in his purchase, without hunting out and inspecting the original mortgage,—a task of great trial and difficulty." Now, if the purchaser is not bound to look into the original mortgage, how much less is he bound to look into the contents of the bond which the mortgage is intended to secure. It is true that the case just cited was subsequently reversed, upon another point, by the court of errors, in *Beekman v. Frost*, 18 Johns. 544; but no disapproval of the views of Chancellor Kent, upon the point for which we have cited the case, was expressed. In *Gilchrist v. Gough*, 63 Ind. 573, 30 Am. Rep. 250, a mortgage given to secure the payment of \$5,000 was, by a mistake of the recording officer, recorded as a mortgage to secure the payment of \$500, and it was held that it operated as constructive notice only to the amount mentioned in the record; and at page 257 the court cites quite a number of cases, beginning with *Frost v. Beekman*, supra, in support of its conclusion. In that case, it appears that in the index book the mortgage was mentioned as one for the sum of \$5,000, and this, it was contended, was sufficient to put the subsequent mortgagees upon inquiry; but the court held otherwise, for while the statute did require an index book to be kept, in which certain items should be noted, it did not require the amount of the mortgage to be noted, and hence its entry was not even such notice as would put a party upon inquiry.

We have no case in this state, so far as we are informed, which decides the point we have been considering. The nearest approach to it is the case of *Kennedy v. Boykin*, 35 S. C. 61, 14 S. E. 809. In that case one of the questions involved was as to the respective rights of two mortgagees,—Witte Bros. holding the senior mortgage; and Armstrong, the junior. Both mortgages were duly recorded, but in the record of the Witte mortgage, by a mistake of the recording officer, it appeared to be a mortgage for 200 acres, more or less, though the metes and bounds of the land were correctly set forth, while the number of acres should have been for 2,000, more or less; and the question was as to the effect of such mistake,—whether the lien of the Witte mortgage could be confined to the number of acres set forth in the record. Upon that question the court expressed itself as follows: "The question is not as to the effect which any mistake in the record of a mortgage may have, as, for

example, a mistake in stating the amount of the debt secured by the mortgage, in the record, as \$200, when, in the original, it is \$2,000; and hence such a question does not arise in this case, and will not, therefore, be considered. Confining ourselves to the question presented in the record, we think it is clear that a mere mistake in the record of a mortgage as to the number of acres covered by it, especially when the number of acres there stated, as in this case, is accompanied by the words 'more or less,' cannot possibly have the effect claimed by the appellant, Armstrong. The addition of those words shows very plainly that the number of acres stated is a very unimportant, and in most cases wholly immaterial, element in the description of the land intended to be conveyed or affected by the lien of a mortgage." The court then proceeded to cite several cases in which it had been held that the number of acres, with the superadded words, "more or less," had always been regarded as a very immaterial element in the description of land. It is apparent, therefore, that the court, in that case, carefully guarded itself against any inference as to what its opinion would be where there was a material mistake in the record.

The case of *Montague v. Stelts*, 37 S. C. 200, 15 S. E. 968, cited by counsel for appellant, is not in point, for the reason that there the rights of subsequent purchasers were not involved; the question being between the original parties to the mortgage, and in such a case the mortgagor would be held to have actual notice of the terms of the mortgage, and of the obligations which it was given to secure, even if the mortgage had not been recorded at all. *Fowke v. Woodward*, Speer, Eq. 233.

Counsel for respondents has undertaken to sustain the judgment below upon a ground which, so far as appears in the case, was not taken in the circuit court, and was not considered or passed upon by the circuit judge; and, as the required notice does not appear to have been given, the point thus raised is not properly before us. But as counsel for appellant, in his argument in reply, has argued the point, we will, without resting our judgment upon it, indicate briefly our views. That position is thus stated in the argument of counsel for respondent: "That foreclosure in court is not the 'collection of the bond by suit' provided for in the bond." We do not understand that this position is based upon the proposition that a proceeding for the foreclosure of a mortgage of real estate cannot properly be regarded as a suit for the collection of the money due on the bond which the mortgage was given to secure, as seems to be assumed by counsel for appellant in his argument in reply; for that such a proposition is untenable is, we think, shown by the case of *Branyan v. Kay*, 33 S. C. 283, 11 S. E. 970, cited by appellant's counsel. But, as we understand it, the ar-

gument is that the connection in which the provision for the payment of 10 per cent. counsel fees, as well as the omission of any such provision from the mortgage, shows that it was not the intention of the parties that these counsel fees should be exacted for any proceeding to enforce the mortgage, but only in case it became necessary to sue on the bond in an ordinary action at law. We confess that there is much reason in this view. The fact that this provision is found only in the last paragraph of the bond, in connection with the stipulation for the waiver of any claim of homestead or exemption "in any property which I now or may hereafter own," is a strong indication that the parties intended that this provision for the payment of 10 per cent. counsel fees should apply only in a case where the obligee of the bond should find it necessary to enforce payment of the same out of property in which the obligor could claim a homestead or other exemption, not to a proceeding to foreclose the mortgage, against which no such claim of homestead or exemption could be made. This, coupled with the further fact that while the mortgage does contain a stipulation for the payment of the expenses of the sale, including counsel fees, in case the mortgagee should undertake to enforce payment of the mortgage debt by exercising the power of sale conferred by the mortgage, and altogether omits the provision for the payment of counsel fees in case the mortgagee undertook to enforce payment by proceedings for foreclosure in court, lends no little force to the view contended for by counsel for respondents. But, as we have said, for the reason above indicated, we are not disposed to rest our judgment upon this view, we need not pursue the subject further. The judgment of this court is that the judgment of the circuit court be affirmed.

POPE and GARY, JJ. We concur in the result. The mortgage purports to recite the terms of the bond, and does not make mention of the attorney's fees of 10 per cent. Persons consulting the records had a right to presume that the bond was correctly set forth in the mortgage. We do not, therefore, think that it furnished evidence of such facts as required those consulting the records to make further inquiry.

(40 W. Va. 118)

ICE v. MARION COUNTY COURT et al.  
(Supreme Court of Appeals of West Virginia.  
Dec. 15, 1894.)

ROAD SURVEYORS—APPOINTMENT—CONSTITUTIONAL LAW.

1. That part of section 2, art. 9, of the constitution of the state, which provides that surveyors of roads shall be appointed by the county court, is mandatory, and provides the only mode of filling that office.

2. That part of paragraph 3 of section 56a of chapter 43 of the Code of 1891 which enacts

that the surveyor of roads for each road precinct shall be elected by the people is unconstitutional and void.

(Syllabus by the Court.)

Error to circuit court, Marion county.

Petition by Andrew S. Ice against the county court of Marion county, John T. Beall, and others, praying for the issuance of a writ of prohibition to prohibit the county from accepting bonds of, and administering oath of office to, parties alleged to be entitled to the office of surveyors of roads. From an order of the circuit court allowing the writ, John T. Beall brings error. Order affirmed.

Jas. A. Haggerty, for plaintiff in error. Wm. H. Martin, for defendant in error.

HOLT, J. On the 19th day of December, 1892, the plaintiff, Andrew S. Ice, a citizen and resident of the county of Marion, presented to the judge of the circuit court of that county his petition, duly verified by his affidavit, praying a writ of prohibition to prohibit the commissioners of the county court of Marion county from taking bond and administering the oath of office to defendants John Beall and others named, who had been declared elected to the office of surveyor of roads in the several magisterial districts of Marion county at an election held on the 8th day of November, 1892, and in the meantime refrain from, and stay all further proceedings in the matter of, taking said bonds and administering said oath of office. As ground of the application, the petition set forth that the said election for the office of surveyor was without authority of law and void; that paragraph 3 of section 56a of chapter 43 of the Code (see 1891 Ed. p. 333) was and is in conflict with section 2 of article 9 of the constitution of the state. This article relates to county organization, and provides, among other things, that "coroners, overseers of the poor and surveyors of roads shall be appointed by the county court." Under section 1, c. 110, of the Code, the circuit judge awarded the rule, and the clerk issued it returnable to the first day of the following term. It was served on all the parties. On the 22d day of March, 1893, the commissioners of the county court filed in court their return and answer, in which they set forth the facts of the election, and that the persons named were duly and lawfully elected surveyors of roads under the statute already cited, praying that the writ may not issue. On the 22d day of March, 1893, the case came on to be heard, and the court being of opinion that so much of the statute in question as provides for the election of one surveyor of roads for each precinct or magisterial district is unconstitutional, and therefore inoperative and void, judgment was given that the writ of prohibition do issue. And from this the defendant John T. Beall obtained this writ of error.

Article 9 of the state constitution relates to county organization. Section 1 provides that the voters of each county shall elect a sur-

veyor of lands, a prosecuting attorney, a sheriff, and one and not more than two assessors. Section 2 provides that: "There shall be elected in each district of the county, by the voters thereof, one constable. \* \* \* The assessor shall, with the advice and consent of the county court, have the power to appoint one or more assistants. Coroners, overseers of the poor, and surveyors of roads shall be appointed by the county court." Section 24 of article 8 provides that "the county courts shall also, under such regulations as may be prescribed by law, have the superintendence and administration of the internal police and fiscal affairs of their counties, including the establishment and regulation of roads, ways, bridges, public landings, ferries, and mills, with authority to lay and disburse the county levies." So that from the language used, "surveyors of roads shall be appointed by the county court," from the context, the subject-matter, and the fact that it is used in a constitution, show that the language is to be taken as mandatory; for it is the province of an instrument of this solemn and permanent character to establish those fundamental maxims, and fix those unvarying rules, by which all departments of the government must at all times shape their conduct; and if directions are given that certain officers shall be elected by the people, and certain other officers shall be appointed by the county court, there is a strong presumption, from the character of the instrument, as well as from the imperative meaning of the language used, and the context, that the provision is mandatory, and must be obeyed and observed by the legislative as well as by the other departments of the government. And one of the reasons for giving the county court such exclusive power of appointment is the fact that it is charged with the duty of establishing and regulating the county roads, and with their general superintendence, as a part of the internal police of their respective counties; so that the nature of the subject-matter lends weight to the view that the term "shall appoint" cannot be read and taken as directory, for the two modes of filling these two classes of offices—one by the people, the other by the court—are exclusively and specifically applied to each office by name, and no authority is anywhere given, expressly or by necessary implication or reasonable intendment, for filling this office in any other way than by appointment by the county court, as provided for in section 2 of article 9. And, inasmuch as the mode of filling the office is provided for in the constitution, impliedly, the legislature shall not prescribe the manner in which surveyors of roads shall be elected or appointed; for, by section 8 of article 4, it is only in cases not provided for in the constitution that the legislature shall prescribe by general laws the manner in which public officers and agents shall be elected, appointed, or removed. To this view the following authorities lend some weight: Peo

ple v. Raymond, 37 N. Y. 428; People v. Al-  
bertson, 55 N. Y. 50; People v. Laurence, 86  
Barb. 177. See Cooley, Const. Lim. (8d Ed.)  
top p. 78; 3 Am. & Eng. Enc. Law, 680.

Thus we see some of the cogent reasons  
why the courts reluctantly, and only in ex-  
treme cases, feel themselves authorized to  
hold as merely directory any provision of  
an instrument, from its nature and purpose  
indicating that it is intended to be stable,  
and, unless otherwise expressed, mandatory.  
Although we are not warranted in holding a  
statute to be invalid, in whole or in part,  
unless we see clearly that it runs counter  
to some provision of the organic law,—for  
the power of the legislature is full and free,  
except where limited and restricted,—yet in  
this case that part of the statute here brought  
into question seems to us to be, for the rea-  
sons given, a plain and palpable infraction  
of that instrument; as much so, and in good  
part for the same reason, as would be a stat-  
ute requiring the secretary of state to be  
elected by the people. See article 7, § 3.  
Therefore, we are of the opinion that the  
judgment complained of, holding so much of  
the alternative road law, numbered and de-  
signed in the Code (edition of 1891) as pa-  
ragraph 3 of section 56a of chapter 43, as  
provides for the election of the surveyors of  
roads by the people, to be inoperative and  
void, is plainly right, and should be affirmed.

(40 W. Va. 39)

**DEMPSEY v. BOARD OF EDUCATION OF  
HARDEE DISTRICT.**

(Supreme Court of Appeals of West Virginia.  
Dec. 15, 1894.)

**MANDAMUS TO SCHOOL BOARD.**

A school board cannot be compelled, by  
mandamus, to make a special levy for the pay-  
ment of illegal orders, or other evidence of debt  
issued by it contrary to section 8, art. 10, of the  
constitution, and the laws enacted in pursuance  
thereof.

(Syllabus by the Court.)

Error to circuit court, Logan county.

Application by petition of M. B. Thompson,  
administrator of W. A. Dempsey, against the  
board of education of Hardee district, for a  
writ of mandamus to compel them to levy  
a tax for the payment of certain drafts.  
From a judgment of the circuit court deny-  
ing the writ, plaintiff brings error. Affirmed.

Z. T. Vinson, for plaintiff in error.

DENT, J. This is a proceeding by manda-  
mus, instituted and carried on by the ad-  
ministrator of William A. Dempsey, deceased,  
to compel the board of education of Har-  
dee district, of Logan county, to lay a levy  
to pay the following drafts drawn on the  
sheriff of said county by said board, to wit:

"Drafts.

"No. 16. Hardee District, Logan Co., W.  
Va., January 1st, 1875. On or before the 1st

day of April, 1875, the sheriff of Logan coun-  
ty pay to the order of Wm. A. Dempsey  
three hundred and fifty-six 07-100 dollars,  
with interest from date, and charge to spe-  
cial (1874) fund of Hardee district. By or-  
der of the board of education. Thos. Webb,  
President. Ira Evans, Secretary. (The  
above draft must specify what fund is meant,  
—whether building or school fund.)"

Indorsements on back of said order:

"Presented for payment Jan. 18, 1876, and  
not funds in my hands to pay said order.  
G. W. Taylor, S. L. C.

"No funds in my hands, and no arrange-  
ments to pay within claim. Dec. 3, 1883.  
R. W. Peck, S. L. C."

"No. 17. Hardee District, Logan County,  
W. Va., Jan. 1, 1875. On or before the first  
day of April, 1876, the sheriff of Logan coun-  
ty pay to the order of W. A. Dempsey three  
hundred and fifty-six 07-100 dollars, bearing  
interest from date, and charge to special  
(1875) fund of Hardee district. By order of  
the board of education. Thos. Webb, Presi-  
dent. Ira Evans, Secretary. (The above  
draft must specify what fund is meant,—  
whether building or school fund.)"

Indorsement on back of said order:

"No funds in my hands, and no arrange-  
ment to pay within claim. Dec. 3, 1883.  
R. W. Peck, S. L. C."

"No. 18. Hardee District, Logan County,  
W. Va., January 1, 1875. On or before the  
1st day of April, 1877, the sheriff of Logan  
county pay to the order of W. A. Dempsey  
three hundred and fifty-six 07-100 dollars,  
bearing interest from date, and charge to  
special (1876) fund of Hardee district. By  
order of the board of education. Ira Evans,  
Secretary. Thos. Webb, President. (The  
above draft must specify what fund is meant,  
—whether building or school fund.)"

Indorsement of back of said order:

"No funds in my hands, and no arrange-  
ment to pay within claim. Dec. 3, 1883.  
R. L. Peck, S. L. C."

These proceedings began in August, 1884,  
and were continued by amendments, etc., un-  
til the 26th day of October, 1891, when the  
circuit court finally determined the matter,  
and gave judgment for the defendant. The  
following defenses were interposed: (1) That  
the drafts were ultra vires, illegal, null,  
and void. (2) The statute of limitations. (3)  
Procured by fraud, the payee being a mem-  
ber of the board of education. (4) Issued in  
lieu of other orders, which had been provided  
for and paid out of former levies, which levies  
had gone into the hands of the payee, as  
deputy sheriff of said county. (5) That the  
sheriff had defaulted to the amount of the  
orders to the district, which had obtained  
and held an unpaid decree against him, he  
being insolvent.

The very first question presents itself,  
whether a board of education can be com-  
pelled by mandamus to pay any order issued  
by it against the sheriff. Section 37, c. 45,

of the Code provides: "When any order of the board upon the sheriff of the county or judgment or decree has been presented to such sheriff without obtaining payment, payment thereof may be enforced by the circuit court by mandamus or an order for a specific levy on the property taxable in the district." The same provision was in section 37, c. 123, Acts 1872-73. This section must be construed together with section 8, art. 10, of the constitution, which forbids the contraction of any indebtedness on the part of any board of education without first having submitted all questions in relation thereto to a vote of the people. This section has been construed by this court, in so far as county courts are concerned, and the same construction will apply to boards of education. *Davis v. County Court*, 38 W. Va. 104, 18 S. E. 373. It also must be construed along with section 45, c. 45, Code, and also Acts 1872-73, which is in words as follows, to wit: "It shall not be lawful for the board of education of any district, or independent school district, to contract or expend, in any year, more than the aggregate amount of its quota of the general school fund, and the amount collected from the district, or independent school district levies of that year, together with any balance remaining in the hands of the sheriff or collector at the end of the preceding year, and such arrearages of taxes as may be due such district or independent school district." This provision of the law was obviously made in compliance with the section of the constitution supra. Taking these provisions of the law together, and it is plain that the board of education has no authority to issue any evidences of debt whatsoever, but only to issue orders on the sheriff, in any year, limited to its "quota of the general school fund, and the amount collected from the district, or independent school district levies of that year, together with any balance remaining in the hands of the sheriff or collector at the end of the preceding year, and such arrearages of taxes as may be due such district or independent school district." If the amount of the order, when issued by the board, is already in the hands of the sheriff, in accrued funds, or taxes levied but not collected, the board cannot be commanded to provide a fund for the payment of such order, for it has already done so in the manner provided by law; but if there are no funds or levies in the hands of the sheriff, or provided for by said board, at the time of the issuance of such order, the same is issued without authority and in disobedience of the law, and operates as a contraction of a debt in disobedience of the constitution, and is ultra vires, null, and void, and mandamus will not lie to compel its payment. To hold otherwise would be to say to the board: "It is unconstitutional and unlawful for you to contract a debt, and issue the evidence thereof; but, if you do so, we will compel you, by mandamus, to pay it." This

would be lending the aid of the court to break down and destroy the constitution, and the laws made in pursuance thereof. The true meaning of the clause of section 37, c. 45, of the Code, heretofore referred to, is that, if the sheriff fails to pay an order properly issued by the board of education, he may be compelled to do so by mandamus; and, if the board fails to provide for judgments and decrees rendered against it, it may be required to make a specific levy for the purpose. Whenever an order is drawn on the sheriff by the board, it is to be presumed that he has funds or tax levies in his hands liable for the payment of the same; but as soon as it is made to appear that such is not the case—which must be always alleged and shown in a mandamus proceeding against the board—the order becomes an illegal debt, and its payment cannot be enforced. Mandamus will not lie to compel the doing of an illegal act. *High, Extr. Rem. § 854; 14 Am. & Eng. Enc. Law, p. 168; State v. Yeatman, 22 Ohio St. 546; People v. Village of Hyde Park, 117 Ill. 462, 6 N. E. 33.*

The drafts in controversy were issued by the board when there were no funds in the hands of the sheriff for their payment, but they were to be paid out of future levies. This was a clear violation of duty on the part of the board, and the creation of a debt against the district without authority so to do. If the sheriff had the funds to pay these orders, the remedy was to proceed against him; otherwise they were illegal. It matters not that these drafts were issued in lieu of other orders. The board of education was not authorized by law to fund its floating indebtedness, and make it continual or permanent. The only authority it had was, if it was legal, to provide for its payment by levy. It is therefore plain that the mandamus applied for in this case was properly refused, and the judgment complained of is affirmed.

(40 W. Va. 37)

#### THOMPSON v. LYON.

(Supreme Court of Appeals of West Virginia.  
Dec. 8, 1894.)

#### CHARGE ON LAND—RELEASE BY PAYMENT—TENDER—WHAT CONSTITUTES—WAIVER.

1. A father deeds to his son a tract of land, in consideration of the payment of a certain sum therein named by said son to his two sisters, one year after the father's death, without interest. Such son is not bound to wait until the end of the year after his father's death before he can pay said amount, but has the privilege of paying it at any time during the year.

2. An offer to pay one of the sisters the amount coming to her under the deed, two or three days before the end of the year, and counting the money down to her, which she declined to receive, without assigning any cause, constituted a valid tender, under the circumstances.

3. Said sister having made no subsequent demand for the money, said son, upon paying the money due said sister into court after giving proper notice, was entitled to a release of the vendor's lien reserved in said deed, so far as it secured her said sum.



4. A strictly legal tender may be waived by an absolute refusal to receive the money, on the ground that no man is bound to perform a nugatory act.

5. It is not necessary, to constitute a legal tender, that the identical money tendered was kept and brought into court.

6. In general the effect of a tender in proper time by the debtor is to stop subsequent interest on the claim, if the money is unqualifiedly refused, which tender may be defeated by a subsequent demand and refusal.

Dent, J., dissenting.

(Syllabus by the Court.)

Error to circuit court, Harrison county.

Proceeding by Thomas Thompson against Nancy J. Lyon to secure release of a lien on real estate. From an order of the circuit court directing the release of the lien, defendant brings error. Affirmed.

John Bassel, for plaintiff in error. John J. Davis, for defendant in error.

ENGLISH, J. By a deed dated the 14th day of May, 1873, Hugh Thompson conveyed to Thomas Thompson a tract of land, in consideration of \$833 $\frac{33}{100}$ , to be paid by said Thomas Thompson to Nancy J. Lyon and Elizabeth Payne equally, one year after the death of the said Hugh Thompson, and, to secure the same, a vendor's lien was therein retained on said tract of land until paid, and for the further consideration of natural love. It appears that, two or three days before the expiration of the year after the death of said Hugh Thompson, the said Thomas Thompson went to the house of Nancy J. Lyon, and offered to pay her the sum of money she was entitled to under said deed, and counted the money down on a stand to her, and she said she could not take it, and did not take it. On the 31st day of August, 1893, said Thomas Thompson had a notice served upon said Nancy J. Lyon that on the 14th day of September, 1893, he would move the circuit court of the county of Harrison to direct the clerk of the county court of said county to execute a release of the lien reserved in a certain deed of conveyance made to him by Hugh Thompson on the 14th day of May, 1873, to secure the payment to said Nancy J. Lyon and Elizabeth Payne of the sum of \$833.33 $\frac{33}{100}$ , to be paid to them equally one year after the death of said grantor, Hugh Thompson, on the tract of land therein mentioned (describing it), as he had theretofore tendered her her portion of said sum and she refused to accept the same. On the 14th day of September, 1893, an order was entered, in pursuance of said motion, in which it is stated that the court having heard the evidence and argument of counsel, and it appearing to said court that said Thomas Thompson duly tendered to the said Nancy J. Lyon her portion of said sum secured to her in said deed, in pursuance of the terms and provisions thereof, which she then refused to receive, and now here pays into court for the said Nancy J. Lyon, the sum of \$166.66 $\frac{66}{100}$ , her share of the sum so secured to be paid her by said deed; and it fur-

ther appearing that the sum due Elizabeth Payne has been paid her; and the court being now of opinion that Thomas Thompson is now entitled to have a release of the lien retained in said deed, which the said Nancy J. Lyon refuses to execute,—it was ordered that P. M. Long, clerk of the county court of Harrison county, do execute to the said Thomas Thompson a release of the lien reserved in said deed for the benefit of the said Nancy J. Lyon, and that he, the said Thomas, recover against her his costs herein expended; and from this order the said Nancy J. Lyon obtained this writ of error.

It is assigned as error that the court held there was a sufficient tender, although the same was made before the money was due. Now, it must be conceded that the weight of authority is that, where one party contracts to pay another money on a certain day, the tender, in order to be available, must be made on the day it falls due. When, however, we look at the circumstances of this transaction, it is apparent that there really was no contract between said Thomas Thompson and Nancy J. Lyon, by which he promised to pay her any money at any specified time. The deed which Hugh Thompson made to his son Thomas imposed upon him, as a condition precedent to his acquiring the title to said land, that he should pay to his sisters Nancy J. Lyon and Elizabeth Payne the sum of \$833.33 $\frac{33}{100}$  one year after the death of said Hugh Thompson. This length of time (one year) was allowed said Thomas Thompson as a favor, not by Nancy J. Lyon, but by his father, and she was no party to the contract fixing the date of payment, and she could not object if, in pursuance of the terms and conditions imposed upon him by his father's deed, said Thomas paid said sum before the year expired. His father had conferred upon him the privilege of waiting a year before he paid said money, and Nancy J. Lyon could not complain if he did not exercise the privilege thus conferred to the last moment and to the fullest extent. Again, the money said Thomas was to pay was not bearing interest at the time he offered to pay it to her. Parsons on Contracts (volume 2, 8th Ed., top page 642) says: "It has been said that a tender cannot be made before the debt is due, as the creditor is not then obliged to accept it, even if it does not draw interest. But we should be inclined to believe that the courts of this country would generally hold a tender valid that was made before the debt was due, provided the debt did not draw interest, or if, when the debt did draw interest, the tender included interest to the maturity of the debt." In speaking of the effect of the plea of tender, Prof. Minor, in his Institutes (volume 4, pt. 1, side page 611), says: "The effect of the plea of tender, in a few cases to which it is not needful to advert, is to extinguish the obligation; but, in general, it is merely to relieve the debtor from subsequent interest and costs,"—citing Bac. Abr. "Tender," F, where

It is said: "The effect of a tender, when lawfully made, is to discharge the debtor from subsequent interest and costs." See *Jackson v. Law*, 5 Cow. 248; also *Raymond v. Bearnard*, 12 Johns. 274. As we have seen, the debt in the case under consideration did not bear interest at the time Thomas Thompson offered to pay the amount to his sister Mrs. Lyon, the year had not expired from the date of the death of Hugh Thompson, and it is difficult to perceive how she could have been prejudiced by receiving the money at the time it was offered to her. The evidence shows that the money was counted down to her, and, without assigning any reason whatever for her action, she simply said "she could not take it, and did not take it." Now, what is the effect of this conduct on the part of Nancy J. Lyon? Lawson, in his work on Rights and Remedies (section 2534), says: "A tender may be waived by the creditor either expressly or impliedly, as where he states that nothing is due him, and that he will accept nothing, or says, simply, that he will not receive the money or chattels." So, in *Litt. Sel. Cas. (Ky.)* 204, it was held, in the case of *Dorsey v. Barbee*, that "the positive declaration of one to whom money is to be paid, within a certain time, that he will not receive it, will excuse the tender of the money, provided the declaration is made before the expiration of the time." It was also held by the supreme court of Tennessee in the case of *Farnsworth v. Howard*, 1 Cold. 216, that the production of the money is dispensed with if the party is ready and willing to pay, and is about to produce the money, but is prevented by the party to whom the money is going refusing to receive it; but his bare refusal to receive the amount proposed, and demanding more, is not, of itself, sufficient to excuse an actual tender. Again, in the case of *Bellinger v. Kitts*, 6 Barb. 274, it was held that "the general rule is that a strictly legal tender may be waived by an absolute refusal to receive the money, on the principle that no man is bound to perform a nuptial act." And in 10 Cush. 287, in the case of *Hazard v. Loring*, the court held that, "in making a tender, actual production of the money is not necessary, if the defendant refuses to receive it." See, also, 2 Para. Cont. p. 643. This question was also before this court in the case of *Koon v. Snodgrass*, 18 W. Va. 320, where it was held that "the proper mode of making a legal tender is to actually produce and proffer the exact sum due; but this may be dispensed with by the party to whom the money is to be paid, when he refuses to receive the money, not on the ground that the money is not produced, nor on the ground that the amount produced was not the exact amount offered, but on some collateral and entirely distinct ground"; and this case is quoted with approval in 38 W. Va. 80, 18 S. E. 379, by the court, in the case of *Poling v. Parsons*. Where the money is tendered in proper time, and is refused, all the elements of a technical

tender are waived, and the effect is precisely the same as if a tender, legal and proper in every respect, had been made; just as where protest of a negotiable note is waived, the indorsers are bound to the same extent as if all the technicalities of a legal protest had been complied with, including notice, etc. To illustrate, *Parsons on Contracts* (volume 2, top page 642) says: "To make a tender of money valid, the money must be actually produced and proffered, unless the creditor expressly or impliedly waives this production, and he does this by declaring that he will not receive it." In the case of *Rudolph v. Wagner*, 36 Ala. 698, the court held that "a tender of the amount due, including interest, at any time between the maturity of the debt and the commencement of the suit, stops the interest, and discharges the debtor from the costs of the suit." 2 Para. Cont., at top page 638, speaking of the effect of a tender, says: "But it puts a stop to accruing damages or interest for delay in payment, and gives the defendant costs." So in *Curtiss v. Greenbanks*, 24 Vt. 536, it was held that, "where money is tendered and refused, the person tendering it is at liberty to use it as his own. All he is under obligations to do is to be ready at all times to pay the debt when requested." And Lawson on Rights and Remedies (volume 5, § 2526) says: "The debtor must keep the money safely, so as to be ready at any time to produce it, but he may use it, and he need not have the identical money ready. \* \* \* But the benefit of a tender is lost by subsequent demand and refusal." And in *Jackson v. Law*, 5 Cow. 248, it is held that "the effect of a tender, when made in season, is merely to discharge the debtor from subsequent interest." It is not necessary to prove, under a plea of tender, that the identical money tendered was kept and brought into court. *Colby v. Stevens*, 38 N. H. 191. See, also, *Railroad Co. v. Dunham*, 30 Mich. 128.

Now, if Nancy J. Lyon refused to accept the money offered her by her brother Thomas Thompson, because it was offered to her a day or two before the year had expired since the death of their father, Hugh Thompson, she failed to assign that as a reason, and, as the amount was not bearing interest, it would have been very unreasonable in her to assign such a motive for rejecting the money. Why should she have objected to receiving the money if it had been offered to her one day or one week after the death of said Hugh Thompson? If she had received it, she could have invested it, and made it an interest-bearing fund, instead of permitting it to lie idle in her brother's hands. Why, then, should she insist that the last day of the year should arrive before she received the money? She did not, however, do this. She simply declined to receive it, without assigning any cause, and, so far as the record discloses, she never made any subsequent demand for it. As I read this clause in the

deed, Hugh Thompson intended to say to his son Thomas, "You can have one year's time in which to pay this purchase money to your sister"; but he never intended to say he could not pay it sooner, if he chose to waive the privilege conferred by the deed, and, while Nancy J. Lyon had no right to demand the money before the end of the year, she had no right to prevent him from anticipating the payment for one or two days, or six months, if he saw proper to do so. There is a marked distinction between contracts made between parties for their mutual benefit, where one becomes a borrower of money because he wishes to use it in some business undertaking, and desires such use for a definite period, and the other loans it because he desires the interest at stated periods, and wishes to avoid the inconvenience and trouble of making reinvestments at short periods, and the case of a mere charge or lien reserved upon land to secure the payment of money at some future time without interest. In the first instance, each party is directly interested in having the payment of the principal at the time fixed in the contract, and in preventing the payment by way of anticipation; while in the second instance, the party to whom the money is coming has a direct interest in receiving the money as long before the time fixed for the payment as possible. If Thomas Thompson had succeeded in getting Nancy J. Lyon to receive the money when he offered to pay it, it would have been to her benefit, and to his prejudice, and in violation of no contract between her and himself. If the debt had been an interest-bearing one, there would be some excuse for her refusal to receive the money until the year was out; but, as the amount did not bear interest, she could in no way have been prejudiced by receiving the money, and there could be no reason for delaying the tender, if said Thomas was able and willing to make it, until the expiration of the year. In the case of *M'Hard v. Whetcroft*, 3 Har. & McH. 35, the case considered was an action of debt upon a bond dated the 24th day of September, 1778, and conditioned for the payment of £442. 10s. at or upon the 1st of September, 1788, with interest. The defendant pleaded payment before the issuing of the writ, to wit, on the 1st of September, 1788. General replications of nonpayment and issue joined. At October term, 1790, the jury found by their special verdict that the defendant, in discharge of so much of the bond on which the suit was brought, did tender bills of credit, which was a legal tender by law to the plaintiff, to the amount of \$1,175%, which tender was made on the 7th of March, 1781; and, if the said tender was good, then they found that there was £13. 1s. specie due on said bond; but, if the tender in discharge of said bond could not be made before the 1st of September, 1788, then they found due on the said bond £88. 10s. specie with interest from the date of

said bond. The general court gave judgment on the said special verdict for the plaintiff for the penalty and costs, to be released on the payment of £88. 10s. current money, with interest from the 24th day of September, 1778, and costs. The defendant appealed to the court of appeals, which court, after hearing arguments, reversed the judgment of the general court. Now, in that case, the bond bore interest, and yet the court of appeals held the tender made before the maturity of the bond to be good; and, if that decision be good law, how much more so ought the tender to be held good where the claim bears no interest, as in the case we are considering. If the reason for the law be that it would be an unwarranted infringement of the contract between the parties who had made the contract, for the purpose of enjoying the interest without the trouble of reinvestment, to allow a tender to be good before obligation become due, how much more so should a tender be held good which is made before the claim is due, where the claim bears no interest. The legal maxim, "*Cessante ratione legis cessat et ipsa lex*," applies.

Said Nancy J. Lyon having absolutely declined to receive the money when offered to her only a day or two before it was due, without assigning any reason for such refusal, and never afterwards having made any demand for the money, my conclusion is that the plaintiff, having paid the money into court, was entitled to a release of the vendor's lien, and the court committed no error in so ordering; and the judgment complained of is affirmed, with costs and damages.

BRANNON, P. (concurring). A question in the case is, after a tender, must the very identical money be kept ready to be paid to the creditor, if he comes for it, or ready to be filed with a plea of tender or other pleading seeking to enforce the tender? If the money be not kept, but is used by the debtor, will he be charged with interest after the tender? I think he need not keep the same money. So he have that same money, or good legal-tender money, when demanded of him, or when he brings it into court, that will do. He thereby keeps good his original tender. The other rule confers no benefit on the creditor. So he gets good money when he concludes to accept, or when the tender is enforced upon him, that is all he can ask. Why keep the same gold dollars? One is as good as another. The other rule would needlessly harm the debtor, as it would require him to keep money idle for an indefinite time. Will we be told that he ought to pay interest because he has used the money and made interest? To that I reply that the money is his own, not the creditor's, as before the tender it was the debtor's, and by refusal to accept it the creditor refused to become its owner. The interest upon it is not the creditor's, because it is not his

money, and also because by the tender the debtor does all in his power to execute his promise to the creditor, and the creditor's wrongful refusal of the tender ought not to give him legal or moral claim to interest produced as well by the talent of the debtor as by the money. We will be misled in this matter by the general language of the books in treating of tender, as in many instances they seem to imply that the thing tendered (the same) must be brought into court; but when we come down to the very point (that is, the identical money) they do not mean that. The forms of the plea of tender never aver that the money brought into court with the plea is the selfsame, identical money tendered, but is the same sum or amount of money tendered. That is their import. 2 Saund. Pl. & Ev. 835; 2 Chit. Pl. 431, 469, 601, 661; 5 Rob. Pr. 952, 953; 1 Barton, Law Pr. 493. A rule requiring the keeping of the same silver or gold dollars would be inconvenient and unnecessary. That the identical money need not be kept is held pointedly by Colby v. Stevens, 38 N. H. 191; Curtiss v. Greenbanks, 24 Vt. 536. The case of Bissell v. Heyward, 96 U. S. 580, holds a contrary doctrine. It holds that a tender, to stop interest and costs, must be kept good, and ceases to have that effect if the money is used by the debtor for any other purpose. When we analyze the case, we find it unsatisfactory and not well considered on this point, as the opinion simply asserts said proposition, and cites Roosevelt v. Bank, 45 Barb. 579; Giles v. Hart, 3 Salk. 343; Sweatland v. Squire, 2 Salk. 623. Turn to these cases. The case cited from Barbour is productive of mischief by the syllabus, that "if after tender made the money is used by the debtor in his business, and mingled with his other money, the tender is not valid." It is unwarranted by the opinion, as the judge delivering the opinion says, not that it is the law, but that "it may be doubted whether a tender is good when it appears that the money tendered was afterwards used by the debtor in his own business. He is to keep the money always ready to pay when demanded, and when bills are tendered in payment, and not objected to, the same bills should be brought into court. This would not be necessary to discharge a lien, but it might be to deprive a creditor of interest." He cites Kortright v. Cady, 21 N. Y. 343. How that case supports such a proposition I do not see, holding, as expressed in the syllabus, that "tender of the money due upon a mortgage, at any time before foreclosure, discharges the lien, though made after the law day, and not kept good; and where the tender does not discharge the debt, but only defeats a particular remedy, it is unnecessary to show continued readiness to pay or bring the money into court." The two old English cases cited in the supreme court do not touch this point. Giles v. Hart, 3 Salk. 343, holds that, "in debt on bond to pay a certain sum on a day, there a tender on the day and semper paratus is a good plea, but not in

assumpsit." In Sweatland v. Squires, 2 Salk. 623, the plea was a tender of so much, but the court held that as there was a breach of contract, and no damages or interest for time from breach to tender was included in tender, it was not good. The case of Shumaker v. Nichols, 6 Grat. 592, may be said to look the other way, as it holds that a tender in payment of a judgment will not authorize the quashing of an execution, unless the tender is followed by payment into court and a motion to enter satisfaction. This is correct. It was an execution. The court has control of its execution. It ought not to be quashed, except on payment. It was a case still pending as to payment; just like a plea of tender before judgment, it must have the money with it. But, at any rate, this does not decide that it must be the identical dollars tendered. It further holds that a tender will not justify a court of equity in stopping execution, when it is not alleged or proven that the party kept the money on hand for discharge of the judgment. This is only a reiteration of the old doctrine that the plea must aver "a tout temps priet et uncare priet,"—at all times ready, and still ready, to pay. It does not hold that the very same money must be kept isolated and distinct after tender. The Virginia case of Downman v. Downman, 1 Wash. (Va.) 26, supports the view of the majority, as it holds that where money is tendered which is legal tender at the time, but not so afterwards, the plea of tender ought to either bring in the very money tendered, or else money which is legal tender at the date of the plea.

DENT, J. (dissenting). It was over 18 years from the time of the tender in this case until this proceeding was instituted. Yet there is no allegation, evidence, or even a pretense that the tender, after being made, was kept good during all these years, so as to relieve the plaintiff from the payment of interest. His motion was an equitable one, and to sustain it he who asks must show that he has done equity. "The obligation to keep a tender good is as essential to its legal efficacy as the tender itself." Burlock v. Cross, 16 Colo. 162, 26 Pac. 142. "A tender to prevent the running of interest must be continuing. Using the money, after refusal by the creditor to receive it, destroys this necessary attribute of a legal tender." Gray v. Angier, 62 Ga. 596. "Tender must be kept good in order to stop interest." Augler v. Clay, 109 Ill. 487; Peugh v. Davis, 113 U. S. 542, 5 Sup. Ct. 622; Sanders v. Bryer, 152 Mass. 141, 25 N. E. 86. A large number of authorities to the same effect will be found in 25 Am. & Eng. Enc. Law, p. 922, note 3, and Id. p. 926, note 1. Further comment is unnecessary, and entirely useless. It is sufficient, however, to add that in none of the authorities referred to by Judge English to sustain his opinion is there any discussion of the question of interest, further than to state that a proper tender stops the running of interest.

Since writing the above, I have read the note prepared by Judge BRANNON. His claim is that, after a tender is once made, it is not necessary to keep the same money on hand, but the money belongs to the one making the tender, and he may use it after it is refused, and cannot be required to pay interest on it. As in this case, the plaintiff, having kept the money for 18 years, had the right to use it, and the interest or profit belonged to him, and all he had to do at the end of the time was to bring forward the principal; yet, by his own acknowledgment, for all these 18 years he owed the debt. The only reason the law excuses him from paying interest on the amount is because he has lost the use of it, as he has had to keep himself ready at all times to make his tender good. While he is not required to keep exactly the same money, yet he is required to keep the same sum or amount, and thus he loses the use of it, and is excused from payment of interest thereon. Otherwise, if he uses it he should pay interest on it; for, though it is his money, the debt against him still exists, and he is permitted to the extent of that indebtedness to use a sum of money which does not belong to him, and it is the same thing as though he had borrowed the money. In the case of *Pulsifer v. Shepard*, 36 Ill. 513, it is held: "A tender, to be available, must be kept good." "Under a plea of tender, the burden of proof is on the party pleading it." And in *Stow v. Russell*, Id. 18: "If a creditor refuses money tendered by a person having the right to make the tender, interest will cease to run from the time of the tender, if the debtor keeps the money continuously ready, and makes no profit by it." In *Tuthill v. Morris*, 81 N. Y. 94, it is held: "The most that can equitably be claimed by the mortgagor is relief from payment of interest and costs subsequent to the tender, and to entitle him to this he must keep the tender good from the time it was made." And in this case all that this plaintiff could claim was relief from payment of interest and costs subsequent to the tender, and, to entitle him to this, he should show that he kept the tender good from the time it was made, or pay his sister (defendant) interest on her money which he has been using for 18 years. Any other conclusion is plainly unjust, and contrary to the law of this case.

(40 W. Va. 38)

BERRY v. WIEDMAN et al.

(Supreme Court of Appeals of West Virginia.  
Dec. 8, 1894.)PURCHASE BY WIFE—CONVEYANCE TO HUSBAND—  
RESULTING TRUST—EVIDENCE OF GIFT  
—LAPSE OF TIME.

1. When a husband purchases property with his wife's money, and takes the deed in his own name, a resulting trust is raised in her favor, unless it is shown that she intended the money as a gift or loan to her husband, the establishment of which fact devolves on the husband, or those claiming under him.

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2. Mere lapse of time is not sufficient to establish a gift on her part, in so far as his collateral heirs are concerned, if he has indulged her in the belief of ownership, and allowed her to improve the property with her separate estate.

(Syllabus by the Court.)

Appeal from circuit court, Preston county.

Bill by Helen A. Berry against Caroline Wiedman and others. From a decree in favor of plaintiff, defendants appeal. Affirmed.

Jos. Moreland, for appellants. P. J. Crogan, for appellee.

DENT, J. At July rules, 1891, in the clerk's office of the circuit court of Preston county, Helen A. Berry, plaintiff, filed her bill in chancery against Caroline Wiedman, S. A. Litman, Carl Litman, and Mrs. A. J. Morris, heirs of her husband, Oliver Berry, deceased, to compel a conveyance to her of the legal title to a certain house and lot situated in Evansville, in said county. She alleges that the lot was originally purchased and paid for with money advanced to her by her father, but that the deed was made to her husband; that he always recognized the property as hers; and that she, with this understanding, during the years 1887, 1888, 1889, built thereon, with her separate funds, a house costing more than the property would sell for. After her husband's death, which occurred in the year 1891, his heirs set up claim to the ownership of the property, and thereupon she brought her suit to compel a conveyance of the legal title. On the 14th day of September, 1891, the defendants appeared, and filed their joint answer, in which they denied the plaintiff's ownership of the property, or that she had invested any money in building the house thereon, but claimed that the whole property was bought and improved by Oliver Berry, deceased, out of his own funds. To this answer a general replication was entered, and the parties went to proof. On the 1st day of April, 1893, the circuit court entered a decree in favor of plaintiff, for which the defendants have appealed, and now, here, assign numerous errors:

First, want of proper parties; that the administrator of the personal estate of Oliver Berry should have been made a party. There were no debts, and no decree was sought against the personal estate, and therefore the administrator was not a necessary party. As to the wife of A. J. Morris, she appears to have been properly summoned as Mrs. A. J. Morris, and she was before the court in her husband's name, and no objection to this was made in the court below; but the answer is filed for all the defendants, denying the plaintiff's equity, and this court will not now permit the husband, who was not summoned in the case, to come in here, after a fair hearing, without objection, on the merits, and say that it was his, and not his wife's, answer that was filed. Courts of equity will not

permit themselves to be trifled with in this way. According to the rule laid down by this court in the case of *Rader v. Neal*, 13 W. Va. 373, the husband was not a necessary party. It does not affirmatively appear that Isaac Litman was a necessary party, as there is nothing in the case to show that he has any interest in the subject-matter of the litigation, and unless the error affirmatively appear the decree will not be reversed.

The next four assignments of error relate to the merits. The proof on the part of the plaintiff clearly establishes the following to be the facts: That in January, 1866, the plaintiff and Oliver Berry, deceased, were married; that shortly prior to their marriage he had bargained for the property in controversy, but had not paid for the same, or obtained the deed therefor; that, after the marriage, plaintiff's father, as an advancement to her, furnished the money to pay for the property, and the deed was then taken in the name of the husband; that from time to time she received other funds from her father's estate, amounting in the aggregate to about \$8,000; that in the years 1887, 1888, and 1889, with her separate funds, she erected a dwelling house on the property, at an expense of from \$1,000 to \$1,500; that the lot on which this was erected was a small portion of the original property, worth about \$100, the residue having been sold; that the husband and wife had lived in peace together from the time of their marriage, in January, 1866, up until his death, March 18, 1891, over 25 years; and that he continually recognized the property in controversy to be the property of his wife, and had no estate at the time of his death. To contradict this state of affairs, the defendants show that Oliver Berry received about \$1,000 from his father's estate prior to his marriage with plaintiff; that he was a frugal and industrious man, and should have been, and was generally considered, worth a large sum of money, to wit, something like \$6,000, at the time of his death; and that he and his wife lived unhappily together, she being overbearing to him, and treating him cruelly. Defendants' evidence is founded on mere matter of hearsay and supposition, and it seems to me that it clearly appears from this case, taken as a whole, that what little estate Oliver Berry had at the time of his marriage was expended in payment of debts, or used in the support of his family; that the fortune that he was supposed to have was really the money, and the increase thereof, received by his wife from her father's estate; and that, outside of her means thus received, he never was worth anything on his own account. All this he had a right, even prior to the Code of 1868, to recognize and treat as her property, when the same was not used in any manner to defeat the rights of his creditors. The decisions referred to by defendants' counsel, in his exhaustive brief, were in cases where the rights of creditors were involved. A very different rule prevails where there is

no such controversy, but it is merely a litigation between the wife and the collateral heirs of the deceased husband. So far as the latter are concerned, the husband has the right to give his wife his property, his time, his labor, and skill, and they have no reason to complain. They are only entitled to receive such estate as rightfully belonged to the husband, and was undisposed of at the time of his death. In morals, a wife who has lived with her husband for 25 years has a far superior right, to collateral heirs, whose right of inheritance is merely a legal provision, through want of direct heirs, and contains within it no moral obligation. It is true, the defendants charge that they did not live happily together. The proof does not sustain this charge, and, if it did, such a fact would have little to do with determining the status of the property in controversy. The husband and wife sometimes did not perfectly agree, but this is not uncommon. On the contrary, it is rather the rule than the exception, because married people generally consider they have a proprietaryship in each other; and therefore, if they do sometimes express their differences in language too severe or harsh, it is a matter entirely within and between themselves, and with which the public at large have nothing to do. Affections sometimes must be lacerated, before they will knit together properly, and form two souls into one. Such difficulties are always magnified and exaggerated by repetition. The only question here is whether the plaintiff has shown a legal right to the property in controversy. "When a husband buys property with his wife's money, in his own name, there arises a resulting trust in her favor" (14 Am. & Eng. Enc. Law, p. 580, § 17; 1 Perry, Trusts, § 127), "unless a different intention on her part is shown; and the burden of proof is on the husband to show she intended a gift to him, which is, however, prima facie established by proof of her knowledge and consent" (14 Am. & Eng. Enc. Law, supra). The fact that the deed of the lands was made to the husband, in the absence of proof that it was so made by the wife's direction, consent, or knowledge, is no evidence of such gift, and warrants no presumption against the wife's interest. *Wales v. Newbould*, 9 Mich. 45. In the case of *Pusey v. Gardner*, 21 W. Va. 470, this court held that "Courts will not enforce a resulting trust after a great length of time, or laches on the part of the supposed cestui que trust. Lapse of time, when not a statutory bar, operates in equity as evidence of assent, acquiescence, or waiver." Approved in *Smith v. Turley*, 32 W. Va. 14, 9 S. E. 48. Lapse of time, as an equitable bar, only raises a presumption, which may be rebutted. "Courts will not enforce a resulting trust after a great lapse of time, or laches on the part of the supposed cestui que trust, especially when it appears that the supposed nominal purchaser has occupied and enjoyed the estate. But if the trust is admitted, and there has been no ad-

verse holding, lapse of time is no bar; and laches will not be allowed to avail as a defense, where fraud has been practiced on the cestui, to keep her in ignorance of her rights until just before filing the bill. Any excuse for delay that takes hold of the conscience of the chancellor, and makes it inequitable to interpose the bar, is sufficient." 1 Perry, Trusts, § 141. And in the case of *Cranmer v. McSwords*, 24 W. Va. 595 (fifth syllabus), this court propounded the law as follows: "While ignorance of law will not prevent the operation of the statute of limitations, the rule is different in equity,—a court of conscience. In such court, moral as well as legal grounds may be considered, and a satisfactory moral excuse may be entertained, although it result from ignorance of law."

A long period of time had elapsed from the making of the deed until this suit was instituted, to wit, upwards of 25 years,—sufficient, ordinarily, to bar a proceeding of this kind. But during all this time the plaintiff and husband occupied the property as their common home; he, as far as the evidence discloses, always admitting, in her presence, her ownership. While, under a fiction of law, her possession was his, yet he had no adverse holding to her; and equity has little regard for mere fictions of law, but always looks at the facts and circumstances as they really exist. Even according to the evidence of defendants' witnesses, "She was lord of all she surveyed." "There was none her right to dispute," in so far as the property in controversy was concerned. Even if he did sometimes assert an ownership in the property in her absence, he never did so in her presence, nor to any witnesses who would be likely to inform her of his claim; and such conduct on his part would only tend to show that he was attempting to deceive her as to the true legal condition of the property, lull her into a state of security, and perpetrate a fraud upon her. A wife's knowledge of law has always been recognized as limited, and therefore a court of equity vigilantly looks after her interests with tender solicitude. It is clearly established, beyond dispute or question, that her money built the dwelling house. Many of the receipts filed show on their face that they were taken by the husband in her name, and he admitted to several witnesses, not only that she built the property, but that it belonged to her. His admissions are proper evidence against, but not in favor of, his heirs.

The counsel insist that the administration account should have been settled, to ascertain whether he had not repaid her for the investments in the property. There is nothing of this kind alleged in the pleadings, and there is no evidence that she ever received one dollar of his estate. On the contrary, the evidence tends to show that he was supported and cared for by her out of her separate property,—the only source of income for many years prior to his death.

The legal evidence in this case vastly preponderates in favor of plaintiff, and establishes beyond dispute her moral and equitable right to the property in controversy; and therefore the circuit court committed no error in compelling a conveyance of the legal title to her by the defendants, and, on their failure, by a commissioner appointed for the purpose.

As to the question of costs, if no defense had been made, or no resistance of the plaintiff's rights undertaken, there might have been some justice in the claim that the defendants should not pay costs. But when parties make a rigid defense, and compel the expenditure of time, money, and the examination of witnesses, to secure their defeat, they ought not to expect to escape the payment of unnecessary costs occasioned by their own conduct. The decree is affirmed.

(40 W. Va. 53)

LAWSON, Commissioner of School Lands, v. HART et al.

(Supreme Court of Appeals of West Virginia. Dec. 8, 1894.)

SCHOOL LANDS — ACTION TO COMPEL SALE — PARTIES — APPEAL.

The commissioner of school lands is neither a necessary nor proper party to a chancery suit brought in the name of the state of West Virginia, under section 6, c. 24, Acts 1893, and therefore he is not entitled to appeal from the decrees of the circuit court in such suit.

(Syllabus by the Court.)

Appeal from circuit court, Harrison county.

Bill by L. C. Lawson, commissioner of school lands, against Charles M. Hart and others. From the judgment of the circuit court in favor of defendants, plaintiff appeals. Dismissed.

L. C. Lawson, in pro. per. John Bassel and M. M. Thompson, for appellees.

DENT, J. On the 21st day of January, 1893, the circuit court of Harrison county directed a suit in chancery to be brought and prosecuted by and in the name of the state of West Virginia in accordance with the provision of section 5, c. 105, Code, to sell, among others, a certain tract of land known as the Browns Mills tract or property, situated in said county. C. H. Odbert and Thomas L. Ford, as persons claiming ownership of or interest in said land, were made parties defendant to the bill when filed. Defendant Odbert answered said bill, setting up that he formerly owned said land, and sold it to defendant Ford, but had never made a deed therefor, for the reason that a large part of the purchase money, to wit, the sum of more than \$700, remained unpaid; that he was not aware of the forfeiture of said land; and prayed that he might be either permitted to redeem the same, or, if sold, his lien for purchase money might be preserved and protected. Thomas L. Ford also filed his petition and answer in said suit, in which he

virtually admitted the facts set out in the answer of said Odbert, but attempted to shift the blame of the forfeiture of said land from himself to said Odbert, and prayed to be allowed to redeem the same. Both of said answers were in the nature of cross bills, and should have been so treated. The court, for some reason, wholly disregarding the petition to redeem contained in each of said answers, on the coming in of the report of the commissioner in chancery to whom the cause had been referred, directed a sale of said land to pay—First the costs of suit and expenses of sale; second, \$59.13, taxes and interest due thereon; third, the vendor's lien of C. H. Odbert for unpaid purchase money due from Thomas L. Ford, amounting to \$828.71, and the balance, if any, to said Ford. And on the 8th day of February, 1894, the commissioner having reported a sale of said land at the price of \$1,270, the court, by its decree, distributed the proceeds as follows: First. One-half of the costs of the suit, including the half of a special fee of \$25 and \$41.87, commission, to the commissioner; also \$5 for making deed to purchaser. Second. \$59.13, taxes to the state. Third. \$828.71, with interest, to C. H. Odbert. Fourth. The residue to Thomas L. Ford. The commissioner, Lewis C. Lawson, not being satisfied with this decree, appeals to this court for himself, and, as he alleges in his petition, for the state of West Virginia. The errors assigned and relied on in his argument are (1) that he was not ordered to pay the surplus over and above the taxes, interest, and costs into the state treasury for the benefit of the school fund; (2) that he was not allowed commission on the sale at the maximum fixed by law, being 10 per centum.

Under the provisions of section 5, c. 95, Acts 1882, and section 3, c. 134, Acts 1872-73, the commissioner of school lands was directed to file his petition in the circuit court of the county in which such lands were situated for a sale of such lands. This court, in the case of McClure v. Maitland, 24 W. Va. 561, held that such proceedings were in no manner to be regarded a civil suit, but merely *ex parte* proceedings, adopted by the legislature for the sale of the lands belonging to the state; that they were administrative in their nature, and properly belonged to the legislative branch of the government, and not to the judicial; and, in so far as the circuit court was called upon to act in such proceedings, it acted as the agent of the legislature, and therefore its orders entered in furtherance thereof were nonjudicial, and could not be reviewed by appeal or writ of error in this court. *Auvil v. Jaeger*, 24 W. Va. 583, was to the same effect. This doctrine was reviewed and approved in the later case of McClure v. Maupeture, 29 W. Va. 683, 2 S. E. 761. To avoid the effect of these decisions, if possible, the legislature provided, in section 5, c. 94, Acts 1891, and section 5, c. 105, Code, that "a suit in chancery should be

brought and prosecuted by and in the name of the state of West Virginia," in lieu of the old provision by petition in the name of the commissioner of school lands. Under chapter 105 of the Code, this suit was commenced, but it was carried on to final decree under the provisions of chapter 24, Acts 1893, similar, so far as the remedy is concerned, in all respects, to the former law. In section 7, c. 24, Acts 1893, it is provided: "All suits brought and prosecuted under the provisions of this chapter shall be commenced as provided in chapter one hundred and twenty-four of the Code, and proceeded in, heard and determined in the same manner, and in all respects as other suits in chancery are brought, prosecuted and proceeded in, and shall be subject to the same rules of chancery practice as other suits in chancery in the state courts of this state, except as herein otherwise provided." And in section 18: "In every such suit brought under the provisions of this chapter, the court shall have full jurisdiction, power and authority to hear, try and determine all questions of title, possession and boundary which may arise therein, as well as any and all conflicting claims whatever to the real estate in question, arising therein." And in section 20: "Every final decree entered in any such suit shall be a bar to the claim of every person to the real estate, or any part of it, or any lien thereon, or to the proceeds thereof, who has failed to appear and present his claim thereto as is provided in the sixth section of this chapter except as to the excess of the proceeds of the sale thereof as provided in section sixteen of this chapter." Section 16 provides how the owner, his heirs, personal representatives, or assignees, or any lien creditor, may recover the excess referred to in the twentieth section, which undoubtedly means the excess of the proceeds not before disposed of by the court. Section 10 provides that the circuit court may decree a sale of such lands as are subject to sale for the benefit of the school fund. Section 13 makes provision for the disbursement of the proceeds of lands which have been sold for the benefit of the school fund. By these provisions the circuit court is given complete equitable jurisdiction of the land in controversy, and is required to determine what lands can be sold for the benefit of the school fund.

By the constitution and statutory law, owners and those holding liens on the forfeited lands have reserved to them the right to the excess over and above the taxes, interest, and costs. If such lienors or owners appear in the chancery suit brought to sell such lands before a sale thereof, and establish their claims, the right of the school fund to participate in the proceeds of a sale in so far as they are in excess of the taxes is completely ousted, and there can no longer be a sale of such land for the benefit of the school fund alone. The sale, when ordered by the court, must be made, not for the benefit of the



school fund alone, but for the taxes due thereon, liens established, and the residue to the person who has shown himself to be the lawful owner of the property. Such is the manner in which the court proceeded and determined this case. It settled all rights and claims with regard to the property in controversy, and then proceeded to sell it in accordance with the prayer of the bill and the answers filed, except that the result of its determination was to exclude the school fund from any benefit in the proceeds of the sale in excess of the taxes. This was obviously in direct accord with the intention of the legislature in providing for a chancery proceeding in such cases. The legislature would do no such foolish thing or require the circuit court, acting as a court of equity, to do such a foolish thing, as to ascertain who were the lienors and owners of the property, and entitled to the fund in controversy, in control of the court, and then say to them: "The fund is yours. Here it is. You may have it, but the court will just pay it into the state treasury, and you take this order to the auditor, and he will give you an order on the treasurer for it." Such circumlocution is not in accordance with the rules and proceedings of a court of chancery, and never was intended by the legislature. Therefore the court committed no error in ordering the funds paid directly to the parties entitled to receive the same.

The land not being sold for the benefit of the school fund alone, the state of West Virginia, having received the full amount of taxes and interest due, has no interest in this appeal, and is therefore improperly made a party thereto. Only parties prejudiced by the decree complained of can appeal therefrom. It is plain from the record and petition that, while the state is nominally a party, this appeal is on behalf of and in the name of Lewis C. Lawson, commissioner of school lands, and, as such, appointed commissioner of sale in this suit. His complaint is that the circuit court has not allowed him full commissions on the proceeds of sale as fixed by law. The amount controverted is too small to give this court jurisdiction; hence the other matter is seized upon as a pretext for that purpose. He is not a party to the suit, either necessary or proper, but is a mere appointee of the circuit court, acting as its commissioner to carry out its decrees. If he does not want to obey them, he can resign, and the court can appoint another commissioner in his place. If a court does not allow a commissioner his commission on sales as the law directs, this does not make him such party to the suit as will allow him to appeal from the court's decrees, but he must seek some other remedy to secure his commissions. He is merely the agent of the court so far as such suit is concerned.

For the foregoing reasons, the appeal in this case is dismissed as improvidently awarded.

(1 Va. 715)

DULIN v. COMMONWEALTH.<sup>1</sup>

(Supreme Court of Appeals of Virginia. Jan. 10, 1895.)

HABEAS CORPUS PROCEEDINGS—FORMER JEOPARDY—DELAY IN INDICTMENT—CHANGE IN COURT'S JURISDICTION—TRANSFER OF CASE—EFFECT.

1. In November, 1893, petitioner was committed for murder, and indicted at the next term of the court. He then demanded to be tried in the circuit court, whereupon he was remanded to jail for trial in that court. At the next term of the circuit court, held in the same month, the cause was continued for the commonwealth. At the next term of the circuit court, in May, 1894, the court dismissed the indictment of its own motion, in the absence of the prisoner and over his objection, because it had no jurisdiction to try the case, but without prejudice to the right of the commonwealth to arrest, indict, and try the accused. After said judgment was entered, another warrant was sworn out against him for the same offense, and upon it he was committed to jail. At the June term of the county court he was again indicted, and upon the calling of the case he pleaded not guilty, and was remanded to jail. *Held*, on subsequent habeas corpus proceedings, that petitioner was not illegally detained in custody.

2. To make a defense of former jeopardy, the accused must show that he has been put upon his trial before a court with jurisdiction, upon indictment or information sufficient in form and substance to sustain conviction, and that a jury has been impaneled and sworn, and thus charged with his deliverance.

3. Section 4001, Code 1837, requires the discharge of one held under criminal charges if no indictment is found against him before the end of the second term after his arrest. *Held* that, to entitle one to a discharge under said law, it must appear that he is held by the court whose terms are to be counted; it not being permissible to count the terms of one court, when the prisoner is detained in another.

4. By Act Feb. 12, 1894, the circuit court's jurisdiction to try criminal cases was taken away, but no provision was made for the transfer of cases then pending in said court to the county court. *Held*, that all such cases fell with the repealed statute, and that the time between such repeal and the time when one held under indictment was again indicted for the same offense could not be considered in determining whether there was a delay in the county to indict the prisoner, under section 4001, Code 1837.

Error to circuit court, Rappahannock county.

Petition by John T. Dulin for a discharge under a writ of habeas corpus. A discharge having been refused, he brings error. Affirmed.

J. C. Gibson, for plaintiff in error. R. Taylor Scott, Atty. Gen., for the Commonwealth.

BUCHANAN, J. On the 8th day of November, 1893, the plaintiff in error was committed to the jail of Rappahannock county under a warrant of a justice of the peace, upon the charge of murder. At the next term of the county court for that county he was indicted for said offense, and at the same term of the court was arraigned, and demanded to be tried in the circuit court of said county; whereupon he was remanded to jail for trial

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

in that court. At the next term of the circuit court, which was held in the same month, the cause was continued upon motion of the commonwealth. At the following term of the circuit court, which was held in May, 1894, the court dismissed the said indictment of its own motion, in the absence of the plaintiff in error, and over his objection, upon the ground that it had no jurisdiction to try the case, but without prejudice to the right of the commonwealth to arrest, indict, and try the accused for the offense with which he was charged. After said judgment was entered, and before the accused was actually released from custody, another warrant was issued against him for the same offense, and upon it he was committed to jail to answer an indictment in the county court. At the June term of the said court he was again indicted for the same offense. Upon the calling of the cause at that term of the court, he tendered a number of special pleas, which were rejected by the court. He then pleaded "not guilty," the cause was continued, and he was remanded to jail. Afterwards, on the 19th day of the said month, he presented his petition for a writ of habeas corpus to the judge of the said circuit court. The writ was accordingly awarded, and, the cause coming on to be heard before the judge on the 25th of that month upon said writ, return thereto, and the evidence offered, the judge was of the opinion that the petitioner was not illegally detained in the custody of the jailer of the said county, and therefore ordered him to be remanded to jail. This is the judgment to which the writ of error was awarded in this case.

It is claimed by the accused that the amendment to section 4016 of the Code, approved February 12, 1894 (Acts Assem. 1893-94, p. 270), repealing so much of that section of the Code as conferred jurisdiction upon the circuit courts to try certain criminal cases remanded to such courts by the county courts, had no effect upon the cases then pending in the circuit courts, and that the order of the said circuit court at its May term, 1894, operated as an acquittal of the accused of the offense for which he is in custody. We express no opinion upon that question of jurisdiction, as it is not necessary to the decision of this case; for whether the circuit courts were deprived of all original criminal jurisdiction by said amendment, or still had jurisdiction to try criminal causes pending in those courts, the order of said circuit court could not operate as an acquittal of the accused of the offense for which he is in custody. If the circuit court did not have jurisdiction of the case at its May term, it is very clear that it could enter no order that could either benefit or prejudice the accused or the commonwealth; for an order of a court without jurisdiction, except an order dismissing the case, is a mere nullity. See *Freem. Judgm.* § 116. If it did have the jurisdiction of the case, whatever may be the effect of

its order, it could not operate as an acquittal of the accused. The court dismissed the indictment without a trial of the accused, and without prejudice to the commonwealth's right to arrest, indict, and try him for the offense with which he was charged. If the court had jurisdiction of the case, the order of dismissal would have the effect of ending the proceedings commenced in November, 1893, in the same manner as if the indictment had been quashed or a *nolle prosequi* entered. The accused would be discharged from liability on that indictment, but not acquitted of the offense charged in the indictment. Inasmuch as there is no limitation to prosecutions for murder, a new proceeding upon the part of the commonwealth could be instituted for the same offense at any subsequent time, either by the presentment of a grand jury or by a complaint before a justice. *Com. v. Bressant*, 126 Mass. 246; *Ex parte Cahill*, 52 Cal. 463; *Ex parte Clarke*, 54 Cal. 415.

The claim of the accused that he has already been in jeopardy for the offense for which he is now in custody is not sustained by the record. In order to make such a defense with success, the party relying upon it must show that he has been put upon his trial before a court which has jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, and that a jury has been impaneled and sworn, and thus charged with his deliverance. Anything short of this is insufficient to raise a bar against a new indictment or prosecution for the same offense. 1 *Bish. Cr. Law*. §§ 1014, 1015; *Whart. Cr. Pl.* § 499; *Cooley, Const. Lim.* pp. 399, 400. The accused in this case has never been put upon his trial for said offense. No jury has ever been charged with his deliverance. He has, therefore, never been in jeopardy for the offense for which he is now in custody.

Neither can the claim of the accused be sustained that he was entitled to be discharged from imprisonment because no presentment or indictment was made against him before the end of the second term of the court in which he was held to answer, as is provided in section 4001 of the Code. This ground of error can have no relevancy to the proceedings had in the circuit court, because that court had no jurisdiction of the case at all until after indictment found, and during the whole time he was held to answer in that court he was under indictment. Nor was there any such delay in indicting him while held to answer in the county court. He was arrested and committed to jail on the 8th day of November, 1893, to answer an indictment in the said county court. At its next term, in the same month, an indictment was found, and the case remanded to the circuit court for trial, upon the demand of the accused. The jurisdiction of the county court over that case was at an end as soon as the case was remanded to the circuit court, and

it had no control over or custody of the accused from that time until the 25th day of May, 1894, when he was again committed to jail to answer for the same offense in the said county court. At the June term of that court, the first term after his commitment, he was again indicted. There was therefore no delay whatever in the county court in either case, before indictment, of which he could complain. Nor was there any delay in the trial of said indictments in either court which entitles him to be forever discharged from prosecution for the offense with which he is charged, as provided in section 4047 of the Code as amended by act of the general assembly approved February 24, 1894 (Acts Assem. 1893-94, p. 464). That section of the Code, as amended, provides that "every person against whom an indictment is found charging a felony, and held in any court for trial, shall be forever discharged from prosecution for the offense if there be three regular terms of the circuit, or four of the county, corporation, or hustings court, in which the case is pending after he is so held without a trial," unless the failure to try him was for certain causes not necessary to mention, as neither of them exists in this case. As there were only two terms of the circuit court for said county held during the time the said first indictment was pending in that court, to wit, the November term, 1893, and the May term, 1894, there was no such delay in trying him in that court as entitles him to be forever discharged from further prosecution. Nor was there any such delay in trying him in the county court. He was indicted at the November term, 1893, of that court, and at the same term of the court, upon his own demand, was remanded to the circuit court for trial. The county court never had any further jurisdiction over that indictment. There was therefore but one term of the county court at which the accused could have been tried upon the first indictment, viz. the November term, 1893. But it is argued very earnestly by the learned counsel for the accused that if the said amendment of February 12, 1894, to section 4016 of the Code, deprived the circuit court of jurisdiction to try the indictment pending in that court, then the amendment which deprived that court of such jurisdiction *ex proprio vigore* forever discharged the accused from further prosecution for said offense, or else remanded said indictment to the county court for trial on the day that the said jurisdiction was taken from the circuit court; and that since there had been four terms of the county court from the time said jurisdiction was taken away from the circuit court, and no trial of said indictment, he was entitled to be forever discharged from prosecution for said offense. It has been shown above that taking the jurisdiction away from the circuit court could not result in acquitting the accused. Neither could it operate to transfer that indictment from the circuit court to the coun-

ty court. Whenever a court is deprived of jurisdiction over any class of cases, by the repeal of a statute which gives the jurisdiction, and there is no provision made for the transfer of such cases to some other court which has or is given jurisdiction, and no reservation made for the trial of pending cases in such court, all such cases fall with the repealed statute. The *Assessor v. Osbornes*, 9 Wall. 567, 575; *Railroad Co. v. Grant*, 98 U. S. 398, 401; *South Carolina v. Gaillard*, 101 U. S. 433. To remand such a case from the circuit court to the county court would require an act of the legislature, and there is no such act. The indictment pending in the circuit court was therefore never remanded to the said county court by operation of law or otherwise, and the time between the amendment of said section 4016, and the time the accused was again indicted, in June, 1894, cannot be considered in determining whether there was such delay in the county court in the trial of the accused as entitles him to be forever discharged from further prosecution for said offense. Upon every view of this case, therefore, we are of opinion that there is no error in the judgment complained of, and that it should be affirmed.

(90 Va. 836)

# NORFOLK & W. R. CO. v. MARSHALL'S ADM'R.<sup>1</sup>

(Supreme Court of Appeals of Virginia. Dec. 22, 1894.)<sup>2</sup>

## ACTION AGAINST RAILROAD COMPANY—INJURY TO PASSENGER—WASHOUT ON LINE—ACT OF GOD.

1. The mere fact that an accident has occurred, by which a passenger is killed, raises no presumption of negligence, when it is conceded that the accident was caused by the act of God.

2. In an action against a railroad company for the death of a passenger, it appeared that the accident occurred on a dark and rainy night, the rain falling in torrents, which flooded the track, laid along the side of a mountain; that the train was stopped at times at exposed places, but met no obstruction until it reached the place of the accident, by which time the rain had ceased. This place was an earth fill, provided with a stone culvert 35 years old, and no accident had ever happened there. In consequence of a waterspout, the culvert did not carry off the water, and a great pond was formed against the earth embankment, causing it to give away, but leaving the rails and ties unbroken; and the train went down into this washout, killing plaintiff's intestate. *Held*, that defendant was not liable.

Error to circuit court, Bedford county; Dupuy, Judge.

Action by Marshall's administrator against the Norfolk & Western Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Kirkpatrick & Blackford and S. Griffin, for plaintiff in error. Blair & Blair, for defendant in error.

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

<sup>2</sup> Application for rehearing pending.

**LAOY, J.** This is a writ of error to a judgment of the circuit court of Bedford county, rendered on the 10th day of June, 1893. The suit was instituted by the defendant in error against the railroad company to recover damages for the negligent killing of W. F. Marshall, a passenger, on the night of July 1, 1889. It is admitted upon the record, by the plaintiff, that the accident by which his intestate was killed was caused by the act of God, in the shape of an unprecedented storm. Thereupon, the defendant company introduced no testimony, and demurred to the evidence. The jury found a verdict for \$7,500, and the court, after hearing the argument, overruled the demurrer to the evidence, and gave judgment accordingly, whereupon the defendant company applied for and obtained from this court a writ of error.

The question as to how far the mere fact that an accident has occurred raises a presumption of negligence on the part of the carrier which caused the injury, in the case of a passenger, will not be discussed, because it was conceded by the plaintiff below that the accident was caused by the act of God. See *Curtis v. Railroad Co.*, 18 N. Y. 534; and the General Doctrine, pp. 197, 212, *Thomp. Carr.*; *Railroad Co. v. Reeves*, 10 Wall. 176; *Gillespie v. Railroad Co.*, 6 Mo. App. 554; *Long v. Railroad Co.*, 147 Pa. St. 343, 23 Atl. 459; *Transportation Co. v. Downer*, 11 Wall. 130; *Ingalls v. Bills*, 43 Am. Dec. 363.

But it is claimed by the defendant in error that the consequences of this act of God could have been prevented by the act of ordinary diligence on the part of the defendant company, and this can only be determined from the evidence in the case, which shows that the accident occurred on a dark and rainy night, the rain pouring in torrents at times, and flooding the track, which was laid along the side of the Blue Ridge Mountains, causing stoppages from time to time at exposed places. Before the train reached the place of the accident, the rain ceased and the train had reached a portion of the track which had always been regarded as perfectly safe. The character of the watershed was such along the mountainside that the water rapidly ran off, and the train proceeded on its way without further obstructions. The train at last reached the place of the accident, which was a dirt fill, provided with a stone culvert for the outlet of the water from the hillside above. This culvert was built 35 years before, on the construction of the road, as to which there had never been any accident. It was very dark, and the train ran upon the fill. No one suspected evil. The engine crossed, and its nose reached the embankment on the other side, where, by reason of what is called a "waterspout," the culvert had proved insufficient to carry the water off. A great pond had formed above the fill, and the water bore the fill out, leaving the rails and ties of the track unbroken. The train went down into the water, which, de-

prived of its support, formed a sort of cataract. A large number of persons were injured; among them, the defendant in error's intestate, who was killed. The contention of the defendant in error is that the speed of this train was recklessly rapid, and it hurled the mail car clear across on the opposite side. But the fact is that the whole train did not go on the embankment. Some of the cars stopped when the accident occurred, and were wholly uninjured; and there is nothing whatever in the evidence—which is adduced by the defendant in error only—which shows any negligence on the part of the company. The circuit court erred in overruling the demurrer to the evidence of the defendant company, which should have been sustained; and this judgment must be reversed and annulled, for the reasons stated, and this court will render here such judgment as the said circuit court ought to have rendered.

**FAUNTLEROY, J.**, absent.

(90 Va. 799)

**VOIGHT et al. v. RABY.**<sup>1</sup>

(Supreme Court of Appeals of Virginia. Dec. 22, 1894.)

**EJECTMENT—TITLE TO SUSTAIN—LACHES—BOUNDARIES—ACQUIESCENCE.**

1. Poverty and inability to bear litigation are no excuse for failure to bring suit to recover land, as Code 1887, § 2913, declares that no continual or other claim upon or near any land shall preserve any right of making an entry, or of bringing an action.

2. Defendant in ejectment need not offer any evidence of title in himself or a third person, provided he make it appear that the legal and possessory title is not in the plaintiff.

3. Where one is present at the running of a boundary line between his property and his neighbor's, and acquiesces therein, he and those claiming under him cannot subsequently dispute such line.

Appeal from circuit court, Nansemond county.

Action by Thomas M. Raby against John T. Voight and others. Judgment for plaintiff, and defendants appeal. Reversed.

White & Garnett, for appellants. John H. Wright and E. E. Holland, for appellee.

**RICHARDSON, J.** This was an action of ejectment brought in the circuit court, Nansemond county, in 1885, by Thomas M. Raby, plaintiff, against John T. Voight, Nancy J. Voight, his wife, and Peter B. Prentiss, trustee, defendants. The object of this suit was to recover a certain tract of land in said county, containing some 200 acres, and described as the Stalia Hardy and Hezekiah Raby land.

Such proceedings were had that the cause came and was finally heard at the October term, 1889, when the jury found a verdict as follows: "We, the jury, find for the plaintiff

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

a fee-simple title to two hundred and thirty-five acres of the land described in the declaration, and bounded by the Green tract, the land of R. Umphlet, the Robert Johnson land, the Amos Riddick land, the Wilson Ellis tract, the Abram Griffin land, the Henry Raby land, and the land of Thomas M. Raby, as shown on the plats used in evidence in the cause, and that the defendants unlawfully withhold from him the possession thereof." Whereupon, the defendants moved the court to set aside the verdict and grant them a new trial, upon the ground that the said verdict was contrary to the law and the evidence, which motion being argued, the court took time to consider of its judgment, and the case was continued until the next term. And at the April term, 1890, the court overruled the motion made at the preceding term to set aside the verdict and grant a new trial, to which ruling of the court the defendants excepted. And thereupon the court proceeded to give judgment according to the finding of the jury, and to said judgment of the court the defendants obtained a writ of error.

At the trial of the cause the court instructed the jury as follows: "The court instructs the jury that if they believe that the defendants have succeeded in proving adversary possession, and in furnishing prima facie evidence of its continuance for 15 years or more, it is then incumbent on the plaintiff to show that the continuity has been interrupted or broken." The plaintiff claims under the will of his father, James Raby, which is as follows:

"In the name of God Amen: I, James Raby, of the upper parish of Nansemond County in the State of Virginia, being sick and in low state of health, do make and ordain this my last will and testament in manner and form following, to-wit: First. I give my soul to God that gave and my body to the earth, to be buried in a christian-like manner, at the discretion of my executors hereafter named, and as to such property as God has blessed my labors with, I give and dispose of the same, in the following manner, to-wit. Item. I give and bequeath to my son, Henry Jimmerson Raby, the plantation where I now live; also my mill seat and mill; the said land contains fifty acres more or less; joining Wilson Ellis and Amos Barnes, and Kedan Raby; my old gun, my blacksmith's tools, all so, fifty dollars in cash to be raised out of my estate, for the purpose of schooling him, to him and his heirs forever. Item. I give and bequeath to my son Thomas M. Raby, all the remaining part of my land, including the whole in my possession, one old gun and one small one; all so one hundred dollars to be raised out of my estate for the purpose of schooling him, to him and his heirs. Item. I give and bequeath to my nephew, Quintin Raby, son of Hezekiah Raby the land where his father formerly lived, containing fifty

acres more or less; with this condition—if the said Quintin Raby should happen to die without a lawful heir, the land to return to my son Thomas M. Raby. Item. I lend to my beloved wife, Pamela Raby the use of my plantation and land where I now live, during her natural life or widowhood, all so, all the remaining part of my estate, including all my stock of all kinds and all my household and kitchen furniture, for the purpose of raising my childring and paying the above named legacies to Henry J. Raby and Thomas M. Raby, and my just debts, my will and desire is that after the death or marriage of my wife Pamela Raby, all the property that may be found of any kind, be equally divided between my three youngest children, to-wit: Thomas M. Raby, Tempty and Mediann Raby, share and share alike. Item. My will and desire is that if either of my sons should happen to die without a lawful heir the land given them should descend to the other. Lastly. I nominate and appoint my friend, Jethro Riddick, my soul executor to execute this my last will—revoking all other wills; ratifying and confirming this to be my last will. In witness I have set my hand and seal, this 16th day of March 1829. James Raby. [Seal.]

"Signed and acknowledged in the presence of,

"John Harrell

"John Knight

his

"Edward X Saunders."

mark

Other than the will aforesaid, the plaintiff offered no documentary evidence.

The defendants traced their title back to Rispah Raby, the widow of Hezekiah Raby, deceased, and, by a succession of conveyances, down to John F. Voight, covering a period of some — years. By reason of the destruction of many of the public records of Nansemond county, the chain of title under which the defendant John T. Voight claims is somewhat irregular; but, in the main, the defects therein are substantially cured by the official certificates as to the existence and destruction by fire of some of the deeds constituting links in said chain of title; but this is immaterial, under the peculiar circumstances of this case, as will be seen in the progress of this opinion. It will be seen, also, that the plaintiff, at the trial, somewhat departed from the purpose indicated in the declaration. He was introduced as a witness on his own behalf, and testified that he had always claimed the land in controversy, and had not brought suit therefor because of his poverty, or inability to bear the expense of litigation. But this pretension is cut up by the roots by the statute (section 2916, Code 1887), which declares, "No continual or other claim upon or near any land shall preserve any right of making an entry or of bringing an action." In the action of ejectment, it is incumbent upon the plaintiff

to, and he must, make out a legal and possessory title to the premises in controversy; and the defendant's evidence may be confined to disproving the plaintiff's pretension, or rebutting the presumptions which may arise from his proofs. The defendant need not offer any evidence of title in himself, or of a third person. It is sufficient if he make it appear that the legal and possessory title is not in the plaintiff, for it is the general rule that the plaintiff must recover, if at all, upon the strength of his own title, and cannot do so by reason of the weakness of the defendant's title, the rule being that possession gives the defendant a right against every person who cannot show a good title. *Hutch. Land Titles*, citing *Haldane v. Harvey*, 4 Burrows, 2484; *Wilson v. Inloes*, 11 Gill. & J. 351; *Witten v. St. Clair*, 27 W. Va. 770. This general rule is, however, subject to important qualifications, as, where the defendant has entered under the title of the plaintiff, and in subordination thereto, as tenant, trustee, coparcener, or licensee, he cannot set up title in a third person, in opposition to that of the plaintiff, under which he entered.

The plaintiff not only fails to show that he was entitled to the possession at the time of the institution of this suit, but, in effect, establishes the fact that he never was at any time in possession of, or entitled to possession of, any portion of the land in controversy. One of the intermediate alienees of the land in controversy,—one Johnston by name,—many years ago, and while he was the owner of this land, became embarrassed; and, in a suit in equity by his creditors to subject the same to the payment of his debts, J. R. Kilby was appointed commissioner to make sale of the same. A survey was had by the county surveyor of Nansemond county, in order to ascertain the true boundaries and quantity of land contained in the premises in controversy. In making the survey, it became necessary to establish the dividing line or boundary between the land in question and that devised by the will of James Raby to the plaintiff below, Thomas M. Raby. The dividing line was run, and was found to be a well marked and defined line. At the running of this line, which was many years ago, the plaintiff below, Thomas M. Raby, who is the defendant in error here, was present, and acquiesced in the running of said line, making no objection thereto. This effectually overturns the claim attempted to be set up at the trial, that the land in controversy is part of the James Raby tract, devised by his will aforesaid. It is true that at the trial the plaintiff introduced several witnesses,—some of them very aged persons,—who testified, in substance, that they had known the land in controversy for many years, and had always understood it to be the James Raby land; but neither of these witnesses professed to know the lines and boundary of the land in controversy, or had been

so related to it as to have any peculiar knowledge in respect thereto. Their testimony, therefore, is worth but little, if anything. Much more might be said in respect to the utter want of merit in the claim asserted by the defendant in error, Thomas M. Raby. Perhaps no case was ever presented more utterly barren of merit than the claim thus asserted. Suffice it to say that in no possible view can the judgment of the court below be sustained. We are therefore of opinion to reverse said judgment, set aside the verdict of the jury, and remand the cause to the said circuit court of Nansemond county for a new trial to be had therein in accordance with the views expressed in this opinion. Judgment reversed.

LAOY and FAUNTLEROY, JJ., absent.

RICHMOND & D. R. CO. v. SCOTT.<sup>1</sup>  
(Supreme Court of Appeals of Virginia. Dec. 21, 1894.)

REVIEW ON APPEAL—MOTION FOR NEW TRIAL.

In an action on the case against a railroad company, the defendant demurred to the evidence, and the jury returned a verdict for the plaintiff, subject to the opinion of the court, whereupon judgment was entered upon said verdict. The defendant made no motion to set the verdict aside and for a new trial. *Held*, that the omission to make said motion puts it out of the power of this court to review the proceedings.

Error to circuit court, Albemarle county.

From a judgment in favor of the plaintiff below, W. C. Scott, the defendant, the Richmond & Danville Railroad Company, appealed. Affirmed.

Kirkpatrick & Blackford, for plaintiff in error. L. C. Bailey and J. K. M. Norton, for defendant in error.

FAUNTLEROY, J. This is a writ of error to a judgment of the circuit court of Albemarle county, rendered on the 14th day of May, 1892, in an action of trespass on the case for damages, in said court pending, in which W. C. Scott, Jr., is plaintiff, and the Richmond & Danville Railroad Company is defendant. After the evidence was all heard, the defendant demurred thereto; and the jury assessed the plaintiff's damages at \$2,500, subject to the judgment of the court upon the demurrer, and entered judgment for the plaintiff according to the verdict, and for costs. The case is here upon a writ of error, which was awarded by one of the judges of this court.

The record shows that there was not a motion addressed to the court for a new trial; and under the ruling of this court in the case of *Newberry v. Williams*, 89 Va. 238, 15 S. E. 865, and the cases therein cited, the omission of a motion to set the verdict aside

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

and for a new trial puts it out of the power of this court to review the proceedings had in the case in the trial court. The writ of error must therefore be dismissed, as having been improvidently awarded, and the judgment of the circuit court of Albemarle affirmed.

30 Va. 825)

**ASTON et al. v. KINDRICK.<sup>1</sup>**

(Supreme Court of Appeals of Virginia. Dec. 22, 1894.)

**SALE OF WIFE'S LAND — CONVERSION INTO PERSONALTY—WRONGFUL APPLICATION ON HUSBAND'S DEBTS.**

M. K. owned a tract of land in fee upon her marriage with K., which they desired to exchange for C. tract, and she instructed him to sell her tract, and invest in C. Her land was sold for \$5,000 to her brother, P., who gave three bonds in payment thereof, payable to K.; and on the same day K. bought C. tract for \$3,225, for which he gave three bonds, with said P. and A. as sureties. It was understood by all, including A., that this was merely an exchange of lands, and that the M. K. tract was to pay pro tanto for the C. tract. K. indorsed the bonds given by P., amenable to M. K.'s equity, and K. and his wife deeded her tract to P., but no deed was made of C. tract. M. K. took possession of and improved C., and sold a part for \$1,225, which was paid on the purchase price of the C. tract. P.'s three bonds were transferred to A., one of the obligors on the bonds for the C. tract, to be applied by A. to the discharge of said bonds of K. for the C. tract; and, having been paid, A. applied them to a debt owing him by K., and the C. tract was sold to pay the balance due on its purchase price, and was bought by A.'s widow. *Held*, that A.'s personal representative was liable for the value of M. K.'s reversionary interest in the proceeds of the K. tract.

Appeal from circuit court, Washington county.

Bill by M. E. Kindrick, by her next friend, R. W. Price, against W. H. Aston and others. From the decree, defendants appeal. Affirmed.

D. Trigg and Hutton & Honaker, for appellants. Ward & Ashworth, for appellee.

**FAUNTLEROY, J.** This is an appeal from a decree of the circuit court of Washington county, pronounced May 28, 1891, in a chancery cause therein pending, in which M. E. Kindrick, by her next friend, R. W. Price, is complainant, and W. H. Aston, administrator d. b. n. of the estate of A. W. Aston, deceased, and others, are defendants. It appears from the record that the complainant in the court below, M. E. Kindrick, was M. E. Price before her marriage to H. F. Kindrick, and inherited from her father, John W. Price, deceased, a tract of land in Washington county, of which she was seised in fee, as her maiden land, when she became the wife of H. F. Kindrick in the year prior to 1877, in which, under the common law, her said husband acquired his marital rights.

He was a merchant of the firm of Kindrick & Aston, composed of H. F. Kindrick and A. W. Aston, having their place of business at Cedarville, in Washington county, some distance from the residence of the said H. F. Kindrick and his wife. There was a tract of land, known as the "Cassell Tract," belonging to the estate of Adam Cassell, deceased, situated near to Cedarville (the place of business of Kindrick & Aston), which was for sale, under the will of Adam Cassell. Mrs. M. E. Kindrick desired to sell her maiden land, and to invest the proceeds in the purchase of this Cassell tract, so as to have a residence near Cedarville, and convenient to her husband and place of business; in which wish and purpose her said husband, H. F. Kindrick, concurred; and accordingly she requested and instructed him, the said H. F. Kindrick, to sell her said tract of maiden land, and to invest the proceeds of said sale in the purchase of the Cassell tract. To carry out this purpose and plan, she and her husband united in a sale of her said maiden land on the 28th of February, 1871, to William H. Price, the brother of Mrs. Kindrick, for \$5,000, for which the said W. H. Price executed his three single bills, of that date, payable to H. F. Kindrick at 12, 24, and 36 months, respectively. On that same day, viz. February 28, 1871, the Cassell tract was sold, and bought by the said H. F. Kindrick; for which he executed his three single bills, with said W. H. Price and A. W. Aston as sureties, and payable to Samuel A. Cassell, executor of Adam Cassell, deceased, in equal installments of \$2,075, in 12, 18, and 24 months. All these said transactions of sales and purchase were at her request and by her instructions, with the concurrence of her husband, H. F. Kindrick, to carry into effect their purpose aforesaid, as one transaction, for the exchange of the said two tracts,—her maiden land and the Cassell land; and they were all done with the privity and knowledge of the said Kindrick, W. H. Price, her brother, and of A. W. Aston, who was brother-in-law and partner of H. F. Kindrick, and all of them obligors on the bonds for the purchase money of the Cassell tract, W. H. Price being also the purchaser of Mrs. Kindrick's said maiden tract. The said H. F. Kindrick and wife made a deed conveying her maiden land to W. H. Price, but no deed was made for the Cassell tract. But Mrs. Kindrick took possession of the Cassell tract, and made improvements thereon; and she sold 40 acres of it to C. V. Moore for \$1,225, to pay (as she did pay therewith) the difference between the sale prices of her maiden land and the Cassell tract, to the executor of the Cassell estate. The three bonds of W. H. Price, for the purchase money of Mrs. Kindrick's maiden land, were transferred to A. W. Aston (one of the obligors on the bonds for the purchase of the Cassell tract), to be applied by the said transferee, A. W. Aston, to the discharge of the bonds of H. F.

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

Kindrick for the Cassell tract, and were paid to A. W. Aston; but the said A. W. Aston did not, nor did his legal representative, apply the same to the payment of the bonds for the Cassell tract, but he applied them to the payment of the personal debts of H. F. Kindrick to himself. The Cassell tract, not having been paid for, was subsequently sold for the default, and Mrs. Aston, the widow of A. W. Aston, became the purchaser. A. W. Aston had died, and W. B. Aston became his administrator, and, on the death of W. B. Aston, W. H. Aston (the appellant here) became administrator d. b. n. This suit was brought by appellant, Mrs. M. E. Kindrick, by R. N. Price, her next friend, against Mrs. E. E. Aston (widow of A. W. Aston), W. H. Aston in his own right and as administrator d. b. n. of A. W. Aston, the heirs of A. W. Aston, and H. F. Kindrick, for the conveyance to her of the Cassell land which Mrs. E. E. Aston bought at the last sale, or to have the proceeds of the sale of Mrs. M. E. Kindrick's maiden land refunded to her. After various proceedings, demurrers sustained, and amended bills, answers, and depositions, and master's reports, corrected and confirmed, the circuit court entered its final decree that the complainant, M. E. Kindrick, recover of W. H. Aston, administrator d. b. n. of A. W. Aston, deceased, \$2,441.30, with interest from 23d March, 1891 (the present value of the reversionary interest of Mrs. M. E. Kindrick in the proceeds of the sale of her maiden land); and that W. H. Aston, administrator d. b. n. of A. W. Aston, recover of H. F. Kindrick \$2,441.30, with like interest; and that complainant recover costs. From this decree this appeal is taken.

From the foregoing facts disclosed in the record, it appears that the appellee, M. E. Price, was owner in fee of a tract of land—her maiden land—when she became the wife of H. F. Kindrick, prior to 1877; that she and he both desired to exchange this tract for the Cassell tract, convenient to his place of business, and to this end she instructed her husband, H. F. Kindrick, to sell her said maiden land, and to invest the proceeds in the Cassell land; that her said maiden land was sold to her brother, W. H. Price, on 28th of February, 1871, for \$5,000, for which he gave his three bonds, payable to H. F. Kindrick. On the same day (and as part of the same aim and end) the Cassell tract was sold, and was bought by H. F. Kindrick, her husband, according to agreement and instructions, for her, for the price of \$6,225, for which he executed his three bonds, with W. H. Price and A. W. Aston as securities. It was in fact, and was so fully understood, that this was only an exchange, and that the maiden land of Mrs. M. E. Kindrick was to pay, pro tanto, for the Cassell land. A. W. Aston was privy to the transaction, and he was brother-in-law and partner in business with H. F. Kindrick, and security on his bonds. H. F. Kindrick signed the bonds of

Price, for the maiden land, to A. W. Aston, amenable to the recognized equity of Mrs. M. E. Kindrick, and Aston took them with this knowledge; but, instead of applying them to the payment of the Cassell land bonds, he applied them to the payment of a personal debt of H. F. Kindrick to himself, in fraud of Mrs. Kindrick's equity. The court held rightly that A. W. Aston's estate is liable to her, and must refund to her, the value of her reversionary interest in the proceeds of her maiden land. The sale of Mrs. Kindrick's maiden land, under the circumstances detailed, does not, ipso facto, convert the proceeds into the absolute property of her husband, and make it liable to his debts, either then existing or subsequently incurred. There was nothing in the mind of either Mrs. Kindrick or her husband contemplating a conversion of her land into personalty, but expressly the contrary. It was plainly the intent of both merely to effect an exchange or substitution of the Cassell land for her maiden land, and to this intent and endeavor A. W. Aston was a privy, and one of the obligors on the purchase-money bonds for the Cassell land. The two sales were made eo instante, as parts of the same transaction, and amounted to an exchange as fully as if deeds had been mutually exchanged. The intent of all the parties to the transactions, fully proved by the direct evidence and by the circumstances, establishes simply a change of investment. The proof is conclusive that Mrs. Kindrick intended her land, and its proceeds of sale, for the purpose of investment in the Cassell land, to be and continue to be her realty. If her husband had intended aught else, it would have been a fraud on her, which equity will not aid, either for the husband or for his creditors. The decree appealed from is plainly right, and the judgment of this court is to affirm it.

LACY, J., absent.

(90 Va. 339)

GEORGE et al. v. BATES et al.<sup>1</sup>

(Supreme Court of Appeals of Virginia. Dec. 21, 1894.)

EQUITY PRACTICE—TAKING OF TESTIMONY—DESCRIPTION IN DEED—SUFFICIENCY.

1. When a bill presents a case meet for equity, and exhibits are filed tending to support such a case, and the answer denies the identity of the property claimed by the plaintiff with that which has been conveyed to him, it is error for the court to determine the question of identity on the pleadings and exhibits, without giving full opportunity to take all desired testimony.

2. A description in a deed which consists only of the words, "a piece or parcel of land near Bacon Quarter Branch," is too vague and indefinite to create a right of property in any particular parcel of land.

Appeal from chancery court of Richmond. Bill by one Bates and others against one

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.



George and others. From a decree for complainants in accordance with the report of a commissioner, defendants appeal. Reversed.

John Dunlop and Leigh Robinson, for appellants. J. H. Webb Peploe and Hill Carter, for appellees.

HINTON, J. This suit in equity was instituted in 1874, by the plaintiffs, the present appellees, to have certain lots, which are specifically enumerated in a deed of trust of October 23, 1824, from the grantor, James Brown, Sr., to Copeland, MacMurdo, and Burton, trustees, as lots in Duval's addition, numbered 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 163, 164, etc., released from the obligation of said trust. They (the plaintiffs) say that the said Brown, who was a man of large property, subsequently, to wit, on the 6th of August, 1825, executed another trust deed to Charles Copeland, Robert Burton, and Samuel Taylor, trustees, as additional security to James Scott, executor of John Leslie, deceased; that in this latter deed two classes of property are conveyed; that the first class comprises unincumbered property, which is conveyed with particular description; that in the second class are contained several parcels of incumbered land, which are described in the most general terms; and they insist that the 26 acres now in dispute were conveyed in this last-mentioned deed of trust by the words: "All the interest of every description that may result to the said James Brown \* \* \* in a certain parcel of land near Bacon Quarter Branch, \* \* \* after the execution of a prior deed thereon." To the bill there was a demurrer and answer; and, upon the hearing, the chancery court of Richmond dismissed the bill of the plaintiffs, Bates and others, whereupon an appeal was taken to this court.

In January, 1885 (see *Bates v. Brown*, 80 Va. 126), this court rendered its decision, holding, in effect, that when a bill presents a case meet for equity, and exhibits are filed tending to support such a case, and the answer denies the identity of the property claimed by the plaintiff with the property which had been conveyed, it is error for the court to determine the question of identity on the pleadings and exhibits, without giving the parties full opportunity to take all desired testimony. The cause was remanded then, for the purpose of allowing all the evidence to be adduced, and to be determined upon the merits.

In obedience to mandate of this court, the chancery court made the necessary order of reference to one of its commissioners, who reported that the said Samuel Taylor, the surviving trustee in the deed of August 6, 1825, sold the said 26 acres on Bacon Quarter Branch. To this report the defendants excepted, but the chancery court overruled their exceptions, and ordered said 26 acres to be released to the plaintiffs. In this, we

think, the court below manifestly erred. The claim of the plaintiffs is that in May, 1844, the surviving trustee in the deed of August 6, 1825, offered for sale, "by virtue of a deed of trust from the late James Brown to the undersigned, \* \* \* a certain piece or parcel of land near Bacon Quarter Branch"; that this property, at the sale which ensued, was bought by T. F. Crew for the sum of \$5.50, and by him sold on the 27th of February, 1854, for the consideration of \$1, to Micaiah Bates, the ancestor of the plaintiffs; and that this piece or parcel of land, thus acquired, contains 26 acres, and is the identical property conveyed by the trust deed of 1824 as lots in Duval's addition, numbered as 151, 152, etc.

Now, it may well be questioned, as has been done by the learned counsel for the defendants, whether a description which consists only of the words "a piece or parcel of land near Bacon Quarter Branch" is not too vague and indefinite to create a right of private property in any particular parcel of land which could be maintained in a court of justice. *U. S. v. King*, 3 How. 787. And this was manifestly the view of this court when it sent the case back for testimony to be taken, for it had then all the advantages to be derived from the deeds, which were before it; and, if the lights derived from the deeds had been sufficient to identify the property, there would have been no necessity for sending the case back. "To give a deed any sensible operation, it must describe the subject-matter of the conveyance, so as to denote, upon the instrument, what it is in particular, or by a reference to something else which will render it certain. The want of such a description or reference in a deed is a defect which renders it totally inoperative." *Kea v. Robeson*, 5 Fred. Eq. 373. And in the case of *Dickens v. Barnes*, 79 N. C. 490, the court says: "A deed conveying land, and describing it as 'one tract of land, lying and being in the county aforesaid, adjoining the lands of A. and B., containing twenty acres, more or less,' does not constitute color of title, and possession under it is not adverse. Such description is insufficient, and cannot be aided by parol proof." See, also, *Capps v. Holt*, 5 Jones, Eq. 155; *Westfall v. Cottrills*, 24 W. Va. 763; *Clark v. Chamberlain*, 112 Mass. 19; *Lumbard v. Aldrich*, 8 N. H. 81. It may, then, well be doubted whether the description relied on in the present case passed any title to Samuel Taylor, and, if it did not, of course none could be transmitted by him.

But, passing from this point, the evidence, instead of strengthening the plaintiff's case, shows that Mr. Taylor himself could find no such land, and such was the growing uncertainty with regard to this claim, that, although it was bought in 1844 for the pitiful sum of \$5.50, it sold 10 years afterwards, notwithstanding the presumed enhancement in the value of real estate, for only \$1.

Without going more into detail, we think it sufficient to say that the 26 acres claimed by the plaintiffs has not been identified as the property conveyed in the deed of 1824, and that the decree of the chancery court must be reversed, and the plaintiffs' bill must be dismissed.

LACY and FAUNTLEROY, JJ., absent.

(90 Va. 816)

SMITH'S EX'R v. HOUSEMAN et al.<sup>1</sup>  
(Supreme Court of Appeals of Virginia. Dec. 22, 1894.)

WILL—WHEAT CONSTITUTES—REVOCATION—CLAIM AGAINST ESTATE—TESTIMONY OF WIDOW—APPEAL BY ADMINISTRATOR.

1. S. executed the following paper: "\$1,000.00. This article is to certify that, if E. survive me, I bequeath him \$1,000 of my property, free from any lien or incumbrance,"—and sealed and signed it. E. was an orphan, living with S., when the above was written, but subsequently left. Afterwards S. executed a will disposing of all his property, but made no mention of the above or of E. *Held*, that the first writing was a will, and was revoked by the subsequent will.

2. Where a paper in the form of a will is attempted to be established as a contract, the widow of the one who executed it is incompetent to testify as to the value of the services rendered by the beneficiary.

3. A contract to make a provision for another by will must be established by clear and convincing evidence.

4. One who appeals in his capacity as administrator cannot have a decree against him as an individual reviewed.

5. Personal estate is the natural and primary fund for the payment of debts, and must first be exhausted before the real estate can be made liable; nor will it be exonerated by a charge on the real estate, unless there be express words or a plain intent in the will to make such exoneraton.

Appeal from circuit court, Botetourt county.

Bill by Smith's executor against one Houseman and others to obtain the construction of a will. From the decree rendered by the circuit court, complainant appeals. Modified.

Benj. Haden, for appellant. O. M. Lunsford, for appellees.

LEWIS, P. On the 1st day of June, 1888, Henry E. Smith executed the following paper, to wit: "\$1,000.00. This article is to certify that, if Elliott Smith survive me, I bequeath him one thousand dollars of my property, free from any lien or incumbrance. To the above bequest I hereunto set my hand and seal, this first day of June, 1888. [Signed] Henry E. Smith. [Seal]." Elliott Smith was an orphan boy, between seven and eight years of age, at the time of the execution of this paper, and a member of Henry E. Smith's family. On the 2d day of December, 1889, Henry E. Smith executed a will, whereby he disposed of his entire estate, real and personal, without in any way referring either to Elliott Smith, or to the paper just mentioned. He died in February, 1891, soon

after which his will was duly admitted to probate. The bill was filed by the executor for a construction of the will and an administration of the estate; and the first question to be determined is as to the nature and effect of the paper writing of June 1, 1888.

By the decree complained of, the circuit court adjudged it to be a valid contract, to be treated as though it were a general pecuniary legacy in the testator's last will and testament. Upon careful consideration, we are unable to concur in this view. There is no element of contract about it; and the evidence returned by the master with his report falls to establish a contract. The paper was evidently intended as a will, which was revoked by the subsequent incompatible will, disposing of the whole estate. The only evidence on the subject of the alleged contract is the deposition of an illiterate woman, who says she heard the testator remark to his wife that, if she would "fetch the child back, he would will him a thousand dollars." The child, it seems, had been taken care of by the testator from its infancy; and shortly before the 1st of June, 1889, Mrs. Smith left his house, and took the child with her to an adjoining county. It was to induce her to return it that his promise to leave it a sum of money was made. But it is not shown that she was authorized to contract for the child, or that she had any legal control over it. It seems, moreover, that the testator, after writing the paper, put it in a Bible in the house, and told his wife to take care of it till his death. What afterwards became of the child does not appear, and the evidence as to the value of its services is extremely weak. It is true the widow was examined as a witness in support of the theory of a contract founded on valuable consideration, but her competency as a witness was objected to, and the objection was unquestionably well founded, although the coverture was ended. 1 Greenl. Ev. § 337; William & Mary College v. Powell, 12 Grat. 372; Smith v. Bradford, 76 Va. 758. That a person may make a valid contract to make provision for another by will is not disputed; but as was held in Rice v. Hartman, 84 Va. 256, 4 S. E. 621, the evidence to establish such a contract must be clear and convincing.

The next question relates to the Beale debt. This debt amounted to something over \$1,000, and was evidenced by bond payable to the testator. About one-half of this debt was assigned by the testator in his lifetime to Swann, and for the residue, which Swann collected, the contention is that Swann agreed to pay the testator an annuity of \$168.13 during his life. The circuit court, however, refused to credit Swann with the residue of the debt, but charged him with it, as executor of Smith. This branch of the decree was especially assailed in the argument at the bar; but as the appeal from the decree was taken by Swann in his representative capacity (i. e. as executor), and as the estate is not ag-

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

grieved, the question whether he is aggrieved in his individual capacity cannot be considered. That a decree, though erroneous, will not be disturbed at the instance of an appellant not prejudiced thereby, is a proposition too well settled in this state to require the citation of authority.

The next and last question discussed at the bar is whether the real estate devised by the residuary clause of the will should be subjected for the payment of debts before calling for contribution from the specific legacies. The well-settled general rule is that the personal estate is the natural and primary fund for the payment of debts, and must first be exhausted before the real estate can be made liable; nor will it be exonerated by a charge on the real estate, unless there be express words or a plain intent in the will to make such exoneration. In the present case no such intent appears, and the case is therefore governed by the general rule.

Reversed in part, and affirmed in part.

HINTON and LACY, JJ., absent.

#### LENNIG'S EX'RS v. WHITE.<sup>1</sup>

(Supreme Court of Appeals of Virginia. Dec. 22, 1894.)<sup>2</sup>

##### ADVERSE POSSESSION—TAX SALE—PRESUMPTION OF VALIDITY.

1. In 1796 the commonwealth of Virginia granted by patent 93,000 acres of land to B., who never took possession of the same or paid any taxes thereon. In 1806 the United States marshal sold and deeded the tract to G. at a tax sale, for direct taxes due the United States, which deed was duly recorded. B. lived for nine years after this sale, but never questioned it. The tract was mostly wild mountain land, and after said sale, in 1806, parts of the tract were sold, devised, leased, and improved in many ways, all parties tracing their rights to the tax sale above. The various owners subsequent to G., and all claiming through him, successfully asserted their title in several legal proceedings; and the tract was known throughout the country as the "Waterman Tract," that being the name of the last owner under G.'s title. B.'s title was also forfeited for nonpayment of state taxes. *Held*, in a suit by heirs of B. against those claiming under G. as above, that defendants were entitled to the land by adverse possession.

2. A description by metes and bounds is not necessary, where the premises are well known by name.

3. An adversary possession must be actual; that is, by occupation, use, or enjoyment, or other notorious and habitual acts of ownership. Cultivation and improvement are not the only tests of adversary possession. Habitually cutting and selling wood by a claimant of a tract of land in vicinity of a city, or, in case of an uninclosed city lot, where the owner uses it as a coal or lumber yard, quarry, or landing place, are all instances of possession regarded by the law as sufficient upon which to base title by prescriptive use.

4. Statutes forfeiting land for nonpayment of taxes are constitutional, and, in order to consummate a forfeiture in such a case, no judgment or decree or other matter of record is necessary; the statute a proprio vigore effectually

divests title out of the defaulting owner, and perfectly vests it in the commonwealth.

5. Wherever inquiry is a duty to one purchasing property, the party bound to make it is affected with knowledge of all that he would have discovered had he performed his duty. Means of knowledge, with the duty of using them, are in equity equivalent to knowledge itself.

6. Where property was sold for taxes 80 years ago, during which time the former owners have acquiesced in the sale, and in the possession of the purchaser and his grantees, and where the records of the court in which the proceedings were had have been largely destroyed by fire and war, the sale will be presumed to be valid.

7. A tax deed valid on its face will give color of title, though it may be defective in form or substance, or be founded on irregular proceedings.

Appeal from circuit court, Rockingham county.

Bill by John K. White against Clement B. Barclay, Charles Lennig, and others for partition and other relief. Said Lennig having died, the cause was revived against Nicholas Lennig and John B. Lennig, his executors. From a decree for complainant, said executors appeal. Reversed.

Conrad & Conrad, G. Eastham, and Holmes Conrad, for appellants. John E. Roller, for appellee.

RICHARDSON, J. This is an appeal from a decree of the circuit court of Rockingham county rendered on the 31st of October, 1892, in the suit in equity therein then pending wherein John K. White was plaintiff and Clement B. Barclay and others were defendants. The object of the suit was to have partition, under the provisions of section 2562 of the Virginia Code of 1887, of a tract of 93,000 acres of land lying in the counties of Rockingham and Pendleton, the latter county now being in the state of West Virginia, but formerly in Virginia, which tract of land was granted by the commonwealth of Virginia, in the year 1796, to John Barclay, a citizen of the city of Philadelphia and state of Pennsylvania. The substantial facts appearing by the record are these: On the 5th day of March, 1796, there was granted by the commonwealth of Virginia to John Barclay, in his own right for one moiety, and as assignee of Matthew Gambill for the other moiety, a tract of 93,000 acres of land, lying partly in the county of Rockingham, in the state of Virginia, and partly in the county of Pendleton, now in the state of West Virginia, but formerly also in the state of Virginia. The tract of land thus granted to John Barclay in 1796 was in the year 1806 sold by Joseph Scott, marshal for the district of Virginia, in the name and as the property of John Berkeley, as delinquent for the nonpayment of the United States direct land tax due thereon; and at said sale H. J. Gambill became the purchaser of said tract of land; and by deed dated the 1st day of June, 1806, said marshal conveyed the said tract of land to said Gambill, the deed reciting the authority under which said sale and conveyance was

<sup>1</sup>Affirmed on rehearing. See 21 S. E. 473.

<sup>2</sup>Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

made; and said deed was recorded in December, 1806. Thereafter the said tract of land was conveyed by the successive deeds now to be referred to: By deed from H. J. Gambill and wife to Asher Waterman, dated December 16, 1806, and recorded December 16, 1806; by deed from Asher Waterman's heirs to Augustus Waterman, dated June 8, 1827, and recorded June 8, 1827; by deed from Augustus Waterman's devisees to the appellants' testator, Charles Lennig, dated July 9, 1859, and recorded July 9, 1859. All these conveyances are set forth in the plaintiff's bill, with the simple comment that all of them "are deeds of special warranty only"; a circumstance of no significance whatever touching the real merits of this controversy. The bill sets out at great length the genealogical history of the Barclay family, and alleges that by deed bearing date the 8th day of May, 1890, from De Grasse Fox and Harriet Biddle, his wife, who is a remote descendant of said grantee, John Barclay, which deed has been duly recorded in the clerk's office of the county court of Rockingham county, the complainant is the owner of an undivided one-ninth interest in said tract of land, and is desirous of having a partition of same in kind, if such partition can be had with due regard to the interest of all concerned, and, if this be not practicable, of having a sale of said land, or at least that portion of the same that lies in the state of Virginia, and a distribution of the proceeds. And the bill further alleges "that your complainant finds, however, that by an agreement dated the 6th day of March, 1890, one Charles Lennig [the appellants' testator] has undertaken to sell and convey to the J. P. Houck Tanning Company, a corporation under the laws of the state of Virginia, upon certain terms and conditions, all the tan bark to be found in and upon said tract of land; and the said company has, through its agents and employés, entered upon the same, and is now actively engaged in cutting down the chestnut trees and other growing timber upon the said tract of land from which said tan bark can be procured, and, unless restrained by the court, will utterly destroy said timber, to the irreparable damage of the freehold." And a copy of said paper is filed, marked "B," as an exhibit with the bill. The bill further sets forth that from said agreement it appears that the contract in respect to the sale of the right to cut and carry away said tan bark was originally with J. P. Houck and J. O. Steigle, who assigned their interest in the same to England & Bryan, who in turn assigned the same to the said J. P. Houck Tanning Company. And the bill further sets forth that the said Lennig, in said agreement, professes to have acquired said tract of land from the heirs of Augustus Waterman, deceased, and, tracing this claim of title, your complainant finds it is derived through Augustus Waterman and the heirs of Asher Waterman, deceased, by deeds, with

covenants of special warranty only, from Henry J. Gambill, who bought the whole of said tract of land, for the sum of \$8.09, from Joseph Scott, marshal, as aforesaid, under a sale made of the same as the property of John Berkeley (not Barclay), as delinquent, for the nonpayment of the United States direct land tax, and received a deed therefor; and thus practically admitting a good title in Gambill and those claiming under him. But the plaintiff, in his bill, proceeds to negative this seeming admission, as follows: "That, as your complainant is informed and believes, these tax sales and deeds have been held to be illegal and invalid so often and so uniformly by the court as scarcely to constitute them sufficiently strong to make even a color of title to any lands referred to in them. That, as he avers in this case, the sale and deed aforesaid were had and made, without the formalities required by law, as the property of John Berkeley (not Barclay), under a law itself unconstitutional and void, the same, and all deeds made in pursuance of and under said sale and deed, must be set aside, canceled, and annulled." In this way, and only in this way, does the plaintiff in his bill attempt to assail the title of the appellants' testator. Then, after reciting the several deeds of conveyance hereinbefore referred to, the bill proceeds: "That in addition to the claims asserted to said tract of land under said deeds, and under the agreement aforesaid with the 'J. P. Houck Tanning Company,' your complainant finds that the corporation known as the 'Royal Land Company of Virginia' has placed upon record a deed of trust or mortgage, bearing date the 2d day of October, 1876, and recorded on the 20th of January, 1877, under which it professes to convey said tract of land, as the owner thereof, to the Fidelity Trust, Insurance and Safe-Deposit Company of Philadelphia, also a corporation, in trust to secure certain bonded debts of said Royal Land Co. He also finds an agreement of record between Charles Lennig and the Potomac and Ohio Railroad Company, a corporation, dated April 20, 1881, and recorded on the 1st day of September, 1882; also an agreement between Charles Lennig and R. N. Pool, dated June 27, 1883, and recorded on the 3d day of March, 1885, under which certain interests in the title of said Lennig are conveyed to said Pool; also a contract between R. N. Pool and James Boyce, dated February 27, 1885, and recorded on the 30th of March, 1885, under which the said R. N. Pool conveyed to the said James Boyce the undivided moiety of his rights under his contract with the said Charles Lennig; and also a further contract between the said R. N. Pool and Samuel E. Griscom, dated the 1st day of September, 1888, and recorded on the 6th day of January, 1890, under which the said Pool conveyed to said Griscom all interest then owned by him in the Lennig tract, among others. That your complainant also finds

at Asher Waterman and Augustus Waterman, while they were alive, made some quitclaim deeds to small portions of said tract; it by whom these are now owned your complainant is unable to state, and he proposes bringing these claimants before the court by nenned bill, if the same be deemed necessary or advisable. Wherefore, being remediless save in equity, where matters of this sort are alone and properly cognizable, your complainant prays that Clement B. Barclay, James Barclay, C. Francis Barclay, Mortimer Barclay, Christian Wallace, Edwardrenchard, Dudley Digg (Smith), and Mary, his wife, formerly Mary Barclay, Clement Phillips, and Ann C., his wife, formerly Ann Clifford Biddle, De Grasse Fox, and Harriet B., his wife, formerly Harriet Biddle, Dr. Samuel Miller, and Elizabeth, his wife, formerly Elizabeth Rebecca Biddle, William O. Biddle and Dr. Clement Biddle, Geo. W. Biddle, Mary L. C. Biddle, widow of Chapman Biddle, dec'd, Charles Lennig, J. P. Houck, Geo. C. Steigle, Thos. Y. England, Edward A. Bryan, and Charles S. Walton, partners in trade under the firm name and style of England & Bryan, the J. P. Houck Tanning Co., a corporation, the Royal Land Co. of Virginia, a corporation, the Fidelity Trust, Insurance and Safe-Deposit Co., a corporation, the Potomac & Ohio Railroad Co., a corporation, R. N. Pool, James Boyce, and Samuel E. Griscom may be made parties defendant, and be required to answer, answer under oath being expressly waived; that the J. P. Houck Tanning Co., its agents and employes, and all other persons, may be enjoined and restrained from cutting any trees of any sort growing in and upon said tract of land for the purpose of peeling the bark therefrom, or for any other purpose, and from removing any timber of any sort already cut, or any bark already peeled, until further order of the court; that the court may take cognizance of the various questions presented in this bill affecting the legal title to said tract of land, and that after these are determined there may be a partition of the same, if practicable, and, if not practicable, that there may be a sale of same and a distribution of the proceeds of sale, for general relief," etc.

The injunction was granted according to the prayer of the bill. The J. P. Houck Tanning Company demurred to and answered the bill. In its answer, to which only a very brief reference is necessary, this respondent says that it contracted with Charles Lennig as set forth in the copy of the agreement filed with complainant's bill, and with the full belief that the said Lennig was the legal and rightful owner of the said land, and had the right to contract with respondent as he did; that respondent company was conducting an extensive tanning business at Harrisonburg, and had recently arranged, at very heavy cost, to greatly extend and enlarge its said business; that to effect this object it had entered into said contract with

said Lennig as the surest means of conveniently procuring a sufficient supply of tan bark, and had contracted to pay a more liberal price than he would have been willing to give for bark in smaller quantities; that it had expended a very large sum of money in enlarging its tannery, and in securing the bark on this land, and that it could not obtain the necessary supply of bark elsewhere, as the season was too far advanced for peeling bark in sufficient quantities. And this respondent avers that the said Charles Lennig has been in the actual possession of this land, under at least color of title, and, as it is informed and believes, under a good title, for many years, certainly for as much as 30 years; that during all of this time the said Lennig has in every way exercised ownership and control over the land, and has had continuous, unbroken, open, and notorious possession of the land, and adversary possession as to all claimants whomsoever, and the world at large. "Your respondent further says that, believing that the said Charles Lennig has a complete and perfect title to the said land, and that he was fully authorized to treat and deal with respondent, it entered into the contract above referred to, and proceeded to cut and peel bark, according to the terms and provisions of said contract; that it has already expended a large amount in cutting, peeling, and curing this bark, and has made contracts for the delivery of the same at its tannery at Harrisonburg, Va.; that it has already expended as much as \$6,000. And respondent says that it does a very large business at Harrisonburg, Va., in tanning six hundred hides per week, and has made arrangements so that the output of its tannery will be 1,200 hides per week. And respondent further says that it relied upon said contract, as being made between parties competent to contract, and relied upon the bark which had been cut from this large tract of land to supply its tannery, and its operations are dependent upon it. And respondent therefore prays for a dissolution of the injunction, so far as it is concerned, or, if the court will not dissolve the injunction, then that a bond be required of sufficient penalty to indemnify and save respondent harmless from loss resulting from said injunction" etc. Later, in vacation, the said J. P. Houck Tanning Company moved to dissolve the injunction, which motion was overruled; but the restraining order was so far modified as to permit, under certain specified conditions, the said company to remove from said land the bark already cut and peeled. The defendants J. P. Houck and J. C. Steigle and Thomas Y. England and Edward A. Bryan and Charles S. Walton, partners doing business under the firm name and style of England & Bryan, jointly demurred to and answered the bill; but the matter contained in their answer need not be further referred to, as the same is not necessary to a proper decision of this case.

At the April term, 1891, the death of the defendant Charles Lennig was suggested, and the cause was revived against his executors, the appellants Nicholas Lennig and John B. Lennig. And at the October term, 1891, by leave of court, the executors filed their demurrer to the plaintiff's bill, and assigning several specific grounds of demurrer, to which the plaintiff replied generally, and the same was argued by counsel; upon consideration whereof the court overruled the demurrer. And thereupon, on the motion of said executors, leave was given them to file their answer, and the same was then filed, with general replication thereto. In their answer they admit that on the 5th day of March, 1796, there was granted by the commonwealth of Virginia to John Barclay, of the city of Philadelphia, a tract of 93,000 acres of land, situated as set forth in the complainant's bill; they suppose it is true that said Barclay died many years ago, but they say they are not informed whether the persons named in the bill are the heirs of John Barclay, and in this respect they neither admit nor deny. But they do deny that either the said John Barclay or any of his heirs are entitled to any right, title, or interest in the bill mentioned; but, on the contrary, they say that they are the owners of a large portion of the said tract. That it is true that Charles Lennig, respondents' testator, did make the contract with Houck and Steigle by which he sold to them the right to cut and remove bark, etc., and they believe complainant's Exhibit B is a correct copy of that agreement. That they further say that their testator had a perfect right and full power to make said contract and agreement; that he bought said land from W. H. Ruffner and others, devisees of Augustus Waterman, in 1859, and on the third day of July of the same year received a deed therefor, which on that day was duly recorded in the office of the clerk of the county court of Rockingham county; and they file a copy of the said deed with and as a part of their said answer, and also a copy of the will of Augustus Waterman they likewise file. That the said Augustus Waterman derived title to said land through the will of Asher Waterman, his father, and a deed from the heirs of Asher Waterman; they file with and as a part of their answer copies of said will and deed. That the said Asher Waterman derived his title thereunto through H. J. Gambill, by deed of date December 16, 1806, which they also exhibit with and as a part of their answer. And that said Gambill, by deed from J. Scott, marshal of the district of Virginia, of date June 6, 1806, a copy of which deed is also exhibited by them, said land being sold in pursuance of law by said marshal as delinquent for the nonpayment of the United States direct tax assessed thereon by the United States government. And these respondents say that all of the provisions and requirements of the act of congress of the

United States under which the land was sold were fully complied with. And, further answering, they say that their testator and those through whom he claimed have been in undisputed actual possession and ownership of said land for nearly a century under and by virtue of said conveyances, etc.; that no one has ever questioned the validity of their title until this suit was brought, and there is no just ground for it now; that for nearly a century they have had open, notorious possession, adverse to the complainant and the rest of the world; that they have paid all the taxes assessed against the land since 1806, have sold many smaller tracts from the original tract, and put the purchasers in possession; that deeds of conveyance were duly executed and recorded, and that the purchasers have since their purchases been in undisputed, open, and notorious and continuous adversary possession, under and by virtue of said conveyances, for a great many years, for more than the statutory period; that they have from time to time had tenants on the land to watch over it, care for it, and prevent depredations, have leased portions of the land, and received rents therefor, and, in fact, in every way exercised such open, notorious acts of ownership and continued adversary possession as the land, from its character and quality, was susceptible of. Respondents deny that John Barclay or those claiming under him have ever had actual possession of any part of this land now sought to be taken from the estate of their testator. And the respondents further say that, in addition to the delinquency and nonpayment of the United States direct tax, for which the land was sold by said Scott, marshal of the district of Virginia, the said John Barclay also forfeited his title thereto by his failure to pay the taxes assessed thereon and due to the commonwealth of Virginia, as they will show from the auditor's books of this state, and that the said Barclay, nor any one for him, has ever redeemed the said land after it was so forfeited, so that the chain of title under which the plaintiff claims from the commonwealth is broken and forfeited, and he has no title whatever. And respondents further say that the land has not been assessed to the said John Barclay or his heirs on the assessor's books of Rockingham county since the year 1806; that the complainant and those under whom he claims have not at any time had the land placed upon the land books of either Rockingham or Pendleton counties, and assessed for taxes, and paid the taxes thereon, as required by law to be done by persons claiming to own land which has been dropped from the land books, etc. The cause came on to be heard at the October term, 1892, when a decree was pronounced declaring that the complainant and others claiming under the original patent to John Barclay, and under the title which has descended to some of them as his heirs at law, and under the devises and conveyances made

to others from some others of said heirs at law, are the rightful owners of the tract of 93,000 acres of land in the bill and proceedings mentioned and described. That they be quieted in their possession and ownership of the same. That the deeds and contracts set forth and referred to in said bill of complaint, to wit, the deed from Joseph Scott, marshal, to Henry J. Gambill, dated the 1st day of June, 1806, and recorded December —, 1806, the deed from H. J. Gambill and wife to Asher Waterman, dated December 16, 1806, and recorded on the same day; the deed from Asher Waterman's heirs to Augustus Waterman, dated 28th of June, 1827, and recorded on the same day; the deed from Augustus Waterman's devisees to Charles Lennig, dated the 9th day of July, 1859, and recorded on the same day; the agreement between Charles Lennig, the J. P. Houck Tanning Company, Houck & Steigle, and England & Bryan, dated the 6th day of March, 1890, and recorded on the 22d day of March, 1890; the agreement between Charles Lennig and Richard N. Pool, dated 27th day of June, 1883, and recorded on the 3d day of March, 1885; the deed of trust or mortgage from the Royal Land Company of Virginia to the Fidelity Trust, Insurance & Safe-Deposit Company of Philadelphia, dated the 2d day of October, 1876, and recorded on the 2d day of January, 1877; and the agreement between Charles Lennig and the Potomac & Ohio Railroad Company, dated the 20th day of April, 1881, and recorded on the 1st day of September, 1882; the agreement between Richard N. Pool and James Boyce, dated the 27th day of February, 1885, and recorded on the 3d day of March, 1885; and the agreement between Richard N. Pool and Samuel C. Griscom, dated 1st day of September, 1888, and recorded on the 6th day of January, 1890,—be canceled, vacated, and annulled in so far as they relate to, or have any connection whatever with, the title to said tract of 93,000 acres of land. And declaring and decreeing certain other things not necessary to be here more particularly referred to. From that decree the case is here on appeal.

Instead of passing seriatim upon the question directly and incidentally presented by the record, we will present our view of the whole case, in order that the correctness of the conclusion arrived at may be more readily apprehended. The 93,000 acres of land in controversy was granted by the commonwealth of Virginia to John Barclay by patent dated the 5th day of March, 1796, and the same was regularly entered on the land books of the state, and the taxes assessed thereon in his name from the year 1797 to the year 1806, inclusive; not one cent of which has ever been paid by said Barclay or his heirs, or by any other person for him or them. Not only was this land so delinquent and forfeited to the state of Virginia, but it was also delinquent for the nonpayment of the United

States direct tax charged thereon in pursuance of certain acts of congress which need not be here enumerated, it being admitted in the plaintiff's bill that the land was so delinquent, and was in 1806 sold by Jos Scott, United States marshal for the district of Virginia, for the nonpayment of such taxes, and that the same was at such sale purchased by H. J. Gambill, who received from said marshal a deed therefor, dated and recorded as above stated. John Barclay, the original grantee, a citizen of the city of Philadelphia, died in the year 1815, intestate, leaving numerous descendants, as is shown by the history of the family set out in the plaintiff's bill; and, although he lived for nine years after the sale of this land by the United States marshal, it is not pretended that he ever in any way evinced the least disposition to question the validity of either the sale or conveyance made by that officer of the law. Nor did he during his life, or his heirs since his death, ever take any steps either to challenge the validity of the sale and conveyance by said marshal, or to redeem the land from the forfeiture to the state. By virtue of the tax sale made by the United States marshal in 1806 to H. J. Gambill of the tract of land in controversy, his conveyance thereof to said purchaser, the successive conveyances thereof down to that to the testator of the appellants, and the open, notorious, and habitual acts of ownership by the said successive allenees, under, to say the least, colorable title, for nearly a century, and the palpable acquiescence therein by John Barclay during his life, and by his heirs since his death, has ripened the title so acquired and transmitted into a perfect title, that cannot in any way be affected by the claim asserted by the appellee, or by those under whom he claims. The title thus acquired has passed unscathed through three generations of people, and its validity has never been questioned, except on three occasions now to be referred to. Nearly 70 years prior to the institution of the present suit, one Abraham Joseph asserted a claim under a junior grant to a part of this land. Asher Waterman, the then occupant, brought his action of ejectment in the superior court of Rockingham county against said Joseph, and in said action recovered the land in controversy. Later, Asher Waterman brought an action of trespass against the same Abraham Joseph in respect to this same 93,000 acres of land, and in that action Waterman prevailed. Still later, and during the ownership and occupancy of this tract of land by Augustus Waterman, one Blaine asserted claim to part thereof, and by agreement between Augustus Waterman and said Blaine, the parties to said controversy, the whole matter was submitted to the arbitrament and award of that able and painstaking lawyer, Green B. Samuels, who was afterwards an honored and honorable member of this court; and in the year 1843 he rendered his award in favor of Waterman, as the owner of the land by

title paramount. The result of those controversies, which arose many years ago, and when the circumstances attending the sale of this land by the United States marshal were doubtless fresh in the memory of many living men, powerfully vindicate the validity of the tax title here in question, and under which the testator of the appellants and those under whom he claims have occupied, used, and enjoyed the land for now nearly 90 years. Such has been the open, notorious, and habitual acts of ownership in respect to this tract of land that it long since acquired a local designation. Persons who have lived on and near the land from infancy to old age testify that they never heard of the Barclays, and that they have always known the land as the "Waterman Survey." So well known is the land by the name of the "Waterman Survey" that a description of it by metes and bounds in a deed conveying the same would be unnecessary. In Hutchinson on Land Titles (section 395) it is said: "But a description by metes and bounds is not necessary when the premises are well known by name," etc.; citing a number of authorities, and among them *Snapp v. Spengler*, 2 Leigh, 1, and *Beverley v. Fogg*, 1 Call, 484.

Moreover, under the title in question, numerous smaller tracts, parts of the Waterman survey, have been sold and conveyed, and the purchasers thereof have recorded conveyances, which were properly recorded, have been put in possession, and have built on, cultivated, and improved their premises, respectively, and have occupied, used, and enjoyed the same for many years without challenge or molestation from any source. John Josephs, a witness for the appellee, testifies that he has known the south end of the tract since he was 12 years old; that it was always called the "Waterman Land"; that his father, who had died four years previous, was then 64 years old, and that he had frequently heard him say "Gus Waterman"—meaning Augustus Waterman—leased parts of the land to persons to get out shingles and lumber, and gave personal supervision and attention to the protection of the land against all depredations; that the land recovered by Waterman from Blaine was sold to his father by Waterman, and Waterman said that the judgment which he had obtained against Blaine for trespass belonged to his father, and he gave this judgment to Waterman for the privilege of working the timber to the head of the hollows; that Waterman also had a man named David Ray working timber on the land under contract. Melvina Hulvey, another witness for the appellee, shows occupancy for a great number of years, under sales by Waterman, at the north end of the survey, and never heard of any Barclays, and never heard of any one except the Watermans and those claiming under them exercising ownership over the land. Sol. Gladwell, another of the appellee's witnesses, shows the public notoriety of Waterman's habitual exercise of acts

of ownership and enjoyment, and also the employment of witness by Lennig as his agent. Dr. Ruffner shows that Augustus Waterman's chief income for many years was from the lease and sale of smaller tracts within this large one, and that he let timber rights, cattle ranging, etc.; that he received shingles and cooper stuff in payment for rent; that he had tenants and agents living on the land in different sections, and that many of the timber men made contracts in advance with Mr. Waterman, or his agents, and that he heard the names of tenants and agents, but cannot recall them. In addition to these open and notorious evidences of occupation, use, and enjoyment, there is the regular succession of conveyances, to wit: That from the United States marshal to Gambill, the purchaser at the tax sale; that from Gambill to Asher Waterman; the will of Asher Waterman, devising this land to his heirs, of whom Augustus Waterman was one, and the conveyance by the heirs of Asher Waterman other than Augustus to the latter, and the conveyance by the heirs of Augustus Waterman to Charles Lennig, the appellants' testator. And there are these further evidences of open and notorious claim of ownership: First, the power of attorney executed by Augustus Waterman to Timothy Green in 1811; Augustus Waterman's deed to James Hopkins, in 1842, for 900 acres of this tract of land; the deed of Augustus Waterman to Jacob Bowman, in 1843, for 210 acres of same; the sale to Josephs in 1843; the deed from Augustus Waterman to James A. and William Harriss, in 1847, for 200 acres; the deed from same to Arch Hopkins, in 1847, for 161 acres; the verbal contract of sale between Augustus Waterman and George Shoemaker, in 1848, for 100 acres, under which contract Shoemaker paid part of the purchase money, was put in possession, and built, improved, and cultivated the same, and has continuously occupied, used, and enjoyed the same ever since, but in subordination to the Waterman title, he never having paid the balance of the purchase money, and therefore has never received any deed; the deed from Augustus Waterman to James Hetzel, in 1850, for two tracts; also, the deed from same to D. R. and Arch Hopkins (two tracts), 150 acres. Moreover, it was stated in argument, and not denied, that numerous other sales and conveyances were made by Augustus Waterman, which have not been copied into the record. Add to all these the several contracts and agreements between Charles Lennig and others since said Lennig became owner of this land, all of which, together with the several conveyances heretofore referred to, and constituting the unbroken chain of title under which Lennig, the appellants' testator, claimed, and all of which, except the conveyances of parts of this tract by Augustus Waterman as above set forth, are recited in the complainant's bill, and can it be said that these numerous evidences of continuous occupation,



use, and enjoyment for near 90 years; these continuous, open, notorious, and habitual acts of ownership, under a continuous claim of ownership,—are not in every respect fully equivalent to an adversary possession, evidenced by actual, continuous residence, cultivation, and improvement? In the light of well-settled principles, we think not.

In *Taylor v. Burnside*, 1 Grat. 165, Judge Baldwin, at page 192, clearly defines adversary possession and the essential elements thereof. He says: "An adversary possession must also be actual, in reference to the means by which it is acquired. In that sense, I understand an actual possession to be the occupation, use, or enjoyment of the subject-matter of controversy, by residence, cultivation, improvement, or other open, notorious, and habitual acts of ownership. Of occupation, use, or enjoyment, residence, cultivation, and improvement, respectively, while they continue, are usually the most obvious and decisive. But there may be other open, notorious, and habitual acts of ownership, of quite equivalent import and effect. Take, for example, the case of a town resident who, claiming title to a lot or tract of woodland in the vicinity, openly, notoriously, and habitually cuts and hauls from it his necessary supplies of fuel, or in like manner makes it a source of revenue, by sales of firewood or timber; or the case of an uninclosed or unimproved lot in or near a city, devoted by the professed owner to his use or profit as a coal or lumber yard, quarry, or landing place. There cannot be stronger instances of actual possession than these, and other like cases which might be stated; but they can serve only for the purpose of illustration. When we leave the unquestionable tests of residence, cultivation, and improvement, every case must depend in a great measure upon its own circumstances, and requires a recurrence to the general principle, above stated, of open, notorious, and habitual acts of ownership. That principle must, moreover, be guarded in its application by taking care not to confound an adverse claim with an actual possession, and by distinguishing between repeated trespasses, under a pretense or even belief of title, and the dominion, control, and enjoyment of actual or apparent ownership. That an adversary possession requires actual occupancy, or what is equivalent to it, is sustained by an overwhelming current of American decisions. \* \* \* There is no case, I think, which, when closely examined, will be found in opposition to this doctrine, unless it be that of *Ewing v. Burnet*, 11 Pet. 41. And, if impugned in that case, it is by some of the reasoning, and not by the opinion of the court." Judge Baldwin then proceeds to state the case of *Ewing v. Burnet*, as follows: "It was an action of ejectment, in which the verdict and judgment were for the defendant. The property in controversy was a lot in the town of Cincinnati, incapable, from the character of its surface, of being inclosed,

unfit for cultivation, and without any building or other improvement upon it. Its only value was for the sand and gravel, and the taking and removing thereof the only use to which it was applied. The evidence tended to prove the open, notorious, and habitual use of it by the defendant in that way for upward of twenty years, and that his use of it by himself and his lessees was exclusive, except occasional trespasses by others, which he prohibited, and for which he sought redress by actions of trespass." The opinion in *Ewing v. Burnet*, supra, was delivered by Mr. Justice Baldwin, of the United States supreme court, while that in *Taylor v. Burnside*, supra, was delivered by Judge Baldwin, of this court; and as it becomes necessary to compare these two opinions, for the purpose of showing that, as respects the essential elements of adversary possession, there is no practical difference between them, we will, for convenience, refer to them as Mr. Justice Baldwin and Judge Baldwin. Now, after the remarks above quoted, Judge Baldwin, after some comments on the opinion of Mr. Justice Baldwin in *Ewing v. Burnet*, not pertinent to the present inquiry, proceeds to quote from the opinion of Mr. Justice Baldwin, and to criticise his remarks as follows: "It is well settled that to constitute adverse possession there need not be a fence, building, or other improvement made. It suffices for this purpose that visible and notorious acts of ownership are exercised over the premises in controversy for twenty-one years after an entry under claim and color of title. So much depends on the nature and situation of the property, the uses to which it can be applied, or to which the owner or claimant may choose to apply it; that it is difficult to lay down any precise rule adapted to all cases. But it may with safety be said, that where acts of ownership have been done upon land which from their very nature indicate a notorious claim of property in it, and are continued for twenty-one years, with the knowledge of an adverse claimant, without interruption, or an adverse entry by him, for twenty-one years, \* \* \* and an actual adverse possession against him, if the jury shall think that the property was not susceptible of a more strict or definite possession than had been so taken and held. Neither actual occupation, cultivation, or residence are necessary to constitute actual possession when the property is so situated as not to admit of any permanent useful improvement, and the continued claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim." The criticism of Judge Baldwin is as follows: "Now, what the court thus said, in relation to acts of ownership sufficient to prove an ouster and continued adverse possession, may be very true in reference to the case before it; was the result

of a combination of the circumstances of that case, and required the actual knowledge of them by the other party. But, with great deference, it seems to me it is not a safe guide, if so intended, as furnishing rules to ascertain what is an adverse possession, for the language employed, if taken abstractly, would serve to indicate an adverse claim rather than an adverse possession. That acts of ownership on the property indicate an adverse claim is not, as I humbly conceive, sufficient, unless they amount to an adverse possession; that is, to the occupation, use, or enjoyment of the premises. Nor is it sufficient that they show a continued claim of the party, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim. Such language strikes me as remarkably loose and indefinite, and as calculated to occasion darkness instead of light, which, I think, must be the result of any attempt to give it a practical application as a test of adverse possession."

Counsel for the appellee, seizing upon this criticism by Judge Baldwin, and evidently misled thereby, comes to the conclusion that the doctrine of adversary possession is incorrectly laid down by Mr. Justice Baldwin in *Ewing v. Burnet*, and has been repudiated by the courts of this and other states. This is obviously a mistake. The doctrine laid down by Mr. Justice Baldwin in *Ewing v. Burnet* is that held by the supreme court both before and since that decision, and, consequent thereto, has been reaffirmed by Mr. Justice Clifford in *Harris v. McGovern*, 99 U. S. 161, decided in 1878; by Justice Field in *Fletcher v. Fuller*, 120 U. S. 534, 7 Sup. Ct. 667, decided in 1887; and by Chief Justice Fuller in *Coal Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. 239. In the case last mentioned the very language which counsel for the appellee has characterized as an "unguarded expression" is by the learned chief justice quoted verbatim. As respects the doctrine of adverse possession, and the elements essential to constitute it, there is practically no difference between the statement of the rule by Mr. Justice Baldwin in *Ewing v. Burnet* and that by Judge Baldwin in *Taylor v. Burnside*. The two cases are often quoted side by side without any adverse criticism of the former. It is, perhaps, true that Judge Baldwin's statement of the rule is more clear and compact than that of Mr. Justice Baldwin, and that the illustrations given by the former are happier than those given by the latter; but their statements, when taken together, import one and the same thing. Judge Baldwin says: "I understand an actual possession to be the occupation, use, or enjoyment of the subject-matter of controversy, by residence, cultivation, improvement, or other open, notorious, and habitual acts of ownership. Of these modes of occupation, use, or enjoyment, residence, cultivation, and improvement, respectively, while they continue, are not al-

ways, but usually, the most obvious and decisive. But there may be other open, notorious, and habitual acts of ownership of quite equivalent import and effect." And Mr. Justice Baldwin, with less amplitude of statement, and omitting the words "residence, cultivation, and improvement, the usual, most obvious, and decisive tests of occupation, use, or enjoyment," and speaking with reference to the case in hand, covered all the ground necessary in that case by saying: "It is well settled that to constitute an adverse possession there need not be a fence, building, or other improvement made. It suffices for this purpose that visible and notorious acts of ownership are exercised over the premises in controversy for twenty-one years [the statutory period] after an entry under claim and color of title," etc. And all of the language criticised by Judge Baldwin is predicated of the language of Mr. Justice Baldwin last above quoted, and is referable to the case the learned justice had under consideration, in which, as in the present case, actual residence, cultivation, and improvement by the owner or claimant were out of the way, and in which, as here, the question was whether the occupation, use, and enjoyment, by "visible and notorious acts of ownership," came up to the requirement expressed by Judge Baldwin in the words "or other open, notorious, and habitual acts of ownership" so as to constitute an adversary possession for the statutory period. We fail, therefore, to perceive the justness of Judge Baldwin's criticism of the language and reasoning of Mr. Justice Baldwin; we fail to perceive in the reasoning any tendency to confound an adverse claim with an actual possession, or any failure to distinguish between repeated trespasses, under either a pretense or belief of title, and the dominion, control, and enjoyment of actual or apparent ownership. Again, Judge Baldwin says: "When we leave the unquestionable tests of residence, cultivation, and improvement, every case must depend, in a great measure, upon its own circumstances, and requires a recurrence to the general principle, above stated, of open, notorious, and habitual acts of ownership." Precisely the same principle is stated by Mr. Justice Baldwin, as follows: "But it may with safety be said that where acts of ownership have been done upon land, which from their nature indicate a notorious claim of property in it, and are continued for twenty-one years, with the knowledge of an adverse claimant, without interruption, or an adverse claim by him, for twenty-one years, such acts are evidence of an ouster of a former owner, and an actual adverse possession against him," etc. Now, this must, in the nature of things, be so; for while it is true that, of the different modes of use, occupation, or enjoyment, those of residence, cultivation, and improvement are the most obvious and decisive, yet there are other acts of open, notorious, and habitual ownership,—or, as Mr. Justice Baldwin expresses

It, "visible and notorious" acts of ownership, —exercised over the premises in controversy for the period necessary to constitute the statutory bar, after an entry under claim and color of title. Obviously, the two forms of expression convey one and the same idea; for "visible and notorious" acts, for the statutory period, are the full equivalent of open, notorious, and habitual acts for the same period; and whether the one or the other, if the acts proved are sufficiently strong to clearly indicate that the claimant entered, used, and enjoyed the premises, with the intention of holding against all the world, then such acts constitute an actual adverse possession. It is clear that there is no substantial difference in the statements of the judges as respects the underlying principles of actual adverse possession. But if a real and substantial difference did exist, then the doctrine laid down by Judge Baldwin in *Taylor v. Burnside*, *supra*, is quite sufficient for a just decision of this case.

It should be borne in mind that, prior to the emanation of the title under which the testator of the appellants claimed, the title of John Barclay, the original grantee, had become delinquent, and was forfeited and was extinct, by reason whereof the land was sold and conveyed by the United States marshal; that it was not only delinquent and forfeited by reason of the nonpayment of the United States direct tax lawfully charged thereon, but was delinquent and forfeited by reason of the nonpayment of the taxes lawfully assessed thereon by the state from the year 1797 to the year 1806, inclusive, not one cent of which was ever paid; that since 1806 this land has never been on the land books in the name of John Barclay, or of any one claiming under him; that from 1806 down to the present time the land has been regularly on the land books in the names of the testator of the appellants and those under whom he claimed, and they have regularly paid all the taxes assessed thereon; that not only have no taxes on said land ever been paid by John Barclay or his heirs, or by any other person for him or them, but neither said Barclay nor his heirs have ever taken any steps to redeem or reclaim said land, or asserted any claim or right to do so, until the institution of this suit, although a period of time has elapsed a great many years in excess of the period necessary to constitute the statutory bar. The constitutionality of ever forfeiting land as delinquent for nonpayment of taxes has been repeatedly held by this court. See remarks of Lee, J., in *Wild's Lessee v. Serpell*, 10 Grat. 408, and cases cited. In order to consummate and perfect a forfeiture in such a case, no judgment or decree or other matter of record is necessary. The statutes profess a *proprio vigore* effectually to divest the title out of the defaulting owner, and perfectly to vest it in the commonwealth; so that, John Barclay's title having become extinct by reason of forfeiture, and there never having been

any redemption, there remained in him no vestige of title to pass to his heirs in any way. As to the effect of such forfeiture, see *Hutch. Land Titles*, § 78, and authorities cited. Hence, at the time of the emanation of the tax title under which the appellants' testator claimed, the title of John Barclay, the original grantee, having become forfeited and extinct, the possession was vacant, and there was no person living who could assert any right to the possession, adverse to that acquired by the appellants' testator, and those under whom he claimed; and the deeds to them, respectively, constituting color of title, even though defective in both form and substance, and their deeds importing the right of entry and occupation, they entered, used, and enjoyed the premises, and exercised continuously thereafter such open, notorious, and habitual acts of ownership as constitute an actual adverse possession against all the world.

These acts of ownership were so open, notorious, and habitual, continuing, as they did, for over 80 years next before the bringing of this suit, as to constitute notice, at least, to all persons who might have any claim whatever to the land in controversy. But the circumstances disclosed by the record clearly indicate that the appellee, J. K. White, purchased the one-ninth interest which he claims to own with actual knowledge of the title under which the testator of the appellants claimed. He purchased his claim in the city of Philadelphia, where most of the numerous descendants of John Barclay lived. The interest obtained by him was that of Mrs. Harriet Biddle Fox, the wife of De Grass Fox, and a remote descendant of John Barclay. The other heirs either disclaimed any right, title, or interest in the land in question or for other reasons declined to embark in this novel enterprise of the appellee, Mr. J. K. White. The Barclays and Biddles are noted families in the city of Philadelphia, and extensively connected by marriage. Judge George W. Biddle, one of the Barclay heirs, and a witness for the appellee, being asked if he knew whether his grandfather, John Barclay, had any interest in any Virginia lands in his lifetime, answered: "I have heard that he had, but I had no reason to believe it, except from being pestered very often to make deeds, which I have never done." On cross-examination he was asked: Q. "I understand you to say that you had heard some rumors to the effect that Mr. John Barclay had some lands in Virginia, but that you had no reason to believe that he had any title to them, except that you had been pestered very frequently to sign deeds, which you have refused to do." A. "That statement is correct." Q. "Will you be kind enough to state when was the last time you were applied to on this subject, and state the circumstances." A. "I am under the impression it was in the present year, 1890. It may have been 1889. I think 1890. I was asked if I would sign some deed conveying my supposed right, title, and in-

terest in said land to some one. After talking the matter over with my cousin, Clement B. Barclay, we both concluded we would have nothing to do with it." Q. "Well, then, I understand that you do not claim any title at all to this land." A. "I never have made, nor now make, any claim to any such supposed lands." Judge Biddle also says he is under the impression that he had heard that such supposed lands, or parts of them, have been sold under proceedings which in the state of Pennsylvania are termed "tax sales." Doubtless the Barclay heirs frequently conferred with Judge Biddle, a prominent member of the family, and a lawyer of note, and availed themselves of his superior information, and professional knowledge and skill; in fact, it is plain, from the deposition of Mr. Arthur Biddle, a son of Judge Biddle, and a great-grandson of John Barclay, that such was the fact. Arthur Biddle was also a witness for the appellee. He testifies that these lands were frequently the subject of conversation in his family, and with the family connections, descendants of John Barclay, and that it was a subject of notoriety in the family, being sometimes discussed in the way of gossip, and at other times as a matter of business. Now, the appellee, J. K. White, must have made quite a close canvass of the Barclay heirs, and, although he got but one recruit, that circumstance of itself indicates strongly that the others, constituting quite a number of persons, like Judge George W. Biddle and Mr. Clement B. Barclay, disclaimed any interest, and refused to have any connection with the transaction. Again, the deed from Fox and wife to the appellee, White, was procured on the 8th day of May, 1890; on the 23d day of the same month the bill had been prepared, reciting the numerous deeds constituting the chain of title under which the testator of the appellants claimed, setting forth the contracts of record in the bill mentioned, tracing the tax titles and claim thereunder from the sale and conveyance by the United States marshal down to Charles Lennig, and averring his claim thereunder; and on the 24th day of the same month the bill was filed, and process issued thereon. Thus, after a repose as still as death, and acquiescence for over 80 years, all at once the appellee, J. K. White, succeeds in arousing one of the slumbering heirs of John Barclay, and this monstrous claim is asserted by a bill in equity, which on its face shows the utter poverty of the claim,—a poverty which is equaled only by the audacity of the claim.

In view of all the circumstances disclosed by the record, the conclusion is irresistible that the appellee became the so-called purchaser of the claim asserted by him purely as a matter of bold adventure and speculation, and that he made the so-called purchase with full knowledge of the adverse claim of the testator of the appellants, which had stood unchallenged and uninterrupted for over 80 years. Notice may be actual or con-

structive, and, whether the one or the other, the result is the same. It is the settled doctrine that whatever circumstances are sufficient to put a purchaser upon an inquiry, which, if pursued, would lead to the requisite knowledge and information, are sufficient to charge him with actual knowledge of the facts to which such circumstances would lead him; or, in other words, he must look to the title papers under which he buys, and is charged with notice of all the facts appearing upon its face, or to the knowledge of which anything appearing there will conduct him. Or, in the yet more appropriate and expressive language of Mr. Justice Strong, in *De Cordova v. Hood*, 17 Wall. 1, where that learned judge said: "Whenever inquiry is a duty, the party bound to make it is affected with knowledge of all which he would have discovered had he performed the duty. Means of knowledge, with the duty of using them, are, in equity, equivalent to knowledge itself." See, also, *Long v. Weller*, 29 Grat. 347; *Wood v. Krebs*, 30 Grat. 708; *Coles v. Withers*, 33 Grat. 186; *Lamar's Ex'r v. Hale*, 79 Va. 147; *Hurn v. Keller*, Id. 415; *Effinger v. Hall*, 81 Va. 94; *Wood v. Carpenter*, 101 U. S. 135. In *Effinger v. Hall*, supra, Lewis, P., says: "A strong case on constructive notice is *Armentrout's Ex'rs v. Gibbons*, 30 Grat. 632. There a deed reserving a vendor's lien was duly recorded, and afterwards the record of the deed was destroyed. It was held that the constructive notice afforded by the recordation of the deed was equivalent to actual notice of the existence of the lien, notwithstanding the destruction of the records." So, in the present case, the avenues of information have for over 80 years been open and accessible. For all this period the public records of Rockingham county, where most of the land in controversy is situated, have teemed with evidences of the claim asserted by the testator of the plaintiff, and those under whom he claimed, and during all which time they have exclusively occupied, used, and enjoyed the premises, without interruption, as evidenced by their continued, open, notorious, and habitual acts of ownership, quite equivalent in import and effect to occupation, use, and enjoyment, evidenced by residence, cultivation, and improvement. Had John Barclay, during his lifetime, or those claiming under him, since his death, come forward and asserted their rights in due time and form, they might have reclaimed this land which had been sold as delinquent for the nonpayment of the United States direct taxes, lawfully charged thereon; but this manifest duty they failed to perform, and sat supinely down and neglected to pay the lawfully assessed taxes, neglected to take any steps to redeem the land, and now come admitting the sale of the land as delinquent, admitting the sale and conveyance by Scott the marshal, to Gambill, and tracing, by a regular succession of conveyances, the title

down to Charles Lennig, the testator of the appellants, and only assail the title thus derived by alleging in their bill in a general way, without specifying any particulars, that the United States marshal did not comply with the law in making said sale, and that therefore the said sale and conveyance, as well as all other conveyances and devices constituting links in said chain of title, are invalid and void.

It is in proof that the most diligent and laborious search has been made in the different departments of government, federal and state, and in every other direction where there could be the least hope of discovering any evidence of the regularity of the tax sale; but, after the lapse of so many years, it has been impossible to discover all the evidence necessary to show affirmatively that said sale was made, in every particular, in conformity to the requirements of law. Moreover, it is in proof that the private papers of the two Watermans were many years ago destroyed by fire. The law required the marshal in such cases to return and file in the district court at Richmond the report of sale, who was the purchaser, and the amount for which the land was sold, with other evidences of the regularity of the sale. In all probability, the papers necessary for the purpose would have been found in the clerk's office, or among the papers of that court; but, unfortunately, as the proof shows, a large quantity of the papers of that court and office were consumed in the great conflagration which added so much terror to the closing scenes of that great civil strife which devastated and impoverished this commonwealth throughout her borders. Was it possible to do more than was done to protect the title in question? We think not. In respect to said tax sale, and in view of the peculiar circumstances of hardship attending this case, and the great lapse of time and seeming acquiescence on the part of John Barclay and those claiming under him, and the apparent abandonment of all claim on their part, it will be presumed that all was done that the law required to be done, and that said sale was regular and valid. In *Black on Tax Titles* (2d Ed. § 461) it is said: "Mere lapse of time will not, of itself, afford presumptive evidence of the regularity of a tax sale, if the purchaser and those claiming under him have not had possession under the deed; that is, the antiquity of a tax deed, if no possession has been taken under it, affords no presumption in its favor, but, on the contrary, operates the more strongly against the holder. But where the tax purchaser has been in possession the case is different. Here the responsibility for failure to institute proceedings to test the validity of the title rests alone upon the original owner. It would be unfair to raise a presumption against the purchaser in consequence of his omission to do that which he was under no obligation to do, except, indeed, as a means

of making doubly sure a claim in which he may reasonably be supposed to have had confidence. And, on the other hand, it seems perfectly just to cast an implication on the owner, to the effect that his failure to make any attempt to rescue his land, during a considerable number of years, from the consequences of the tax sale, could only be attributable to his knowledge of the fact that such an attempt would result in demonstrating the validity of the tax title. We have, therefore, no difficulty in assenting to the statement that an ancient tax deed and its recitals, together with long-continued and uninterrupted possession, are evidence from which compliance with the statute in regard to tax sales may be presumed, and the question thereon is one for the jury upon all the evidence in the case."

It would be useless to adduce arguments and quote authorities to show the peculiar appropriateness of the principle above stated to the case in hand. We do not assert the proposition that in the present case the marshal's deed is *prima facie* evidence of title; and, while it may not be such, yet we do assert that it constitutes color of title under which the testator of the appellants and those under whom he claimed entered upon and enjoyed the premises; not by actual residence, cultivation, and improvement, but by "other open, notorious, and habitual acts of ownership," exercised continuously for the full period of the statutory bar, and has thereby ripened into a complete and perfect title. In 2 *Blackw. Tax Titles*, § 1112, commenting on certain cases, the author says: "In both these cases there was a long and uninterrupted possession, under the tax title; and the party in whose favor the presumption was extended was not the original purchaser at the tax sale, but an innocent person, who, for aught that appears, had no notice in fact of the irregularities in the proceeding. And the court place the presumption upon the ground that the jury must be 'satisfied that the deficiencies in the evidence are not chargeable to the fault or negligence of the party,' and that no better evidence within the power of the party 'is willfully withheld.' This doctrine cannot, therefore, be extended to the original purchaser, 'for he is bound to collect and preserve the evidence' upon which the validity of his title depends; and, 'if he has failed to do so, it is his own folly. Again, it will be observed that the rule as laid down in the case cited requires good faith, and a diligent and thorough effort on the part of the person claiming the benefit of the presumption, in collecting all the evidence which can be produced, tending to throw light upon the regularity of the original proceedings of the officers. Strict search must be made in all the offices and places, and inquiry made of all persons, for the documents and facts necessary to establish the validity of the title. The presumption is not raised for the purpose of supplying any defect in the do-

ings of the officers, but to fill up the gap occasioned by a supposed loss of testimony, which, if it had been preserved, would have established, to the satisfaction of the court, the existence of the very prerequisite in question." The present case comes squarely within the principle above stated. Here, the party whose title is assailed, upon the supposed ground of irregularity in the tax sale, was not the original purchaser at that sale, and is, to that extent, entitled to the benefit of the rule. Nor can it be said that any deficiency in the evidence is attributable to his fault; nor that any better evidence within his power is willfully withheld; nor that most anxious, diligent, and thorough search has not been made, in order to discover the papers which would certainly vindicate the validity of the tax title. Again, it is said: "A tax deed, founded upon an actual sale, and purporting by apt words to convey the title to the real estate therein described to the grantee, will give color of title, notwithstanding it may be defective in form or substance, or be founded on proceedings so irregular or defective as not to pass the true title. We do not at present speak of a deed void on its face, but all the authorities we have cited will sustain the rule above given, if the tax deed is at least apparently fair. Thus a tax deed gives color of title, although the judgment on which it is founded be fatally defective. And possession of land in good faith may well be under a sufficient color of title, though it be under a tax sale not preceded by any advertisement thereof." *Black, Tax Titles*, § 503, citing *Pillow v. Roberts*, 13 How. 472; *Flanagan v. Grimmer*, 10 Grat. 421. So, where land was sold by a commissioner under the delinquent land laws, it was said: "He acts like a commissioner to make sales under a decree of the chancery court, and is clothed with a mere naked authority. Having no interest in the land conveyed, the deed of the commissioner would avail nothing, where his authority to make it did not appear, unless there had been such a long acquiescence and possession under the deed as to justify a presumption in favor of the deed." *Walton v. Hale*, 9 Grat. 197, 198. Perhaps no case, more than this, ever demanded every reasonable presumption in favor of a tax sale, and title thereunder. It is, indeed, a very remarkable case, one in which the record discloses not a single circumstance favorable to the decree of the court below. It is, in fact, nothing other than an action of ejectment in equity. The argument has proceeded almost entirely upon the law applicable to an adversary possession, and upon this ground alone the court below might well have sustained the demurrer, upon the familiar principle that where a party has an adequate and complete remedy at law a court of equity will not sustain him. But as to the demurrer, and the several specific grounds assigned therefor, we decide nothing, inas-

much as this proceeding is under section 2562, Code 1887, and it is insisted that the jurisdiction of a court of equity, in proceedings for partition under said section, is not restricted to tenants in common, joint tenants, and coparceners, as the language so plainly indicates, but that persons claiming adversely to all those seeking partition may be covered in the same suit, and that such court may take cognizance of all questions of law arising between them; and inasmuch as several comparatively recent decisions of this court are relied upon by counsel for the appellee to sustain his contention; and inasmuch as a discussion of the questions arising on the demurrer would be untimely, after having considered and passed upon the merits of the case, and would necessarily involve a lengthy review of the cases referred to, which could serve no good purpose now,— suffice it to say that while the writer is firmly convinced that a court of equity has not jurisdiction in this and like cases, and that the authorities relied upon do not sustain the position contended for by counsel for the appellee, yet, for the reasons stated, and others that need not be mentioned, we decide nothing touching the proper construction of said section 2562.

In conclusion, it only remains to say that, in the light of all the facts disclosed by the record, it is undeniably true that the conduct of John Barclay and his heirs from the time of the tax sale to the bringing of this suit has been such as is consistent only with an absolute abandonment, with complete notice of all the circumstances, of all claim to the land in controversy; that the appellee makes no case by his bill entitling him to have partition of the land, as prayed for in his bill, or to any relief in a court of equity; and that it would be a great and unconscionable wrong to now permit him to wrest this land from the rightful owners, when they have lawfully occupied and used and enjoyed it without interruption and without challenge for nearly a century, during which time three generations of people have gone to their graves. For the reasons given above, the decree appealed from should be reversed and annulled, the injunction dissolved, and such decree entered here as the court below should have entered. Decree reversed.

LACY and FAUNTLEROY, JJ., absent.

(42 S. C. 233)

**MAULDIN v. CITY COUNCIL OF GREENVILLE.**

(Supreme Court of South Carolina. Jan. 28, 1895.)

**ADOPTION OF CONSTITUTION — EFFECT ON PRIOR LAWS—EQUALITY OF TAXATION—SIDE-WALK—ASSESSMENT.**

1. Laws and decisions construing them, the force or power of which are not directly nor by necessary implication denied by a new constitution, are not affected by its adoption.

2. An act of the legislature authorizing city authorities to assess two-thirds of the cost of paving the roadway in a street on the abutting land is in conflict with Const. art. 9, § 8, providing that taxes must be uniform in respect to persons and property within the jurisdiction of the body imposing the same.

3. The legislature is not restricted, either by the constitution or law of the land, from empowering a city to assess on abutting land two-thirds of the cost of paving a sidewalk in a street.

Appeal from common pleas circuit court of Greenville county; J. J. Norton, Judge.

Action by William L. Mauldin against the city council of Greenville. There was a judgment for plaintiff, and defendants appeal. Reversed in part.

The grounds of appeal were as follows: (1) Because his honor erred in holding that all of the material allegations of the complaint were admitted by the defendant. (2) In ordering and adjudging that the defendant, the said city council of Greenville, their servants and agents, be, and they are, perpetually enjoined and restrained from collecting or attempting to collect the special tax or assessment levied by them upon the property of the plaintiff and other owners of real estate situate on Main street, in the said city of Greenville, to pay the expenses of improving the said street. (3) In holding that the act of the general assembly (20 St. at Large, 1372) authorizing the improvement of Main street, in said city of Greenville, and the levying and collection of the assessment contained of, was null and void, in that it violated sections 23 and 36 of article 1, section 2 of article 2, and sections 8 and 9 of article 9, of the constitution of South Carolina.

In not holding that the answer of the defendant constituted a sufficient return to the plea to show cause theretofore granted, and therefore in not dissolving the temporary injunction of date of May 20, 1893. (4) In not holding that the facts alleged in plaintiff's complaint were insufficient to entitle plaintiff to the injunction and relief prayed for.

In not holding that by reason of the facts alleged in defendant's second and third defenses, as contained in their answer to plaintiff's alleged cause of action, as set out in his complaint, plaintiff was estopped from denying the validity of said assessment or his liability on account thereof. (6) In not holding that the acts and proceedings of defendant touching the matter complained of in plaintiff's complaint in improving the street, certifying the cost thereof, and levying and collecting the assessment in question, were full and regular, being authorized, by act of the general assembly for this state (volume p. 1372), and ordinance passed in pursuance thereof. (7) In not holding that plaintiff had a complete and adequate remedy at law for any injury threatened him by reason of the collection of the assessment complained of, and therefore not entitled to invoke the aid of the court of equity."

Jos. A. McCullough, for appellants. Earle & Mooney, for respondent.

POPE, J. This action in the court of common pleas for Greenville county had for its object a perpetual injunction against the city council of Greenville, restraining them from any assessment of the property of the plaintiff and other citizens of said city who owned land abutting on Main street, beginning at Ready river, and thence up to a point on said Main street where it is crossed by North street, to pay for two-thirds of the cost of paving the roadway and sidewalk of such street. The basis of the demand for such relief was—First, that the act of the general assembly which empowered said city council to make an assessment of the property of those citizens for the cost of the paving of Main street and its sidewalks, so that such citizens should pay two-thirds of the cost of such improvements (said assessment of such two-thirds to be computed against such property holders pro rata, according to the frontage of their property on said street, respectively), was unconstitutional; and, second, because such city of Greenville made such assessment without giving the citizens affected thereby any opportunity to contest such assessment so made. The defendants denied that such legislation was unconstitutional, and then, in case the court should hold it unconstitutional, claimed that the plaintiff was estopped by his conduct in not opposing its enactment by the legislature, and afterwards by his conduct in not opposing the active steps of the defendants to execute such law. The circuit court, after a hearing of the cause, confined to the complaint and answer, issued the injunction prayed for; and from this decree, therefore, the defendants have appealed. The grounds of appeal, etc., will appear in the report.

If the act of the general assembly authorizing the defendant to make this assessment is unconstitutional, no other question raised by the appeal may be said to fairly arise upon the record of the case, and therefore necessary to be considered and decided. The act in question may be found on page 1372, 20 St. at Large, and its text is as follows: "An act to provide for the grading and paving of the streets, public ways and alleys of the city of Greenville.

"Section 1. Be it enacted by the senate and house of representatives of the state of South Carolina, now met and sitting in general assembly and by the authority of the same, that the mayor and alderman of the city of Greenville, shall have power and authority, and it is hereby made their duty, to grade, pave, macadamize and otherwise improve for travel and drainage the streets, public ways, and alleys of said city or such of them as they may deem advisable, and to construct side walks and to pave the same and put down crossings, curblings, drains, side drains, and cross drains, such as may be necessary



in their judgment to carry out the provisions of this act.

"Sec. 2. In order to more effectually carry out the authority hereby delegated, the said mayor and aldermen shall have power to assess one-third of the costs of such grading, paving, macadamizing and improving said streets, public ways, and alleys of said city both as to sidewalks and roadways upon the abutting property owners on each side of said streets, public ways, and alleys, so that said property in the aggregate shall pay two-thirds of the said costs, and the said city the remaining one-third. Said assessments to be paid by said property holders pro rata according to the frontage of the property on said streets, public ways and alleys, respectively, and the money arising from such assessments shall be applied to the payment of interest on and as a sinking fund to redeem the same under such regulations as said mayor and aldermen may by ordinance prescribe.

"Sec. 3. The assessment provided for in section 2 of this act shall be collected as other taxes in said city are collected and in such installments as the said mayor and aldermen shall by ordinance prescribe.

"Sec. 4. Whenever the said mayor and aldermen shall determine to improve any street, public way or alley as hereinbefore provided, they shall cause the same to be carefully surveyed, and the proposed grade definitely established, and ascertain as accurately as possible the cost of the contemplated improvement, and shall also cause the frontage of each piece of property fronting on said street, public way or alley to be determined and fixed so that the assessment on each property holder may be easily ascertained.

"Sec. 5. To obtain the means of carrying out the provisions of this act on the part of the city the said mayor and aldermen may issue and negotiate bonds of said city under the provisions of section 31 of the charter of said city.

"Sec. 6. The said mayor and aldermen shall have power and authority by ordinance to provide the details necessary and requisite for carrying out the provisions of this act."

Approved December 22, A. D. 1891.

Just now, greater particularity is not needful, to bring the issue of the constitutionality of this act before the court, than to say that the defendants have passed the ordinances required by this act, and made the assessments therein contemplated, upon the plaintiff, as one of the property owners whose property abutted on the front of Main street, in said city, for one-third of such cost.

The first question that presents itself here is, what power of legislation has the general assembly of this state? It may savor of extreme care, but it is eminently proper that this court should declare its recognition of responsibility in undertaking to pass upon the rights, duties, and powers of a co-ordi-

nate branch of the state government. We are not unmindful that in the bill of rights, incorporated in—as a part of—our constitution, section 28 distinctly provides: "In the government of the commonwealth, the legislative, executive and judicial powers of the government shall be forever separate and distinct from each other. \* \* \* " Yet it is made the duty of this tribunal to decide when either of the other two has exceeded the grant of power under the constitution and laws, when such a question is fairly involved in an action or special proceeding between parties litigant; but any decision which denies efficacy to an act passed by the legislature, for the want of constitutional power, is only made after an allowance by us of all presumptions in favor of the rightfulness of such exercise, which are required to be overcome, clearly and certainly, by him who assails such constitutional power.

Our state constitution, as the grant of its power to the general assembly, in section 1 of article 2, is in these words: "The legislative power of this state shall be vested in two distinct branches, the one to be styled the 'Senate' and the other the 'House of Representatives' and both together the 'General Assembly of the State of South Carolina.'" We may announce as the result of our considerations, fortified by decisions both before and after the adoption of this, our present constitution, that by the use of the language here quoted the people, in convention assembled, clothed the general assembly with the whole legislative power capable of being exercised within our borders, subject only to such restrictions upon and regulation of such power as are embraced in the constitution itself, or that of the United States. *State v. Mayor, etc., of City of Charleston*, 10 Rich. Law, 501; *State v. Hayne*, 4 S. C. 420; *Pelzer v. Campbell*, 15 S. C. 592; *Ex parte Lynch*, 16 S. C. 83; *Utsey v. Railroad Co.*, 38 S. C. 399, 17 S. E. 141; and other cases since decided. As before remarked, all presumptions are solved in favor of the constitutionality of an act of the legislature, and it devolves upon one who assails it to point out, certainly and clearly, where it is unconstitutional. This has been undertaken by the respondent in the case at bar, and the duty is now devolved upon this court to pass upon these several propositions.

A municipal corporation, in this state, can only exercise power with which it is clothed by the general assembly. *State v. Town of Maysville*, 12 S. C. 76. And, as we have before seen, the general assembly is only able to vest such municipal corporation with powers within the restrictions contained in our own state constitution and that of the United States. The power of taxation may be given to a municipal corporation, but such power, when exercised by such municipal corporation, must not only be exerted according to the charter thereof, but also within the limits of the constitution of the state.



Among the powers of the corporation of the city of Greenville is the control of its streets, ways, etc.; and, within certain well-defined restrictions, such municipality may tax the property within its territorial limits to improve and keep in repair such streets, ways, sidewalks, etc. The respondent concedes the constitutionality of the act of the general assembly which clothes the city of Greenville with the right, by taxation, to raise the funds necessary to pay for one-third of the cost of the proposed improvements to the roadway and the sidewalks of the city of Greenville; but he goes further, and insists that the whole of such cost should be paid from general taxation in said city. It is too late in the day to question, in our courts, that highways (and public streets in our cities and towns are highways) belong to the public. Their being laid out over the lands of private individuals, without compensation to the private individuals, was maintained in our courts prior to our constitution of 1868. *Lindsey v. Commissioners*, 2 Bay, 38; *Patrick v. Commissioners*, 4 McCord, 541. Since our constitution of 1868, such power exists, but compensation therefor must be first provided. Section 23, art. 1, Const. 1868. But, for highways (and, as before remarked, Main street, in the city of Greenville, is a highway), belonging to the public, may taxes be laid upon private citizens, who happen to own the land abutting upon such highway, to improve such a highway, in exoneration of all other citizens who own property in said city? This is a serious question. Many other states, speaking through their courts of last resort, have so affirmed. It is always to be regretted when a difference in judgment upon the same subjects exists in the courts of last resort in the different states of this Union. Our oath of office requires us to uphold the laws of this commonwealth, subject to such restrictions thereon as exist in the constitutions of this state and that of the United States. Among the laws of this commonwealth is the organic law, as found in the twelfth and fourteenth sections of article 1 of our constitution of 1868. The latter section: "No person shall be arrested, imprisoned, dispossessed or dispossessed of his property, immunities or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty or estate but by the judgment of his peers or the law of the land. \* \* \*" When the clauses of the constitution of the state empowering the general assembly to clothe a city, town, or village with the right to levy a tax are considered, we must also consider sections 12 and 14 of article 1 along with them. The sections of our constitution authorizing the general assembly to clothe one of its municipalities with the power of taxation are sections 8 and 9 of article 9, in these words:

"Sec. 8. That the corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power

to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same. And the general assembly shall require that all the property except that heretofore exempted within the limits of municipal corporations, shall be taxed for the payment of debts contracted under authority of law.

"Sec. 9. The general assembly shall provide for the incorporation and organization of cities and towns, and shall restrict their power of taxation, borrowing money, contracting debts and loaning their credit."

Great stress is laid by appellants upon the two decisions of this court (*State v. Hayne*, 4 S. C. 403, and *State v. Columbia*, 6 S. C. 1) as construing the power of taxation by the state itself, in the first case, and of taxes laid by a city, in the second case. These cases have been recognized by this court repeatedly since they were rendered, and we do not propose to question their ruling authority now. But, when examined, it will be ascertained that *State v. Hayne*, supra, affirmed the constitutional power of the general assembly of this state to require a license fee to be paid by an attorney, in addition to the tax upon property, real and personal, while that of *State v. Columbia*, supra, affirmed the right of the city of Columbia, under its charter, to require a license fee to be paid by a bank within its limits, in addition to a tax upon its property. When these cases are critically examined, it will be discovered that the principles presented by the case at bar were in no wise involved then.

We think it will be found that the case of *State v. City Council of Charleston*, 12 Rich. Law, 702, decided by the court of errors in this state in 1860, will throw great light upon the case at bar. In the case just cited, the city council had determined that it was expedient to widen George street, in said city, and for that purpose had, at an expense of \$28,000, purchased the land on the north side of said street. Under the act of 1850 the city council had appointed commissioners, whose duty it was to ascertain the cost and expense of widening said street, and to assess such cost and expense, to be paid by the proprietors of lots and houses on the south side of said street, according to the benefit accruing to such lots. When these assessments were made, such proprietors of lots and houses refused to pay the same, upon the ground that such assessment was "against the laws of the land, in derogation of the right of trial by jury, and is unconstitutional and void." This question arose under the constitution of 1790, in the ninth article, whose second section provided that "no freeman of this state shall be taken, or imprisoned, or dis seized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life or liberty, or property but by the

judgment of his peers, or by the law of the land." While Chancellor (afterwards Chief Justice) Dunkin was discussing the defense that such power could be successfully referred to and bottomed upon the general power of taxation inherent in every government, he said: "No power is more necessary, none more universally recognized, and, it may be added, none the unjust exercise of which has been, in all countries and all ages, a more fruitful source of complaint and dissatisfaction. Taxes are collected in a summary manner, and without an opportunity to the party of being heard. This legal process (says Judge Nott in *State v. Allen*, 2 McCord, 55), which was originally founded in necessity, has been consecrated by time, etc., *must be an exception to the trial by jury, and is embraced in the alternative in the law of the land.* [Italics ours.] \* \* \* But in the same case it was held by the court that an imposition by the legislature, by the name of a *tax*, yet wanting its qualities, could not be levied and collected as such without violation of the constitutional rights of the citizen, and the act was null and void. Essential characteristics of any system of taxation (properly so called) are *certainty, equality, universality.*" The taxation proposed by the city council of Greenville upon the plaintiff (respondent), under the light furnished by *State v. City Council of Charleston*, supra, in order to be legal, must be either directly authorized by the constitution, or by "the law of the land." Certainly, there is no provision in the constitution which directly, or by necessary implication, authorizes this tax. Is there authority for this tax in "the law of the land"? What does this term, "law of the land," mean, as interpreted by our courts of last resort? Judge O'Neill, in pronouncing the judgment of the court of errors in this state in the case of *State v. Simons*, 2 Speer, 761, thus stated the doctrine: "In this state, taking as our guide *Zylstra's Case*, 1 Bay, 384; *White v. Kendrick*, 1 Brev. 471; *State v. Maxcy*, 1 McMul. 502,—there can be no hesitation in saying that these words mean the common law and the statute law existing in this state at the adoption of our constitution (1790). Altogether, they constitute the body of the law, prescribing the course of justice to which a freeman is to be considered amenable in all time to come." An examination of our statutes prior to 1790, relating to the improvement of streets and sidewalks, will show that the provisions therein related to the city of Charleston, and that such statutes were confined,—that of 1698 (7 St. at Large, p. 12) to requiring every inhabitant of Charleston to mend and raise the sidewalk in front of his house in the manner and to the dimensions therein prescribed, on penalty of forfeiting, for each house, a penalty, to be collected under the warrant of a justice of the peace; and that of 1764 to requiring the construction of sewers or drains and side-

walks. These statutes were considered and upheld, with reluctance, in the two cases of *Oruikshanks v. Council*, 1 McCord, 360 (decided in 1821), and *Yeadon v. Council* (decided on circuit in 1828). And when the act of 1850 (12 St. at Large, p. 5455) was considered by the court in the case of *State v. City Council of Charleston*, supra, the court of errors distinctly repudiated, as foreign to our laws, any mode of taxation for the improvement of the streets of the city of Charleston which looked to the assessment of property abutting on George street, in that city, according to the benefits to be derived from such improvement, to such land-owners, under the said act of 1850, saying: "As has been said, the general rule knows nothing about *partial assessment for benefits*, or the selection of a portion for a class. Existence of persons, or the possession of property, and *not the supposed benefits*, are the guide. When each is taxed according to the value of his property, both equality and certainty may be attained, to a reasonable extent, but what may be beneficial or otherwise is a matter of opinion or fancy or vague conjecture." (Italics ours.)

These principles may be deduced from that case: (1) The right to tax persons or property abutting upon a public street, for improvements made upon such public street, in exoneration of other persons or property within the same territorial limits as are the persons or property abutting upon a highway or public street, is opposed to "the law of the land," and is therefore unconstitutional. (2) The right to tax property abutting upon a public street, to pay the costs of improvements upon the same, according to the supposed benefit to such property by such improvement, is distinctly repudiated. (3) The right to tax the land abutting upon public streets, for the costs of improvements of sidewalks and sewers in front of such land, is recognized, because such power was exercised by reason of statutes passed before the adoption of the constitution of 1790, and may therefore be said to be embraced in "the law of the land." This principle was recognized with reluctance, and only because of previous decisions affirming its existence. We heartily sympathize in the reluctance expressed, and only affirm its existence under the authority of such previous adjudications.

When our constitution was adopted, in 1868, this case of *State v. City Council of Charleston*, supra, had construed the legislative power of this state, so far as its exercise in the direction of requiring property abutting upon streets to pay for improvements upon the same according to the benefits derived therefrom was concerned; and, as before remarked, there is no provision of such instrument which directly or indirectly contravenes the same. The principle is well recognized that when, previous to the adoption of a new constitution, there exist laws and decisions construing such laws, and this force and

power is not directly or by necessary implication denied in the new instrument, such laws and decisions survive with full force and effect. Such being the case, we do not feel at liberty to disregard them, unless we would assume the responsibility, by reversing such decisions, of asserting the existence in our Commonwealth of a different system. This latter step we do not feel at liberty to adopt. It may be frankly admitted that we have employed much of the time since the hearing of this appeal in considering this very question. This consideration of the subject has tended to increase our respect and acquiescence in the previous policy of the state, as being bottomed upon the immutable principles of right in the citizen to the enjoyment of his property free from any danger of its being taken from him by such exercise of arbitrary power, when it is remembered that the fundamental object of government is the protection of the life, liberty, and property of each individual residing within a state; that the exercise of the right of taxation is supported by the truth that every individual should contribute of his means to defray the expenses of government, to enable it to protect life, liberty, and property within its territorial limits; that such taxation is for a public purpose, and must be uniform in its imposition upon all the persons and property within a state, when for state purposes, and upon all the persons and property within a municipal corporation, when for its purposes; that there exists no power, except the police power, in a state, to compel an individual citizen to improve his property, and of this class *Charleston v. Werner*, 38 S. C. 488, 17 S. E. 33, is an instance, and that the improvement of public streets does not fall within the police power; that the experience of mankind has established, as a truth, that, in republics, no greater protection from unjust taxation exists than the power of the people, who select the representatives who lay taxes upon them, to change such representatives, if the taxing power has been unjustly exercised, but that the beneficial results of this principle of our government, in this respect, are largely denied when onerous taxation upon a few, to the exclusion of the many, is laid by representatives chosen by the many against the united opposition of the few. Granted, as it should be, that eminent text writers, and the judicial tribunals of many states of this Union, adopt a different view of this matter; why may not the people of this Commonwealth adopt a domestic policy at variance with the views of others? We have a settled policy of our own on other grave subjects,—for instance, the indestructibility of the contract of marriage, except by death. No reason exists, or can be suggested, why the domestic policy of this state touching the mode of taxation for local improvements should be made to conform to that adopted by any of our sister states.

It is therefore the judgment of this court

that so much of the judgment of the circuit court as grants a perpetual injunction against the defendants, preventing any assessment upon the property of the plaintiff, and other citizens of the city of Greenville in like plight as the plaintiff, to pay for the cost of improving the roadway of Main street, in said city, be affirmed; but when the said judgment enjoins the defendants from levying and assessing upon the plaintiff, and others in like plight with him, the cost of the improvements to the sidewalks and drains fronting their respective lands, it be reversed.

GARY, J., did not hear this case.

(115 N. C. 590)

COMMISSIONERS OF BURKE COUNTY v.  
CATAWBA LUMBER CO.

(Supreme Court of North Carolina. Dec. 27, 1894.)

For majority opinion, see 20 S. E. 707.

AVERY, J. (concurring). If it be true, as appeared from the testimony offered, and as was found by the judge below, that neither the Catawba river nor Johns river affords sufficient water to float logs over the shoals that abound in the beds of both except when they rise suddenly eight or ten times during every year, and continue at a sufficient height to carry the logs off for a period of from 24 to 48 hours, then neither of the rivers would fall within the definition of a floatable highway heretofore given by this court. *Gwaltney v. Land Co.*, 111 N. C. 547, 16 S. E. 692. The record in the case operates as an estoppel only upon the parties to the action, or those who are in privity with them, and are bound by the decree. As between the defendant company and every riparian proprietor who owns any portion of the bed of the Catawba or Johns river, it is still an open question whether the company can use the water passing over his land as a public highway, just as in *Gwaltney v. Land Co.* the decree precludes the defendant from claiming the right to use so much of the bed of the French Broad river between Asheville and the state line as is owned by Gwaltney, and no more. The perpetual injunction must therefore be so drawn as to restrain the defendants from using the portion of said streams where the county bridges are situated for the purpose of floating, and not any part of either river above or below such bridges. In *Gwaltney's Case* it seemed to have been admitted that so much of the French Broad river as was above the city of Asheville was a floatable stream. Non constat, in our case, but that for long distances above the county bridges both the Catawba and Johns rivers may not be hereafter found to be floatable. Nothing, therefore, is settled by this judgment except that the defendants are to be forever enjoined from endan-

gering the stability of the bridges mentioned in the pleadings by attempting to float logs over or under them. Whether it was erroneous in the first instance to hold that the rights of the public to use a stream as a highway should be passed upon whenever a riparian proprietor should see fit to sue one so using it for trespass, is, if our former adjudications are to remain undisturbed, no longer a debatable question. The consequence may be that one mill owner may, by a succession of findings by court or jury, establish his individual right to use a stream as a public highway, notwithstanding the objections of riparian owners or county authorities along the whole distance, while another less fortunate litigant may establish by verdicts the right of the public to an easement in all but a single tract extending over the bed of the stream, and be driven to buy the right of way over that or discontinue his business. Right or wrong, the law has thus been written, and we must adhere to it or modify it. In assenting to the opinion of the court I wish to exclude the inference that the right of any particular riparian proprietor along the Catawba or Johns river to the use of the bed of the stream in his front has been adjudicated, or that the defendant company is precluded from the right to use the water flowing over his land for transporting its logs. It has been long settled that a state may by statute regulate the manner of floating logs, even on larger navigable streams passing through its territory, without interfering with interstate commerce. In the exercise of this authority legislatures have enacted laws requiring that logs should be floated only in rafts. In the face of conflicting verdicts between different parties, it may be difficult to determine whether the public have an easement in any stream for the purpose of transportation. The power must reside somewhere to settle the question whether a water course is a floatable stream. We have seen that the suits between individuals do not determine the rights of the public. If the legislature should enact a law providing that a company should have the privilege of floating logs along so much of a certain river as was not already subject to an easement as a floatable stream, would the courts sanction the awarding of damages to alternate proprietors along its banks because one jury declared it not a highway, and assessed damages in the manner provided by law, while another found it susceptible of use as a channel of commerce? While conceding that the conclusions in this case are in harmony with the opinions in the Gwaltney Case, I deem it proper to point out the quicksands towards which, it seems to me, we are tending, if no way can be devised of ascertaining the rights of the public in floatable streams except by endless litigation, with unsatisfactory and conflicting judgments.

(40 W. Va. 49)

**HAWKER v. MOORE et al.**(Supreme Court of Appeals of West Virginia.  
Dec. 8, 1894.)**CONTRIBUTION AMONG SURETIES—SUBROGATION—  
FRAUDULENT CONVEYANCE—SECRET TRUST.**

1. Between cosureties there should be proportionate equality of burden. One who has been compelled to pay the whole, the principal being insolvent, has a right in equity to compel his cosurety to pay his equitably equal part.

2. To this end he has a right to be subrogated to all the rights and remedies of the creditor, but not to the injury of any one who, by any rule of strict law, or in equity and a good conscience, stands on higher ground, or for any reason has a better right. Such a one will not be displaced or his right disturbed. This is the essence of the doctrine of subrogation.

3. A case in which a conveyance was set aside as made on a secret trust in fraud of the grantor's creditors, and the land conveyed subjected to the lien of a judgment in favor by subrogation of a cosurety, who had been compelled to pay the whole, the principal debtor being insolvent.

(Syllabus by the Court.)

Appeal from circuit court, Harrison county.

Bill by Owen Hawker against Wilson Moore and others. From a decree for plaintiff, defendant Moore appeals. Affirmed.

J. Phillip Clifford, for appellant. John Bassel, for appellee.

HOLT, J. In this case the circuit court of Harrison county, by decree entered on the 27th day of January, 1893, set aside as fraudulent the deed made by appellant, Wilson Moore, on the 1st day of September, 1890, to Elam F. Piggatt, for the 25 acres of land mentioned, and decreed the sale thereof to pay plaintiff's judgment, from which defendant Moore obtained this appeal.

The facts are as follows: On the 15th day of October, 1890, the Merchants' National Bank of West Virginia, at Clarksburg, was the holder of a promissory note given to the bank by James Hawker, the principal therein, and the defendant Wilson Moore, and plaintiff, Owen Hawker, as his sureties, and the bank on that day obtained a judgment thereon against the three parties named. James Hawker, the principal, was insolvent, and plaintiff, Owen Hawker, was compelled to satisfy and pay the judgment. Therefore plaintiff was entitled to contribution from his cosurety, defendant Moore, of one-half the amount of the judgment thus paid, and to that extent to be substituted to the judgment lien of the bank against his real estate. Where one has been compelled to pay the debt of another, equity, as far as it can be done without just ground of complaint on the part of others, substitutes him to all the rights and remedies of the creditor against such debtor. This doctrine of subrogation has been applied freely in this state, and to its full extent, upon the general principles of equity, without the aid of any statute; and, having taken this correct view in the beginning, there has so far never been any need of

any statute to correct any misstep in improper restraint of its application upon the supposition that a debt once paid must thereafter be treated as nonexistent under all circumstances, and to all intents and for all purposes. The doctrine, as it has been expounded and applied in our courts, has nothing of form, nothing of technicality, about it; and he who, in administering it, would tick in the letter, forgets the end of its creation, and perverts the spirit which gave it birth. It is the creature of equity, and real essential justice is its object. *Ender v. Brune* (1826) 4 Rand. (Va.) 438, 447; *McNiel v. Miller* (1887) 29 W. Va. 480, 2 S. E. 335; *Robinson v. Sherman* (1845) 2 Grat. 178; 2 Bart. Suit in Eq. 1051. The doctrine is eminently calculated to do exact justice between persons who are bound for the performance of the same duty or obligation, and is one, therefore, which is much encouraged and protected. "Equality is equity" is on this branch its maxim. It springs naturally out of the two equities of contribution and exoneration, and is in fact one of the means by which those equities are enforced. *Bisp. Pr. Eq.* (4th Ed.) § 335; *Dering v. Earl of Winchelsea*, 1 Cox, 318; *Pendlebury v. Walker*, 4 Younge & C. Exch. 441; *Steel v. Dixon*, 17 Ch. Div. 825; *Brett, Lead. Cas. in Mod. Eq.* (2d Ed.) 285, notes. See *Ferguson v. Gibson*, L. R. 14 Eq. 379; *Forbes v. Jackson*, 19 Ch. Div. 615, under the mercantile law amendment, Act 19 & 20 Vict. c. 97, § 5; 2 Beach, *Mod. Eq. Jur.* § 809. Here the plaintiff has paid off the judgment, and asks the court to give him the benefit of the creditor's lien. Who can object to this? Who is injured by it? Not the bank, for they have received their debt from the plaintiff, and justice binds them to give the plaintiff their vantage ground. Not the principal debtor, for he is insolvent, and has no interest in the matter. Not the cosurety, for it is by his fault that plaintiff had to bear, in the first instance, the whole burden. If he had paid his half, and equality is equity, there would have been no occasion to ask the court to compel him to pay; and it does not lie with him to say that plaintiff shall not occupy a vantage ground that enables him, by process of law, to enforce the performance of this duty. The other creditors cannot complain, for the debt has in truth not been paid, because not paid by the one ultimately bound, but by others, who became his unwilling creditors in due course of law. But if there should be any one who, by any rule of strict law, or in equity and good conscience, stands on higher ground, or for any reason has a better right, he will not be displaced, or his right disturbed; for that is the essence of the doctrine. See *Pott v. Nathans* (1841) 1 Watts & S. 155; *Eddy v. Traver* (1837) 6 Paige, 521; *Gross v. Davis*, 87 Tenn. 228, 11 S. W. 92, and 10 Am. St. R. 635, notes; *Sheld. Subr.* (2d Ed.) § 137; *Id.*, p. 209, § 140; 24 Am. & Eng. Enc. Law, p. 159; *Thomas v. Stewart* (1888) 117 Ind. 50,

18 N. E. 505; *Crumlish's Adm'r v. Improvement Co.*, 38 W. Va. 390, 18 S. E. 456, and 23 L. R. A. 120, note 7; *Dugger v. Wright* (1888) 51 Ark. 232, 11 S. W. 213.

It would answer no useful purpose to take up the testimony and show that it justifies the decree complained of. The fair conclusion to be drawn is that the deed of September 1, 1880, from defendant Moore to E. F. Piggatt, conveying the tract of land of 25 acres in the bill and proceedings mentioned, was made by Moore to hinder and delay his creditors; and that Piggatt took it, was holding it for him, on some sort of secret trust, the full terms of which do not appear. But Moore continued to occupy and use the land as his own, as he had always done, without the payment of any rent; and after E. F. Piggatt's death this tract of 25 acres was, by reason thereof, treated as not belonging to his estate, and was omitted when partition came to be made of his lands among his heirs. Therefore the decree complained of is affirmed.

(40 W. Va. 111)

#### HINKSON v. ERVIN.

(Supreme Court of Appeals of West Virginia.  
Dec. 15, 1894.)

#### EVIDENCE OF PARTNERSHIP—ACCOUNTING—DEPOSITION.

1. Stronger evidence of the existence of a partnership is required between partners than by third persons.

2. Under a bill for settlement of partnership account, the burden of proof is on plaintiff; and if he cannot furnish sufficient to establish a partnership, and also to enable the commissioner to state a partnership account, his suit necessarily fails.

3. A court will not undertake to adjust the rights of parties without satisfactory means of ascertaining what their rights are, and when an account cannot be safely stated, and the true balance between the parties ascertained.

4. A deposition of a party read on the hearing in the circuit court cannot be ignored or suppressed from the hearing of an appeal in this court, on the ground that since the decision in the circuit court the adverse party has died.

(Syllabus by the Court.)

Appeal from circuit court, Brooke county.

Bill by W. T. Hinkson against John Ervin. From a decree dismissing the bill, plaintiff appeals. Affirmed.

J. B. Sommerville and J. C. Palmer, Jr., for appellant. W. P. Hubbard and H. O. Hervey, for appellee.

BRANNON, P. This was a suit in equity in the circuit court of Brooke county by W. T. Hinkson against John Ervin to settle a partnership for dealing in grain, live stock, and other farm products, Hinkson claiming a liability in his favor against Ervin. The circuit court entered a decree that the equities were with the defendant, and dismissing the bill, and Hinkson appeals. Ervin flatly denies the existence of a partnership, and this issue meets us at the front door of the case. The burden is on him asserting the

partnership to prove it, and to prove a partnership the evidence must be stronger between partners than when third persons assert it. *Robinson v. Green*, 5 Har. (Del.) 115. There are some circumstances indicating a partnership, but they indicate only; they do not prove it. If taken alone, they would be inconclusive, and leave the question in such obscurity that I doubt whether a court could find a partnership upon them; but there are numerous circumstances of a more conclusive nature going to repel any claim of the existence of a partnership. The record from which the facts are to be gleaned is voluminous and complicated, and the evidence long and circumstances numberless. It would be simply worse than useless to detail the evidence of facts here, since the question whether there was a partnership is purely one of fact, and the evidence and facts bearing on its solution would be applicable only in this case, and be no precedent for other cases. In opinions for publication in the Reports, details of evidence and facts, except so far as is necessary to render intelligible points of law adjudicated, are out of place. If we give facts on one side, we should give those on the other, and the Reports are cumbered with page after page of mere circumstances and facts which, after all, can perform no legal function. Opinions should give points of law and legal principles adjudicated, not endless details of evidence, or even facts.

We think the evidence, as a whole, does not establish the partnership. Common rules of evidence require one seeking to recover of another to establish the elements essential to his recovery by full proof. *Starkie, Ev.* Moreover, even if we could say that a partnership did exist, the plaintiff would encounter another insurmountable obstacle. A perusal of the large record will show that the means to accomplish a statement are utterly inadequate. No books of three years of quite an extensive business, covering many thousands of dollars, were kept. Little memorandum books are somewhat mutilated; some papers lost; papers claimed to bear upon the matters uncertain and incomplete. A court, to accomplish a settlement, would have to wend its way through a maze of circumstances and papers so complicated, so inconclusive and uncertain, as instruments of evidence, that any conclusion as to amount or process of adjustment would be veiled in uncertainty, leaving the mind uncertain that it was attaining justice. If there was a partnership, the case is a remarkable one for its absence of books and papers and other means of adjustment. A court must have some safe data to guide its steps. If through negligence, bad business conduct, loss of papers, or other cause, such data are wanting, a court simply cannot act. If, as I think is the case, the business done which is claimed to have been partnership was the sole business of Hinkson, or his

wife by him as agent, we can account somewhat for absence of books and memorials of the transactions; but it is incomprehensible that a partnership so important could have existed without papers, books, inventories, and other means of tracing its progress, ascertaining its loss or gain, or stating an account of it; and this is a powerful circumstance to repel the idea of a partnership. To make a partnership account, there must first be a general account of the partnership dealings to ascertain the profit or loss, and then separate accounts between the partners and firm. The individual account is impossible until the general account is made, as we cannot tell whether a profit or loss is to be shared until we know whether there is a profit or loss. The commissioner's report in this case, finding a balance against Ervin, ignored this principle in stating no general account, to say nothing of other defects; and, in fact, this is not surprising, as I do not see how either this general account or one between the partners could be made upon any basis better than guesswork. The commissioner says the means before him were insufficient to make a statement satisfactory to himself. He says the evidence as to terms of partnership and as to profits and losses is exceedingly meager and unsatisfactory. Certain legal principles here apply. Under a bill for partnership accounts, the burden of proof is on the complainant, and, if he cannot furnish sufficient evidence to enable a master to state a partnership account, his suit necessarily fails. *Maupin v. Daniel*, 8 Coop. 223. "Where there are issues as to the existence of a partnership and the state of its affairs and business, or the state of the accounts between the partners, the burden is on the plaintiff; and, if he cannot furnish sufficient evidence to enable the court to state a partnership account, his suit necessarily fails." *Ashley v. Williams*, 17 Or. 441, 21 Pac. 556. Same effect, *Nims v. Nims* (Fla.) 1 South. 527; *Marvin v. Hampton*, 18 Fla. 131. In *Davidson v. Wilson*, 3 Del. Ch. 307, the court refused to state a partnership account because on the testimony it was impossible to state an account, and said that the court would "never undertake to adjust the rights of parties without satisfactory means of ascertaining what their rights are, and when an account cannot be safely stated, and the true balance between the parties ascertained." The Maryland court said: "A court of equity will not grope its way in utter darkness, and undertake to create and establish a claim upon mere contingencies, or the preponderance of mere possibilities or probabilities; and there is no duty devolving on it to assume the impracticable task of adjusting the rights of the partners, when the proof is utterly deficient and inconclusive." *Hall v. Clagett*, 48 Md. 234. And, if any hardship fall on Hinkson, he is to blame for it. He was the

active party in the business, transacting, may say, the whole business. The moneys of the alleged firm were kept in his sole name in bank. He employed people to help in the business. He had the papers. Ervin was an old man then, beyond three score and ten, so bad in health that during the alleged partnership he was compelled to go South. He had lost his memory, was weak in mind, and considerable evidence shows that he was really not competent to transact business; and, in fact, at most against him, he seldom participated in the business. Now,

was peculiarly the duty of Hinkson, under these circumstances, to properly conduct and keep books of the business. In *Stout v. Eabrook*, 30 N. J. Eq. 187, it was held that a decree requiring a copartner to account would be denied in every case where it appears the party seeking the account has, by his laches, rendered it impossible to do full justice to both parties. In the above-cited case of *Hall v. Claggett* it was held by the Maryland court of appeals that it is the duty of each partner to keep precise accounts of his transactions, and if there has been a total failure to do so, it is good reason against an account. There were no firm assets at the close of the alleged firm. The books and papers, what there were, went into Hinkson's hands. Ervin did scarcely any business, we may say, but went South in January, 1882, about one year after the commencement of the business, and it then practically closed, though there is one check, May 10, 1884. After Ervin went South, Hinkson did all the business, as practically he had before. The whole thing was throughout in his hands, and active, we may say sole, agency. The little that Ervin ever did was likely to save himself as surety on notes for Hinkson, who was insolvent, and the property he had doing business with being in his wife's name. There is an allegation in the bill that Ervin received and did not account for firm assets, but, as is the case with several other material reckless allegations, there is no proof of it. What was there to settle? Thus it appears that everything was in Hinkson's hands, and this justifies the application to this case of the remarks of Judge Snyder in *Sodiker v. Appleite*, 24 W. Va. 414: "The plaintiff was the person who had charge of the business, and, there was any partnership, he was the partner to render an account, not the defendant. \* \* \* If there were any assets or profits, they ought to be in the hands of the plaintiff as acting partner, and therefore use of suit might exist against him for an account; but it is difficult to see why he could have occasion to sue the defendant, who had nothing to do with the management of the alleged partnership."

Finally, there is another consideration operative against Hinkson's call for an account, which, if we may not exactly rank it as laches, yet, mingled with other things

above given, fortifies the conclusion of the circuit judge that the equities of the case were with the defendant. The partnership terminated January, 1882. Never did Hinkson ask a settlement of Ervin, as he himself says. No settlement was asked until asked by Everett, a general attorney in fact appointed by Hinkson, March 31, 1887, and this suit was brought in August, 1887. If Ervin owed a large sum, why did Hinkson, an insolvent and needy man, never even ask anything for so long, especially as he knew Ervin was frail and failing? Ervin took a deed in his own name for a lot on which the business was carried on. This deed dates July 30, 1881. Hinkson claims he paid \$500 on the \$4,300 of its cost, and that the balance was paid out of firm assets, though Ervin's check shows he paid it, and Hinkson claims a half in the property. Why did he let the claim sleep so long? He knew of the deed in Ervin's name. The \$500 never went on this property, but was Mrs. Ervin's separate estate money, and the check for it was given Ervin to go on a mortgage for \$2,500 he held on her land. The claim that this \$500 went on this lot's purchase money, and that Hinkson owned an interest in it as partnership property, is repelled by the fact, pointedly stated by himself, that the property was paid for before the alleged partnership began, and by the fact that Mrs. Hinkson demanded that Ervin credit the \$500 on her debt to him. But Hinkson lets time go on without moving,—Ervin an old man, away up in the seventies, frail of body, weak and weakening of mind, his memory going, as Hinkson knew,—until, after years, when Ervin had totally lost his memory of past affairs, and was far sunk in senility, so that he was found utterly incapable of giving a deposition in the case to give us his version of the matter, Hinkson brings this suit to burden Ervin, a man of very considerable means, on Hinkson's own testimony chiefly. When this suit was brought, Ervin might as well have been in his grave, so far as his capacity to defend it is concerned; for, according to the evidence of physicians and others, he was afflicted with a peculiar phase of mental disease which cast all the affairs and events of his past into the night of oblivion and forgetfulness. His mind was otherwise weak. I incline to think Hinkson's evidence incompetent, under section 23, c. 130, Code, forbidding a party, or one interested, to give evidence of transactions had with one "insane or lunatic," both words being used. The reason for the exclusion is that one party shall not be heard if the other is insane enough to disable the other party from giving evidence. But, if this is not so, it is a potent circumstance with others going to deny relief. Hinkson delayed until the other party was incompetent to tell us his side, and now asks a decree, mainly on his own evidence. He never made any demand for years, and not then, until Ervin was

pressing a mortgage which he had on Mrs. Hinkson's land, and it may be that this is the fountain and mainspring of the demand sought to be asserted in this case. We are asked to suppress or ignore the deposition of Hinkson because of the death of Ervin since this appeal was taken. No authority is cited to support the motion but *Zane v. Fink*, 18 W. Va. 747-752. We have no other authority, and do not think this supports the motion. We are of opinion the deposition cannot be excluded in this court, because we must hear the case on the record as it was when the case was heard in the court below. Decree affirmed.

(40 W. Va. 43)

**BIRD v. STOUT et al.**

(Supreme Court of Appeals of West Virginia.  
Dec. 8, 1894.)

**CONSTRUCTION OF WILL—CHARGE ON LAND—ENFORCEMENT—AMENDED BILL—DEPARTURE.**

1. A will gives several pecuniary legacies, and then gives a sum of money to three children, and then gives "the residue of my estate, real and personal," to a brother and three sisters, and appoints that brother its executor. Such will creates a charge on the land for the legacy to those children.

2. Where it is manifest that it was the design of a testator that legacies should be paid at all events, the implication is that the residuary devisee or legatee shall have only the remainder after satisfaction of the previous dispositions.

3. A will charges with a legacy land devised to a person, and he conveys it to a third person, who retains in his hands of the purchase money a sum to pay the legacy, and promises his grantor to pay it. Such grantor may maintain a bill in equity against his grantee, making the legatees parties to compel the payment of such fund on the legacy, and to enforce the charge on the land.

4. An amended bill must not introduce another and different cause of suit from that of the original bill. But an amended bill is no departure from the original if it tend to promote a fair hearing of the matter of controversy on which the suit was originally really based, provided it do not introduce a new substantive cause of suit different from that stated, and different from that intended to be stated, in the original bill. An amended bill cannot be allowed containing statements inconsistent with the nature of the original bill or changing the cause of suit. By it allegations may be changed or modified, and others added, provided the identity of the cause of suit be preserved.

(Syllabus by the Court.)

Appeal from circuit court, Harrison county. Bill by Wesley M. Bird against Noah W. Stout and others. From a decree for plaintiff, defendant Stout appeals. Affirmed.

J. Philip Clifford, for appellant. John Bassel, for appellee.

**BRANNON, P.** Appeal taken by Noah Stout from a decree of the circuit court of Harrison county requiring him to pay certain money. The first error assigned is that the court erred in overruling the defendant's demurrer to the original and amended bills. Wesley M. Bird filed a bill in equity against

Noah W. Stout as sole defendant, alleging that Bird had conveyed to Stout land at the price of \$3,505.95, of which \$3,000 had been paid, and the balance was to have been paid afterwards, the deed retaining a lien for the deferred payment; that part of the land once belonged to James H. Bird, who by will devised it to said Wesley M. Bird and others, and directed said plaintiff, Wesley M. Bird, as his executor, to pay each of three infant children of his sister, Caroline S. Stewart, \$100 on their severally reaching the age of 21 years; that, as plaintiff apprehended that these legacies might be chargeable on the land, he proposed to pay them out of the money Stout was to pay him as the deferred payment for the land, the children not yet having reached 21 years of age; that the \$3,000 recited in the deed as paid had not in fact been paid when the deed was made to Stout, and Stout did not then pay it to plaintiff, but paid debts of plaintiff to sundry creditors; that, in order to ascertain the present value of the legacies to the children at the date of the conveyance a calculation was made, and Stout gave plaintiff his note for \$458.95, which was intended, with the debts to be paid by Stout, to leave enough of the purchase money in the hands of Stout to pay the legacies as they would fall due; that Stout had in fact paid only \$3,277.94 of the price of the land, and still owed plaintiff the residue of the purchase money, being \$228.01, with interest from October 1, 1879; that the children entitled to said legacies were born on certain dates, showing one of them then of age, and Stout had never paid plaintiff or any one else the money so reserved for said children out of said purchase money, and Stout pretended that, as no provision was made in the deed for the legacies or sums to be paid the children, and had paid said note of \$458.95, he had paid for the land in full, and owed nothing more on it. Let us say that the demurrer to this bill was improperly overruled, as the legatees were necessary, but absent, parties. That defect was cured by an amended bill, which brought them before the court. This amended bill repeated the allegations of the original substantially, alleging that the sum left in Stout's hands was there left for the reason that the legacies it was set apart to pay were a charge on the land under the will of James H. Bird, and was a trust fund for the payment of the legacies; that, without regard to any lien on the land Stout should be compelled to account for the fund as trustee for the legatees. The original bill prayed that the \$228.01 be decreed to be paid to plaintiff, while the amended bill prayed that one-third of the fund be paid to each of the legatees, and that the land be subjected to its payment. A specification of grounds of demurrer filed to both bills claims that the original bill shows no equity. We have no brief on behalf of appellant Stout to support this contention. Is it intended to say that equity has



jurisdiction? This question occurred to me as one of doubt on first impression, but my doubt has drifted away on further reflection. I do not think equity jurisdiction can be based on the theory of a lien reserved in the deed, for the deed admits a down payment of \$3,000, and retains a lien for the balance of the purchase money, and the note given for that balance is stated in the original bill to have been paid. It may be said at the aim of the amended bill to sustain jurisdiction in equity on the idea of a trust, and that this is a suit to make the trustee accountable, is untenable. I doubt not but that at common law the children entitled to the money left in Stout's hands could maintain an action at law for money had and received for their use, and under section 2, c. 71, Code. *Miller v. Lake*, 24 W. Va. 545. I have not deemed it necessary to decide whether Bird could maintain assumpsit for breach of undertaking to pay the legacies or money had and received, as I think equity jurisdiction can be clearly supported on other definite grounds, namely, that a charge rests on the land under James H. Bird's will, and that the plaintiff may file a bill on the principle of *quia timet* to compel Stout to pay the legacies to his exoneration.

The will of James H. Bird did create a charge on the land for these legacies. It first gave several other pecuniary legacies, and then the fourth and last clause is as follows: "I give to the children of my sister Caroline Stewart three hundred dollars, when they are of age, to be equally divided between them. The residue of my estate, real and personal, I wish equally divided between my brother, Wesley M. Bird, and my three sisters Emily S. Bird, Sarah L. Patton, and Rebecca A. Bird." Wesley M. Bird is appointed executor. There is a charge on the realty for the \$300. The testator intended it should be paid at all events, as he declares he prefers the legacies over the gifts to Wesley M. Bird and his sisters by saying he gives them what they are to get only after payment of legacies. The use of the word "residue" plainly tells that the brother and sisters are to get only a remnant. And the fact that he does not, in the residuary clause, separate the personal and real estate, but lends them together, and gives his brother and three sisters the residue of both, shows that he had his mind on both as a fund to answer for the legacies. And besides, the personality is inadequate,—a good reason why he should invoke both to discharge the legacies. And the fact that Wesley M. Bird is executor and a devisee also is important. The case of *Dowman v. Rust*, 6 Rand. (Va.) 87, is exactly in point. It holds that, if the personality be inadequate, or there be expressions in the will tending to show that the testator had the land in mind, a court will make legacies a charge on land, rather than they shall go unpaid. In that case, a testator, whose personality was inadequate to

pay legacies, having one brother, who would have been distributee, gave pecuniary legacies to two friends, and devised all the rest of her estate, real and personal, to that brother, and appointed him executor, and it was held that there was a charge on the realty for the pecuniary legacies. So, also, *Thomas v. Rector*, 23 W. Va. 26, sustains this holding by authorities cited in its opinion, and in its syllabus, which is that "where it is manifest from the whole will that it was the design of the testator that the legacies should be paid at all events, the implication is that the residuary devisee or legatee shall only have the remainder after satisfaction of the previous dispositions." See 2 Lomax, Ex'rs., side p. 86. Thus the land is charged, and Stout took it with the burden of that charge. Who will question the right of the legatees themselves to sue in equity to subject the land? They could do so for two reasons: (1) Because they are owners of the charge; (2) because they can sue at law for the deposit left in Stout's hands, or in equity. *Miller v. Lake*, 24 W. Va. 545. And if they could sue, why not Bird? Has he not an interest such as will enable him to enforce the charge, and call on Stout to perform his duty of payment? Bird was bound for payment, and his land also, and he conveys that land with the obligation resting on it, which obligation Stout promised to remove, and was trusted with a fund for its removal. Does not this interest per se enable him to enforce the payment outside of considerations based on the principles of *quia timet*. He may be deemed a creditor holding legal title to the debt for benefit of legatees. But he and his property are endangered by Stout's failure to pay. Stout agreed to indemnify him. A surety, under this principle, can go into equity to have the one primarily bound pay to his relief. So can one who has a guaranty of indemnity. *Call v. Scott*, 4 Call, 402; *Bart. Oh. Prac.* 282; 2 Story, Eq. Jur. §§ 849, 850. The legatees, the parties entitled to receive the money, are before the court. Surely Bird has such interest as to bring all parties interested before the court to abide its decree.

Another ground of demurrer is that the amended bill departs from the original bill by setting up a different cause of suit. I shall not enlarge on this, supposing that the position is plainly untenable under the liberality allowed in amending bills. Even by the strictest rule of amendment, this amended bill is justified. It is based on the same ground of suit and same facts touching that ground. It only brings before the court the legatees, the owners of the money, thus only making an amendment as to parties necessary to a decree on the original bill, and without whom as parties it was defective. The original demanded the money for Bird, but the prayer of the amended bill is that it be paid to the proper parties, the legatees entitled to it; and the very facts stated in the original bill called in law for payment

to the legatees. Surely, here is no departure. In *Lamb v. Cecil*, 28 W. Va. 653, it is held that while, under pretense of amendment, you cannot introduce an original and different cause of action or ground of relief, yet, if the cause of action and relief sought are substantially the same, it is immaterial that the form in which the claim is presented by amendment differs essentially from that in the original bill. Here there is not even that difference. In *Kuhn v. Brownfield*, 34 W. Va. 252, 12 S. E. 519, it was held even at law—and surely equity is as liberal—that such amendments of pleadings should be allowed as tend to promote fair trial of the matter of controversy on which the action was originally really based, provided the amendments do not introduce a new substantive cause of action different from that declared upon, and different from that which the party intended to declare upon when he brought his suit; that amendments cannot be allowed which are inconsistent with the nature of the pleadings or change the cause of action. Allegations may be changed, others added, provided the identity of the cause of action is preserved. Surely, under these principles, this amended bill is fully vindicated.

Next it is assigned as error that the evidence does not justify the decree rendered against Stout for the payment of the money to the legatees. This depends on a simple question of fact; that it, whether, as part of the purchase money for the land sold by Bird to Stout, a fund was deposited in Stout's hands to pay the legacies in question. The circuit court has found against the defendant on this issue, and I see no ground to disagree with—certainly none to reverse—it. A witness (Peck) and the plaintiff say that a calculation was made about October 15, 1878, to ascertain the then present value of the legacies, and that Stout was present, and a sum was left in his hands to pay them. A witness (Kinsely) was present, and corroborates Peck and Bird. Two other witnesses (Stewart and Cottrill) heard Stout admit in 1885 that there was money in his hands going to these children. Cottrill was guardian of one of the children, and had a conversation with Stout, not casual, but specially touching it as in the interest of his ward, and his testimony has therefore the more weight. Stout, on the other side, is the only witness. Decree affirmed.

(40 W. Va. 15)

**RICHARDSON et al. v. RALPHSNYDER et al.**

(Supreme Court of Appeals of West Virginia.  
Dec. 1, 1894.)

**FRAUDULENT ASSIGNMENT OF PERSONALTY—BILL TO SET ASIDE—PRIORITIES AS AMONG CREDITORS—PRACTICE—CONFLICTING EVIDENCE—REVIEW ON APPEAL.**

1. In showing the fraud necessary to impeach a conveyance, the fraudulent intent of

the parties may be shown by the circumstances attending the transaction. Circumstantial evidence is not only sufficient, but is often the only evidence that can be adduced.

2. Where the decree complained of is based upon depositions which are conflicting and contradictory in their character, so that it is difficult to determine on which side they preponderate, and hard to draw a proper conclusion therefrom, and different judges might reasonably disagree upon the facts proved, the appellate court will refuse to reverse the decree of the court below, although the testimony may be such that the appellate court might have rendered a different decree if it had acted upon the case in the first instance.

3. Creditors may come in by petition to a suit attacking a deed on the ground of fraud, and their priority will be determined by the date of filing their petition, unless they have other ground of priority.

4. Where an assignment of personal property is made in fraud of creditors, they, or any of them, may, in a court of equity, have the same set aside. The creditor who first files his bill obtains thereby a priority, and is entitled to be first paid from the proceeds of the sale of the property, if there are no valid prior liens.

5. A creditor may file his petition in a cause pending which has for its object the vacation of a fraudulent conveyance, and, upon proper allegations, he made a party to the suit, and the bill, exhibits, answers, depositions, orders, and decrees, and all the proceedings in said cause, may, upon proper prayer, be read as part of his petition.

(Syllabus by the Court.)

Appeal from circuit court, Preston county.

Bill by Richardson, Goodwin & Co. against George M. Ralphsnyder and others. From a decree in favor of plaintiffs, defendant Ralphsnyder appeals. Affirmed.

W. W. Brannon, for appellant. D. M. Worring, for appellees.

ENGLISH, J. This was a suit in equity in which the bill was filed at the October rules, 1889, in the circuit court of Preston county, by J. T. Goodwin, Louis Schrader, and Henrietta Richardson, administratrix of H. C. Richardson, against George M. Ralphsnyder, Virginia Potter, widow and administratrix of William R. Potter, deceased, in her own right and as such administratrix, and J. Ami Martin, defendants. The object of this suit, as appears from the face of the bill (which greatly exceeds in length what is usually embraced in such pleadings), is to set aside as fraudulent a certain deed of conveyance which appears to have been executed by William R. Potter in his lifetime to the defendant George M. Ralphsnyder, which deed bears date the 31st day of January, 1887, and was admitted to record on the same day, and which deed purports to convey to said George M. Ralphsnyder a certain lot in the town of Kingwood, with the buildings and appurtenances thereon, together with the pump in the well, and the hose connected thereto, and also the whole stock of goods in the store-room on said lot, and the goods stored in the cellar, and to subject the same to the payment of a debt alleged to be due the plaintiffs from said William R. Potter of \$342.23. The material allegations of the bill are as follows:

at the said William R. Potter purchased a lot of land, which is sought to be sub-  
stituted, from the defendant Martin for the  
consideration of \$400. That after said pur-  
chase said Potter erected a large building  
thereon, to be used partly as a dwelling house  
and partly storehouse, and did occupy said  
building as a dwelling and store house until  
January 31, 1887, when he attempted to con-  
vey the same to George M. Ralphsynder.  
That said Potter, for several years prior to  
said purchase, had been engaged in the busi-  
ness of retail merchant in said town, and  
did become largely indebted to various  
wholesale establishments and other parties  
for large sums of money, aggregating many  
hundred dollars. That said creditors became  
easily about their claims, and demanded  
payment, and threatened suit if the same  
were not soon paid. That being thus threat-  
ened and harassed, and fearing his property  
could be subjected to sale by his creditors,  
he determined to put his property out of his  
hands, for the purpose of hindering, delay-  
ing, and defrauding his creditors in and about  
the collection of their said debts. That, in  
order to consummate his design, he entered  
into a compact with the defendant George M.  
Ralphsynder, under the advice of I. C. Ralph-  
synder, a brother of said George M. Ralph-  
synder, who at the time was attorney and  
counsel of said Potter, whereby he (the said  
Potter) should convey all of said property to  
said George M. for the sole purpose of hin-  
dering, delaying, and defrauding his credi-  
tors, and especially the plaintiffs. That, in  
order to carry out said design and agreement,  
said Potter, being advised and assisted by  
the defendant George M. Ralphsynder, and  
his brother I. C. Ralphsynder, the attorney  
for said Potter, on the 31st day of January,  
1887, pretended to convey to said George M.  
the said house and lot in the town of King-  
wood, together with all the articles of mer-  
chandise therein contained, consisting of  
furniture, hardware, drugs, etc., for the pretended con-  
sideration of \$400 cash in hand paid, and  
other considerations mentioned in the deed,  
which is exhibited, and in which the addi-  
tional consideration appears to have been  
the assumption on the part of said George M.  
the payment of two notes of \$100 each,  
dated April 1, 1884, and April 1, 1885, which  
said Martin held against said Potter, which  
are liens on said real estate. That at the  
time of said pretended conveyance, and for  
long time prior thereto, said Potter was in-  
debted to plaintiffs in a large sum of money,  
and had been running an account with them  
since the 12th day of February, 1884, up and  
until the 21st day of January, 1887, just 10  
days before said pretended conveyance,  
that during that time said Potter had bought  
from plaintiffs merchandise aggregating \$1,-  
861, and had paid them \$786.38, leaving a  
balance due them at the time of said pretend-  
ed sale of \$342.23, exclusive of interest. That  
it was a dealing between merchant and

merchant, and that the statute of limitations  
as between such parties only applied, and  
that they were entitled to interest on their  
account after 60 days, on general average.  
That the merchandise of various kinds in  
said storeroom at the time of said pretended  
sale were, in the aggregate, in value far in  
excess of the whole price pretended to have  
been paid for both said merchandise and  
house and lot. That the merchandise in said  
house at that time was worth from \$800 to  
\$1,000; and that said house and lot were at  
that time, and are now, worth from \$800 to  
\$1,200; and that the said sum of \$600 was  
grossly inadequate to the true value of said  
property. That it was not a valuable con-  
sideration, in law or in fact, and that the  
same was therefore fraudulent, null, and void  
as to the debts of creditors of said Potter,  
and especially to the debts of plaintiffs.  
That the said George M. Ralphsynder did not  
pay the pretended amount of \$400, or any  
other amount, or any consideration, upon the  
pretended purchase, neither was it intended  
at the time by either said Potter or said  
Ralphsynder that the same should be paid by  
the said Ralphsynder. That the recitals in  
said deed are false, and were made for the  
sole purpose of hindering, delaying, and de-  
frauding the creditors of said Potter, and es-  
pecially the plaintiffs, about the collection of  
their debt. That at the time of said con-  
veyance, or very soon thereafter, said George  
M. Ralphsynder took charge and control of  
the notes and book accounts of said Potter,  
and proceeded to collect the same in his own  
right, and did collect large sums of money  
on said notes and book accounts in his own  
right and name, and has never turned over  
said money to said Potter, or to any one en-  
titled to receive the same, and that at the  
time said notes and book accounts were turn-  
ed over to said Ralphsynder he did not pay  
anything to said Potter for them, but that  
said transfer or assignment of said notes and  
accounts to said Ralphsynder was made with  
the full knowledge of both parties to the  
transaction, for the sole purpose of hinder-  
ing, delaying, and defrauding the creditors  
of said Potter, and especially the plaintiffs.  
That at the time of said pretended convey-  
ance said George M. Ralphsynder was not  
assessed with any property or money, and  
that he in fact did not have any money with  
which to purchase either real estate or per-  
sonal property, and pay for it. That only a  
portion of the two notes due said Martin,  
and assumed to be paid by said George  
Ralphsynder, has been paid, and that which  
has been paid was not paid out of funds be-  
longing to said George M. Ralphsynder.  
That said George M. Ralphsynder had full  
and complete knowledge of the fraudulent  
intent of said Potter at the time of said con-  
veyance, and knew fully that said Potter was  
doing so for the purpose of hindering, delay-  
ing, and defrauding his creditors, and es-  
pecially the plaintiffs. That at the time of

said pretended conveyance there was an understanding and agreement between said Ralphsnyder, defendant, and said Potter to the effect that at some time subsequent thereto, either when it might be thought proper by the parties or at some particular time specified in said contract, the said George M. Ralphsnyder should reconvey said property to said Potter. That subsequent to said conveyance, some time in 1888, said W. R. Potter departed this life intestate, and his widow, the defendant Virginia Potter, qualified as his administratrix. That the said Virginia Potter was fully conversant and familiar with the said sale and conveyance, and the character of the whole transaction, and that she did then and does now know about the condition of the said sale, and that she knew all about the contract between her husband and the said George M. Ralphsnyder, by which he was to reconvey said property to her said husband; and the plaintiffs call upon said Virginia Potter to answer what she may know about said transfer and sale; how much of said \$400 was in fact paid; who paid the same, and where the money came from; what she may know about said contract or agreement between said G. M. Ralphsnyder and her husband, whereby he should at some future time reconvey said property to her husband; whether said contract was in writing, and, if so, whether she had a copy thereof; and where said original contract is, if she has not got it; and, if said contract was not in writing, that she answer as to its character, effect, and conditions; also whether her codefendant George M. Ralphsnyder did not take charge of the notes and accounts of her said husband, and collect the same; what said notes and accounts amounted to; how much the said George M. collected thereof, and paid over to her said husband; and if it was not true that said George M. collected accounts and notes due her said husband, and paid the same on part of the consideration mentioned in said deed from W. R. Potter to the said George M. Ralphsnyder. And the plaintiffs propound six interrogatories to said George M. Ralphsnyder, calling on him to disclose how much purchase money was actually paid to said Potter by him, and whether it is not true that at the time of said purchase he was merely a law student, and did not have \$400 or any considerable sum of money with which to purchase property and pay for it; whether, if any money was paid on said purchase, it was not the money of his brother I. C. Ralphsnyder, or some one else; whether it is not true that he, or some one for him, took an inventory of the goods directly before or shortly after said purchase, and if he did not tell any person what the value of said stock was, and what it amounted to by said inventory; and he is also called upon to produce a list of said articles of merchandise, and to state their value when he bought the same; also whether he took charge of the

books and notes of said W. R. Potter, and proceeded to collect, and did collect, various amounts thereon, and if part of the money so collected was not paid on the debt, and became part of the consideration of \$600 mentioned in said deed; and that he file a list of the notes and accounts which he took into his possession to collect for said Potter, or for any other purpose, what money he collected, and what he did with the same.

The defendant George M. Ralphsnyder occupies nearly 20 pages of the printed record in putting in issue the allegations of the bill, and in responding to the interrogatories propounded to him in said bill. Virginia Potter, widow of said W. R. Potter, also answered the bill, admitting that she qualified as administratrix of her deceased husband. That she only received of the estate some personal property which she claimed as exempt against creditors, and alleging that she was no party to any of the alleged fraudulent transactions stated in plaintiffs' bill. That for want of information on the subject she cannot answer the interrogatories propounded to her in said bill, except that she is aware that the books and accounts of the late Dr. Potter passed into the hands of I. C. Ralphsnyder, attorney at law. That this was all the personal property owned by said William R. Potter, except what was so held as exempt, which latter was less than \$200; and she claims her dower interest in the real and personal estate of said W. R. Potter. J. Ami Martin, who is named as defendant, also answered said bill, admitting that on the 1st day of April, 1881, he sold and conveyed said lot of land to W. R. Potter for the sum of \$400, in payments of \$100 each, payable in one, two, three, and four years. That the first two of said notes had been paid, but the last two, which fell due on April 1, 1884 and 1885, respectively, have not been paid, but are entitled to two credits, one of \$60 or \$65, paid by George M. Ralphsnyder in the early part of 1888, and another of \$33.39, paid the 24th of March, 1887, by I. C. Ralphsnyder, a brother of said George M. Ralphsnyder, assigning to respondent a note executed by one A. S. Pratt to said I. C. Ralphsnyder for said amount. That said notes were assigned by him to W. G. Brown, who held them for some time; and that respondent has taken said notes back, and exhibits them with his answer, and asks that the same, and the lien by which they are secured, may be enforced, and that said lien be paid from the sale of said lot.

Numerous depositions were taken in the cause, and on the 4th day of April, 1891, a nunc pro tunc order was entered, reciting that at the December term, 1890, the plaintiffs, upon the pleadings and evidence in the cause taken, suggested that evidence so taken disclosed that I. C. Ralphsnyder had an interest in the property conveyed to his brother, the defendant George M. Ralphsnyder; and thereupon said plaintiffs, by their attorney, moved the court for leave to file an amended bill,

making the said I. C. Ralphsnyder a codefendant; which motion was resisted by said I. C. Ralphsnyder in person, and as attorney for his brother, and the motion was overruled, and the court refused to allow the bill to be so amended, and the plaintiffs excepted. On the same day the cause was again heard upon the bill, exhibits, answers, and depositions; and court being of opinion, from the pleadings and proofs, that the conveyance of the storehouse and lot and stock of goods by William R. Potter to the defendant George M. Ralphsnyder, as set forth in the pleadings and evidence, was made by said W. R. Potter with intent to hinder, delay, and defraud his creditors, and especially the plaintiffs, and that the defendant George M. Ralphsnyder had full knowledge of such fraudulent intent on the part of his grantor, it was therefore decreed that the deed set forth in plaintiffs' Exhibit B, filed with their bill, dated January 31, 1887, be decreed fraudulent and void, and set aside and held for nought, as to the plaintiffs' debt established in the pleadings and proofs against the estate of W. R. Potter, deceased; and that there was due to J. Ami Martin from the estate of William R. Potter, deceased, the sum of \$185.51, balance of purchase money, with interest from the date of said decree, which debt is secured by vendor's lien on said real estate; and it further appearing that there was due from the estate of William R. Potter, deceased, to the plaintiffs the sum of \$369.55, with interest from the date of said decree, which debt is a lien on said real estate from the filing of the bill, it was ordered and decreed that the defendant Virginia Potter, as administratrix of the estate of William R. Potter, deceased, do pay to the plaintiffs the said sum of \$369.55, with interest from the date of said decree; and as to the prayer of said Virginia Potter, widow, in her answer, for dower in said real and personal estate, the same was reserved, with all questions touching the same, for the future consideration and order of the court; and it was further decreed that unless the said Virginia Potter, as such administratrix, should within 30 days from that date pay to the plaintiffs, out of the estate of William R. Potter, deceased, in her hands to be administered, the sum of \$369.55, with interest from date, together with the costs of said suit, or unless some other person should pay said debt and costs for her, a special commissioner therein named should, on some court day, at the front door of the courthouse of said county, make sale of said real estate upon the terms therein prescribed; and the sheriff of said county was directed at once to take charge and possession of the storeroom mentioned in said Exhibit B, and ascertain how much of said stock of goods remains in said storeroom and list, and appraise the same; and said special commissioner was also directed, in making the sale of said real estate, to also sell said stock of goods as a whole, allowing the defendant or his attorney to re-

move any goods, not belonging to the original stock, which were brought and put there by him since said purchase. On the 21st day of July, 1891, a decree was entered in said cause, confirming the report of the special commissioner appointed to make sale of said storehouse and lot and stock of goods, which appear to have brought \$1,010 at said sale, \$336.66 of which amount was paid down, and two single bills for a like amount, payable in one and two years, with interest, were executed to said commissioner for the residue; and said decree also directed the manner of disbursing said cash payment.

J. R. Greer, A. Laing, and W. Cruickshank, doing business under the firm name of Greer & Laing, filed their petition in the cause, alleging that said W. R. Potter was largely indebted to them for goods and merchandise which he had purchased from them prior to the 21st day of March, 1884, and on said date said Potter executed his negotiable note to them for \$319.21, payable 60 days after date, at the National Bank of Kingwood, which note is exhibited with said petition; that no part of said note had been paid; and also making the same allegations in regard to the conveyance of said storehouse and stock of goods to George M. Ralphsnyder as were made in the bill filed by Richardson, Goodwin & Co. in their bill; reciting the fact that said deed had been set aside as voluntary, fraudulent, and void in said suit of Richardson, Goodwin & Co., and their debt declared a lien thereon, and said house and lot, and so much of the stock of goods that remained, had been sold to pay plaintiffs' debt; and said petitioners allege that after the payment of said Richardson, Goodwin & Co.'s debt there will remain a considerable surplus fund from the proceeds of said sale, and they ask that they may be allowed to come in and be made parties plaintiff in said cause, and that all the proceedings in said cause may be taken and read as part of their petition; that said deed from W. R. Potter to George M. Ralphsnyder may be declared voluntary, fraudulent, and void, and set aside as to petitioners' debt; and that any surplus remaining after the payment of the lien and charges decreed against may be applied to the debt of petitioners. George M. Ralphsnyder filed his answer, putting in issue the allegations of said petition, which answer was replied to generally; and on the 29th day of March, 1892, a decree was entered in said cause, ascertaining the amount of said petitioners' claim, holding said deed to George M. Ralphsnyder fraudulent and void as to said petitioners' debt, and directing that unless said debt be sooner paid by Virginia Potter, administratrix, or some one for her, said special commissioner apply any surplus in his hands towards the payment of said petitioners' debt; and from said decree rendered in the case of Richardson, Goodwin & Co. against George M. Ralphsnyder and others, on the 4th day of April, 1891, said George M. Ralphsnyder obtained this appeal,

assigning as the first error the action of the court in holding the deed from William R. Potter to George M. Ralphsnyder fraudulent and void as to the rights of the plaintiffs.

Now, this court held in the case of Lockhart v. Beckley, 10 W. Va. 88 (9th point of syllabus), that "fraud is to be legally inferred from the facts and circumstances of the case, when those facts and circumstances are of such a character as to lead a reasonable man to the conclusion that the conveyance was made with the intent to hinder, delay, or defraud existing or future creditors." See, also, Bartlett v. Cleavenger, 35 W. Va. 720, 14 S. E. 273. Now, in considering the circumstances surrounding this transaction; it is proper to look, first, at the pecuniary condition of William R. Potter at the time he attempted to convey his house and lot and stock of goods to George M. Ralphsnyder; and the evidence discloses that at that time he was indebted to two firms in the city of Wheeling in a sum greatly in excess of the consideration named in the deed which ostensibly transferred his house and store and stock of goods. Two days previously he had transferred to his attorney and legal adviser all of his accounts and notes, in consideration of past and future legal services, and to his mother and sister all of his interest in the home farm, which constituted his entire property, with the exception of his household goods. About the 1st of August he settled with the witness C. C. Craig, and fell in his debt \$60 or \$70. He told said witness that he had no money; that he had large accounts standing out, as much as \$500 or \$600, and from \$1,000 to \$1,200 in goods; insisted on his buying goods, saying that he had better take goods when he could get them; that he might not be in business very long. This conversation occurred a few days before said Potter sold out. What the real consideration of the transfer of the books, notes, and accounts to I. C. Ralphsnyder was, does not appear. It lies concealed under the general description of "past and future legal services." This assignment or transfer of books and accounts appears by the testimony of I. C. Ralphsnyder to have been made on the 29th day of January, 1887, and on the 31st day of January, 1887, the deeds from said W. R. Potter to George M. Ralphsnyder for the storehouse and merchandise, and to his mother and sister for his interest in the home farm; and the inquiry suggests itself, at this point, why did W. R. Potter at this time suddenly conclude to part with all of his property, selling his home, his storehouse, and store goods for less than half what it subsequently brought at public sale, and for less than one-third of what the testimony shows it was really worth? He sells it too to a young man, the brother of his attorney and legal adviser, who is accidentally in the town of Kingwood on a visit to his brother; but who is a resident of another county, where he lived

on a farm with his father, who is assessed with no property at his home, but who is stated to have been interested in a wheat crop, and had a horse and some cattle; who borrowed \$390 of the \$400 cash payment from his brother I. C. Ralphsnyder, who had the books, notes, and accounts of W. R. Potter in his possession; who had no money to invest in speculation, but learned of this speculation from the confidential legal adviser of said Potter, as it cannot be presumed that a mere visitor in the town would so soon learn that said Potter wanted to sell; and it is reasonable to suppose that his brother I. C., in their confidential talks, would not only advise him of the fact, but at the same time assist his client in finding a purchaser, although he had to furnish the money to that purchaser to enable him to make the purchase; and another fact shown by the deposition of said George M. Ralphsnyder is significant, and that is that said George M. took no inventory of said goods, either directly before or shortly after the purchase; he just took them upon the representation of said Potter, making what is called, in common parlance, a "lumping trade." This transaction was not accompanied with the usual deliberation practiced by men in such transactions. Again, George A. Walls, in detailing the circumstances of this transaction, says that \$400 was paid to Dr. W. R. Potter in the store-room of said Potter, and his recollection is that it was paid by the hands of I. C. Ralphsnyder. He did not count the money, but saw it passed to the hands of said Potter, and understood that it was \$400. This was after dark, near 8 o'clock in the evening. Said Walls also states that, after taking the acknowledgment of said deed, Mr. I. C. Ralphsnyder said that he would like to have the acknowledgment written out and the deed recorded. "We then came down to the office,—I think all three of us came; I wouldn't be positive about that,—and, after coming to the office, I said to Mr. Ralphsnyder that I would make a memorandum of the acknowledgment to said deed, and mark it, 'Filed for record'; but he said, 'No'; he would rather have the acknowledgment written out in full, and the deed recorded. I then told him, 'All right'; that I would write the acknowledgment of the deed, and sign it, but that it was too late to record it that night." He also says the certificate was written out that night at the urgent request of Mr. I. C. Ralphsnyder, who said he wanted the matter entirely closed up, and that a mere memorandum would not be legal, he was afraid. Whether Mr. I. C. Ralphsnyder was acting in the interest of his client W. R. Potter, or his brother George M., when he was in the clerk's office, between 8 and 9 o'clock at night, urging the immediate recordation of said deed, does not appear; nor is it very material. He was there, and appears to have been apprehensive. The clerk

estifies that such haste is unusual in in-lorsing the certificate of acknowledgment upon deeds, or in recording the same. What, hen, was the cause of this haste? Could it ave been that I. C. Ralphsnyder, who was he legal adviser of said Potter, and so well .cquainted with his pecuniary condition and labilities, was apprehensive of some attack rom the creditors of said Potter, and wish-d to hinder, delay, and defraud them by ransferring all of his property beyond their each? These, however, are not all the circum-stances which point in that direction. The witness H. H. Potter testifies as fol-lows: "I could not say how long it was be-ore the sale, but it was before the house vas finished that he sold, and before he urned out, down on Price street. I hap-pened in his store, and he and Mr. Frey, of reer & Laing, were talking about some old ills, and Mr. Frey said he would see that hey were straightened up, and took the umber of some checks." After Mr. Frey vent away, Doc (meaning W. R. Potter) told im that they had not given him credit for ayments he had made, and had him charged n the books with several hundred dollars ore than he owed them, and that he in-ended straightening them out on them. After Mr. Frey was gone a day or two, said Potter called him over to his store, and howed him a receipt or two, and a state-ment from Greer & Laing on which there vere no credits to correspond with the re-ceipt. After Potter burnt out and moved nto the new building, he (witness) went up here to see Mr. Frey, and he and the doctor vere running over this account again, and, after Frey was gone, Dr. Potter told him hat he never intended to pay what Greer & Laing claimed off of him; that he did not ve them one-half what they claimed; and hat he would spend all he had before he ould pay a debt twice. After the sale, said I. H. Potter also testifies to a conversation ad with I. C. Ralphsnyder at the store-ouse, in the presence of Dr. Potter, in hich he told I. C. Ralphsnyder that if he ad swindled Dr. Potter out of his building e could not beat witness out of what little e had. He replied that he had not done anything of the kind; that he had paid all hat it was worth. He (witness) told him he lid not think so, and he said that there was obody else that would give any more for it, and witness told him that he knew better. Dr. Potter was present, and he said, "Why lid not they do it, if they would?" Witness emarked that he did not think they had a proper chance, and he said he reckoned that hey could have a chance yet if they wanted o pay more; and Mr. I. C. Ralphsnyder then aid, if there was anybody that wanted to ay more, they could have the chance then o do it. Witness told him he would give im \$50 for his bargain right there, and he aid witness could have it. Witness named

the amount he understood he had paid. He said it was \$50 more than that. Witness told him he would go to the record, and see what it said; and he (Ralphsnyder) replied that there was a little difference between him and Dr. Potter before, that was not considered in the record, amounting to \$50, or about that. Dr. Potter then said that was correct. Witness then said he would ad-vance him \$50 on that yet. He said it was a trade, and witness so considered it. He said he wanted the cash right down. Witness told him he would pay him \$25, and the rest as soon as the papers were made over, cash in hand. He said it was not necessary to take the \$25; that he would make the pa-pers out at 1 o'clock. Witness told him he would meet him at the clerk's office. Wit-ness got the money, and went to the clerk's office, and waited until 2 o'clock, but Ralph-snyder did not come. Witness also states that Dr. Potter told him that he had said I. C. Ralphsnyder employed as his attorney by the year. Another circumstance is shown by the answer of J. Ami Martin, who is the holder of the two notes for \$100 each, se-cured by vendor's lien on said lot. He says \$60 or \$65 was paid by George M. Ralphsnyder in the early part of March, 1888, and a payment of \$33.39 was made about the 24th of March, 1887, by said I. C. Ralphsnyder as-signing to him a note on A. S. Pratt, exe-cuted to said I. C. Ralphsnyder for that amount. This is but another circumstance showing how and by whom said purchase money was paid.

Now, as to the fact developed in the testi-mony of H. H. Potter, of a false recital as to the consideration named in the deed from W. R. Potter to George M. Ralphsnyder, creating a discrepancy of \$50. Bump on Fraudulent Conveyances (at page 40) says: "An instrument which misrepresents the transaction that it recites is evidence of a secret trust, and is calculated to mislead and deceive creditors. A false recital is there-fore a badge of fraud, and the instrument in which it occurs must sustain a rigorous ex-amination." Another fact which strongly in-dicates a secret trust is disclosed in the testi-mony of I. C. Ralphsnyder, who states that after said transfer he paid over to W. R. Potter and wife \$100 or \$150 collected by him on store accounts placed in his hands by said Potter. Now, it appears by the tes-timony of I. C. Ralphsnyder that on the 29th day of January, 1887, all the books and ac-counts of said W. R. Potter had been trans-ferred and assigned to said I. C. Ralphsnyder in consideration of past and future profes-sional services; yet said I. C. Ralphsnyder testifies that said Potter told him he needed money, and assigned that as a reason for wanting him to collect these claims, \$100 or \$150 of which he states he paid over to him; and he says, further, that said Potter told him he intended to pay all of his debts, but



how he was to pay any debt out of the accounts, etc., assigned to said I. C. Ralphsnyder for legal services, unless said Ralphsnyder secretly paid the money collected to him, no one can tell. That such was not his intention, however, is plainly apparent from the fact that he sold and conveyed his home, his storehouse, and store goods to George M. Ralphsnyder for less than one-third of its value; that I. C. Ralphsnyder, his confidential legal adviser, not only found a purchaser of this property in the person of his impecunious brother, who was paying him a visit, but furnished him with nearly all of the money with which to make the purchase; and that the deed for same was hurried on to the record at 9 o'clock at night, the clerk testifying that he wrote out the certificate of acknowledgment at the urgent request of I. C. Ralphsnyder, who said he wanted the matter entirely closed up, and that a memoranda would not be legal, he was afraid. The question naturally suggests itself, afraid of what? and why could not the deed as well have been recorded the next day? or the acknowledgment indorsed the next day? Another fact which tends to elucidate this conduct, and account for this haste, appears in the testimony of H. H. Potter, who says that said W. R. Potter told him before this sale that he never intended to pay what Greer & Laing claimed off of him; that he did not owe them one-half they claimed, and that he would spend all he had before he would pay a debt twice; and, at the same time that he conveyed his home and storehouse and store goods, he conveyed his interest in his father's place (the home farm). Everything he had in the shape of property was apparently transferred to bona fide purchasers, yet I. C. Ralphsnyder, several days after the sale, in the presence of Dr. Potter, told H. H. Potter that he could have the property by paying \$100 advance on the cost price, without consulting his brother George M. Ralphsnyder; and this fact, combined with the confidential relations existing between said I. C. Ralphsnyder and W. R. Potter, and his brother George M. Ralphsnyder, are very potent in convincing the unprejudiced mind that George M. Ralphsnyder was not only fully aware of the fraudulent intent of said W. R. Potter in attempting to transfer his property beyond the reach of his creditors, but that he allowed himself to be used by his brother I. C. Ralphsnyder as an instrument by which that object was sought to be effected. I. C. Ralphsnyder was a very active and efficient agent for his client. He not only found him a purchaser, but furnished the purchaser with the money to pay the cash payment and a part of the deferred payment. It is stated in evidence that W. R. Potter needed money to pay debts with, but, as to any debt ever having been paid by W. R. Potter to any one of his creditors with the \$400 received as the proceeds of his house

and lot and store, the record is silent. No inventory of the goods was taken at the time of the purchase, but George M. Ralphsnyder testifies that he had long since repaid to his brother I. C. Ralphsnyder the money he borrowed from him to make the purchase; and this statement is made on the 29th day of August, 1890; this suit was brought in October, 1889; and the conveyance was made in January, 1887,—so that if this statement of said George M. be true, that he had long since paid his brother, if he paid out of the business, he must have been much more successful than said W. R. Potter was during the time he was conducting the business, and the evidence fails to show that said George M. Ralphsnyder had any other source from which to derive the money to pay back said money.

Now, in the case of *Reilly v. Barr*, 34 W. Va. 96, 11 S. E. 750, this court held that "when it appears that an instrument conveying real estate is impeached as fraudulent by creditors of the grantor, if the evidence discloses the fact that said instrument is false in any material part, the burden of showing the transaction was fair lies upon the party who seeks to uphold it." Now, the consideration named in this deed was \$400, and yet H. H. Potter swears that I. C. Ralphsnyder told him, in the presence of W. R. Potter, when he was talking of buying the property, that the true consideration was \$450; that there was a difference between Dr. Potter and him that was not considered in the record; so that, if this be true, there was another \$50 of purchase money not paid by George M. but by I. C. Ralphsnyder, and the deed is shown to be false in a very material part, and the burden of showing the transaction was fair is thrown upon said George M. Ralphsnyder. Waite, in his work on *Fraudulent Conveyances*, says, quoting from Story, J.: "Fraud is always a question of fact with reference to the intention of the grantor. Where there is no fraud, there is no infirmity in the deed. Every case depends upon its circumstances, and is to be carefully scrutinized; but the vital question is always the good faith of the transaction. There is no other test. Fraud does not consist in mere intention, but in intention carried out by hurtful acts. Fraud or no fraud is generally a question of fact, to be determined by all the circumstances of the case." Direct proof of positive fraud, in the various kinds of covinous alienations which we are to discuss, is not, as we shall presently see, generally attainable, nor is it vitally essential. The fraudulent conspirators will not be prompted to proclaim their unlawful intentions from the housetops, or to summon disinterested witnesses to their nefarious schemes. The transaction, like a crime, is generally consummated under cover of darkness, with the safeguard of secrecy thrown about it. Hence it must be judged of by all the surrounding



circumstances of the case. The evidence is almost always circumstantial. Nevertheless, though circumstantial, it produces conviction in the mind often of more force than direct testimony." Among the badges of fraud enumerated by Waite in his work on Fraudulent Conveyances are the failure to take an account of stock, and a false admission of the receipt of purchase money, both of which are present in this instance.

The question as to whether George M. Ralphsnyder had notice of any fraudulent intent on the part of his grantor, W. R. Potter, is one which also may be determined by the surrounding circumstances. The testimony shows that, for a week previous to the purchase of this property from W. R. Potter, he had been a visitor of his brother, and had been with him night and day. Two days before the deed was made, said Potter had transferred his books and accounts to I. C. Ralphsnyder, and it surely never would have occurred to George M. to purchase this property if I. C. Ralphsnyder had not told him of its value, and offered to loan him the money; and Mr. Wall says, in his testimony, that George M. was in the clerk's office when his brother I. C. was urging the immediate recordation of the deed; and the evidence clearly showing that said W. R. Potter made this conveyance with fraudulent intent, and I. C. Ralphsnyder acting as legal adviser of said Potter and George M. (his brother) at the same time, the conclusion is irresistible that he explained the entire matter to said George M. before the purchase was made; and, although the parties went through the formality of paying over the \$400 in the presence of a witness, yet the said Potter, having conceived the fraudulent intent of defrauding his creditors, could easily have handed the money back to I. C. Ralphsnyder, who Wall says handed him (Potter) the money, as he transaction between them in regard to the \$50, which was not included in the consideration named in the deed, clearly shows that their relations were very intimate and confidential. Taking the whole circumstances surrounding the transaction, then, my conclusion is that said George M. Ralphsnyder had full notice of the fraudulent intent of said W. R. Potter. In the case of *Smith v. Yoke*, 27 W. Va. 639, this court held that where a decree sought to be reversed is based upon positions which are so conflicting, and of such doubtful and unsatisfactory character, that different minds and different judges might reasonably disagree as to the facts proved by them, or the proper conclusions to be deduced therefrom, the appellate court will decline to reverse the finding or decree of the chancellor, although the testimony may be such that the appellate court might have pronounced a different decree if it had acted upon the cause in the first instance. The same thing is held in the case of *Bartlett v. Cleaver*, 35 W. Va. 720, 14 S. E. 278. Applying the law, then, to the facts and circum-

stances shown in this case, my conclusion is that the court committed no error in decreeing that the deed from W. R. Potter to George M. Ralphsnyder was fraudulent and void as to the rights of the plaintiffs.

The next error assigned is in not ascertaining the personal estate of William R. Potter, and settling the administration accounts of his personal representative, before any sale of the land and goods in the cause described. As to this assignment of error it appears by the answer of Virginia Potter, widow and administratrix of the estate of W. R. Potter, deceased, that the books and accounts which were assigned by W. R. Potter to I. C. Ralphsnyder were all the personal property owned by said W. R. Potter, except what was held as exempt, which was less than \$200; and she elects to take her dower in gross out of the property sold; and for that reason there was no necessity of assigning her dower, and there was no necessity of directing an account (see *Sweeny v. Refining Co.*, 30 W. Va. 443, 4 S. E. 431), this being a suit to set aside a fraudulent conveyance, and the only personalty being the stock of goods claimed by the defendant George M. Ralphsnyder. See *Clark v. Figgins*, 31 W. Va. 156, 5 S. E. 643, where it is held that, where an assignment of personal property is made in fraud of creditors, they or any of them may, in a court of equity, have the same set aside. The creditor who first files his bill obtains thereby a priority, and is entitled to be first paid from the proceeds of the sale of the property, if there are no valid prior liens. The deed, though ever so fraudulent as to existing creditors of the grantor, is valid and binding as between the parties to the fraud. See *Core v. Cunningham*, 27 W. Va. 210.

It is further assigned as error that the court decreed a sale of the property without giving the appellant George M. Ralphsnyder a day in which to relieve the same from sale. The plaintiffs, however, asserted no claim, and were entitled to no decree, for money against said George M. Ralphsnyder, and obtained no such decree against him. Their decree was against the estate of W. R. Potter, and his personal representative was allowed 30 days in which to pay said decree.

It is also assigned that it was error to read the evidence and pleading in the original cause in the petition proceeding of Greer & Laing against appellant. We find it stated, however, in *Sanders' Suit in Equity* (page 688) that "creditors may come in by petition to a suit attacking a deed on the ground of fraud, and their priority will be determined by the date of filing their petition, unless they have other ground of priority,"—citing *Wallace's Adm'r v. Treacle*, 27 Grat. 479. See, also, 1 Bart. Ch. Prac. p. 340. A creditor may, under the practice, file his petition in a cause pending which has for its object the vacation of a fraudulent conveyance, and upon proper allegations be made a party to the suit; and the bill, exhibits, answers, depositions, orders,

and decrees, and all the proceedings in said cause, may, upon proper prayer, be read as part of his petition. See 3 Daniell, Ch. Pl. & Pr. p. 2142; 1 Daniell, Ch. Pl. & Pr. p. 874.

It is also claimed that it was error to overrule the demurrer of appellant to the petition of Greer & Laing, but as no reason for the demurrer is assigned in argument, and we see no objection to said petition, we must conclude that said demurrer was properly overruled. This disposes of the errors assigned, and, for the reasons above stated, my conclusion is that there is no error in the decree complained of, and the same is affirmed, with costs and damages.

(40 W. Va. 65)

**STEWART et al. v. STEWART.**

(Supreme Court of Appeals of West Virginia.  
Dec. 8, 1894.)

**EQUITY PRACTICE—COPY OF LOST BILL—WAIVER OF OBJECTIONS—CONSENT DECREE—MODIFICATION—CLERICAL ERRORS—REPORT OF COMMISSIONER—EXCEPTIONS.**

1. Where the original papers in a cause have been lost, they may be supplied as provided in section 14 of chapter 130 of the Code; and in a chancery cause, where the lost bill is thus supplied, and the defendant appears and files his answer thereto, he thereby waives any objection to the manner in which the bill was supplied, or to the authenticity of the copy thus supplied.

2. After the term at which a consent decree is entered it cannot be set aside, modified, or altered without the consent of the parties, except only to correct a clerical error, which is a mistake made by the clerk in entering such consent decree, and it may be corrected by the original draft of the decree furnished the clerk by the court; or it may be a miscalculation or mistake in some arithmetical operation, whereby a sum entered in such consent decree, where all the parties are agreed on the basis of the calculation, and the mistake is simply an arithmetical mistake, or a simple blunder, in performing an arithmetical operation, all parties being agreed on the operation to be performed.

3. In order that a decree may be corrected or reversed on motion under section 1 of chapter 184 of the Code, the error complained of must be a clerical error, or error in fact for which a judgment or decree may be reversed or corrected on motion or writ of error coram nobis.

4. When questions purely of fact are referred to a commissioner, to be reported upon, the findings of the commissioner, while not as conclusive as the verdict of a jury, will be given great weight, and should be sustained unless it plainly appears that they are not warranted by the evidence. This rule operates with peculiar force in an appellate court where the findings of the commissioner have been approved and sustained by the decree of the inferior court.

5. Generally, exceptions to the report of master commissioners partake of the nature of special demurrers, and, if the report is erroneous, the party complaining of the report or excepting thereto must point out the errors in his exceptions with reasonable certainty, so as to direct the mind of the court to them. When he does so, the parts not excepted to are admitted to be correct, not only as regards the principles, but also as relates to the evidence, on which they are founded.

6. A decree or order made by consent cannot be set aside either by rehearing or appeal or by bill of review, unless by clerical error

anything has been inserted in the order as by consent, to which the party had not consented, in which case a bill of review might lie.

(Syllabus by the Court.)

**Appeal from circuit court, Monongalia county.**

Bill by William H. Stewart and others against John Stewart. There was a decree for plaintiffs, upon which defendant filed a bill of review, and from an order sustaining a demurrer to and dismissing the bill of review defendant appeals. Affirmed.

J. A. Haggerty and U. N. Arnett, Jr., for appellant. Cox & Baker and Okey Johnson, for appellees.

**ENGLISH, J.** Robert Stewart was at one time the owner of a tract of land situated in Monongalia county, on which he resided, and raised a family of eleven, consisting of sons and daughters. He died intestate, leaving his children, four boys and seven girls, surviving him, whose names were as follows: William, Charles, John, Foster, Anna, Isabel, Elizabeth, Mary, Susannah, Jane, and Rebecca. Four of them, to wit, William, Charles, Anna, and Isabel, married, while the other seven remained single. Isabel had no children, but to the other three who intermarried were born eighteen children, and this suit was brought by seventeen of the grandchildren of said Robert Stewart against John Stewart, Jr., who was a son of said Charles Stewart, to obtain a partition of the real estate inherited from their uncles and aunts, and also to obtain a share of the personal estate left by said uncles and aunts; the said John Stewart, Jr., claiming to be the sole owner of the personal estate left by said relatives. All of the children of said Robert Stewart were dead at the time of the institution of this suit; John Stewart, Sr., and Rebecca Stewart alone of said eleven children having disposed of their property by will, and under the will of said Rebecca said John Stewart claims the personal property entirely, and a large portion of the real estate. When Anna, Charles and William married, they sold their interests in the home farm to Foster, Mary, Susannah, Elizabeth, and Jane; Isabel becoming no party to the purchase, but retaining her interest. In the winter of 1866-67 said Foster, Susannah, Elizabeth, Jane, and Rebecca bought a farm known as the "Smith Farm," containing 75 acres, adjoining the home farm. The unmarried brothers and sisters made their home on these lands, and cultivated the same, and, being industrious and frugal, their earnings went into a common fund, they living together as one family. The bill in this cause was filed in the circuit court of Monongalia county on the first Monday in January, 1880, by William H. Stewart and others. The process appears to have been returned executed, the rules seem to have been regularly taken, the bill regularly taken for confessed, and the cause set for

hearing. On the 22d day of February, 1889, the defendant, John Stewart, filed his answer to the plaintiffs' bill, and the plaintiffs replied generally thereto. On the 24th day of June, 1889, the case was heard upon the bill and upon the answer of said John Stewart in his own right, also as devisee of Rebecca Stewart, deceased, general replication thereto, exhibits, and depositions, on consideration whereof the court was of opinion that John Stewart, deceased, by his last will and testament, dated February 10, 1864, devised his real and personal estate to his four sisters Elizabeth Stewart, Mary Stewart, Susannah Stewart, and Rebecca Stewart and his brother Foster Stewart for life, until the death of the last-mentioned of them, and then to be divided among their legal heirs, and that their sister Jane took nothing by said will; and the court, being of opinion that the cause should be referred to a commissioner, proceeded to refer it to John J. Brown, commissioner, to report certain requirements therein set forth. On the 12th day of November, 1889, another decree appears to have been entered in said cause, when it was heard upon the report of said commissioner, John J. Brown, and exceptions thereto both by plaintiffs and defendants, and on consideration thereof the court appointed commissioners, and directed them to go upon the lands in the bill mentioned, and partition them between the said John Stewart and the plaintiffs in the manner and the proportions therein prescribed. On the 27th day of February, 1890, the report of John E. Price, surveyor, and Joseph Reiner, two of the commissioners appointed by said decree of November 12, 1889, was recommitted, and William H. Brand, surveyor, was substituted in the place of John E. Price, surveyor. On the 25th day of June, 1890, another decree was entered in said cause, in which it is stated that on that day John A. Dille, a member of the firm of Dille & Son, who brought this suit for the plaintiffs, which had been pending over a year, and from which it appeared that a large amount of testimony had been taken; that there had been a decree of reference, and a report thereon, showing the amount of lands coming to the plaintiffs, and the amount to the defendants, the amount of personalty coming to each, and settling generally the rights of the parties to the suit; that there had also been a decree appointing commissioners to make partition of said lands, and a report made, which was recommitted; that the said Dille & Son had all of said papers in their office for examination, etc., and that the whole of said original papers, including bill, answer, exhibits, depositions, and reports, were, on the morning of the 17th of March, 1890, destroyed by fire by the burning of the law office of the said Dille & Son, and that the bill then filed, marked "Filed May 7, 1890," was substantially a copy of said bill, and that exhibits from 1 to 6 are true copies

of exhibits filed with said original bill, and exhibits marked 7, 8, 9, and 10 were filed with said last-named bill; and the court, having seen and inspected said affidavit, bill, and exhibits, ordered that the said cause be docketed again in said court, and proceeded in, heard, and determined in said copy of said bill, exhibits, depositions, and proceedings thereafter had therein according to section 14 of chapter 130 of the Code, and the defendant, should he choose to do so, should have leave to file his answer to said bill or demur thereto, and the cause was remanded to rules for further proceedings therein. The defendant, John Stewart, appeared at rules, and answered said bill, first saving all just exceptions thereto, and demurring to the same as insufficient in law.

The plaintiffs, in their bill, after showing their relation to their grandfather, Robert Stewart, proceeded to state: That said Robert died seised and possessed of the 75-acre tract of land aforesaid, but of little or no personalty, leaving the eleven children whose names have been already given, who, with their mother, continued for many years to reside on said farm; and that whatever was saved or accumulated was kept by them as a joint property until about the 10th of April, 1855, when Charles, William, and Anna were married, when said William and wife, Charles and wife, and Anna and her husband, Lot Henthorne, sold and conveyed their undivided three-elevenths of said farm to their five sisters and brother, to wit, Mary, Susannah, Elizabeth, Jane, Rebecca, and Foster, and that left the family to consist of the widow and eight children, each having one-eleventh in said farm, and Mary, Susannah, Elizabeth, Foster, Jane, and Rebecca having, in addition thereto, the undivided three-elevenths of Charles, William, and Anna. That they all lived together, worked the farm jointly, and the accumulations were held together, each contributing their just proportion of the labor necessary to run said farm successfully and profitably, until the 11th of February, 1864, when John departed this life testate, devising his estate, both real and personal, to his brother Foster, and his sisters Mary, Susannah, Elizabeth, and Rebecca, and the survivors of them, for life, and then to descend to his legal heirs. After the death of John, and from that time until the death of Mary, on the 2d day of April, 1865, the family consisted of Mary, Susannah, Elizabeth, Isabel, Foster, Jane, and Rebecca, who all lived together, and had whatever of personal estate had been accumulated during the lifetime of John in common, and whatever interest John had therein passed under his will to those surviving him, without any distribution among those entitled thereto, and Mary's interest in said personal estate, as well as her interest in the home farm, whether by descent or purchase, descended to her legal heirs without any partition or distribu-

tion, and thus the said estate remained in the hands of said survivors, to wit, Susannah, Elizabeth, Foster, Jane, and Rebecca; Isabel having in the meantime married Pierpoint, and moved away from said home tract, and remained away until the death of her husband, and when she returned she only made her home with her brother and sisters, having and enjoying a pension from the government; and the savings and accumulations up to the 27th day of March, 1867, were invested by them in the Smith farm, of about 73 acres, adjoining the home farm; and the plaintiffs allege that the money invested in said Smith farm was the joint accumulations of said John in his lifetime, Mary during her lifetime, Susannah, Elizabeth, Foster, Jane, and Rebecca; and said Smith farm, at the death of said respective grantees (Rebecca excepted), descended to their legal heirs. After the death of the said Mary, the said home farm, as well as the Smith farm, was held, used, and enjoyed by the said Susannah, Elizabeth, Foster, Jane, and Rebecca, and whatever they accumulated on said farms was held by them up to the death of Susannah, which occurred on the 19th day of May, 1870, and they allege that the general impression was that the personal estate at that time could not amount to less than one or two thousand dollars, and the whole passed into the possession of Elizabeth, Foster, Jane, and Rebecca, and there remained, with the accumulations thereon, until the death of Foster, on the 15th of April, 1872. Then the two farms went into the possession of Elizabeth, Jane, and Rebecca, with the personal estate, and they had the entire rents and profits thereof until the death of Elizabeth, which occurred on the 20th day of July, 1883. Said real and personal estate then went to Jane and Rebecca, who possessed and enjoyed the whole thereof up to the time of the burning of their house, the latter part of the year 1887; and that very little of the money on hand was destroyed by said fire, and all of the personal estate, money, notes, etc., not destroyed by the fire was held by said two sisters, and was the joint property of plaintiffs, as the heirs of their said uncles and aunts, and the said Jane and Rebecca. And they allege that they are informed and believe there must have been from one to two thousand dollars in money saved from said fire, in addition to the notes and accounts held by them, personal property, stock on said farm, etc.; that said Jane and Rebecca held the same for the benefit of themselves and the plaintiffs, including whatever real or personal estate was left them by their aunt Isabel, who died on the 13th day of November, 1885, and that the money left by said deceased aunt could not be less than \$1,000; that the whole of the personal property specified in the appraisement bill of John Stewart, executor of Rebecca Stewart, deceased, was the same personal property

that was in the joint possession of said Elizabeth, Jane, and Rebecca previous to the death of said Elizabeth, on the 20th day of July, 1883, and the death of the said Jane, on the 15th day of January, 1888, and that the said John, who lived on the said Smith farm, and was the tenant of his said aunts, was fully advised in reference thereto; and they allege that the said John Stewart, Sr., Mary, Susannah, Elizabeth, Foster, Jane, and Rebecca all worked together, and held their accumulations in common, and, although the business may have been done at one time by one and at another time by another, no one had any more in it than another; and that Rebecca Stewart, the last survivor of Robert Stewart's family, would have died, as did the rest, without making any disposition of her interest in said estate, had it not been for her age and the influence of some one upon her in her weakness,—old age, as she was about 80 years of age when she died, on the 2d day of July, 1888. But plaintiffs say that if John, the devisee of said Rebecca, will let them have their interest in said property, they will say nothing about said will, and let said John have the undivided interest of Rebecca in said real and personal estate; but they claim the residue as aforesaid. They exhibit a copy of the will of Rebecca Stewart, deceased, and also a copy of the appraisement bill of her personal estate, and they ask the defendant to answer, and say what items, if any, in said appraisement bill, were the separate property of said Rebecca; that he also state what money was saved from the fire, who took the same from the house, and whether, after the death of said Rebecca, all of said money and personal property did not come into his possession, and whether or not, to his knowledge, the said Rebecca ever inherited any property, real or personal, other than what she inherited from her father, brother, and sisters. And they claim their undivided interest in said farms and personal estate, and, as their interests in said land are small to each one, being 18 in number, that their interest in the whole land be laid off together, in order that the same may be sold together, and the proceeds be divided between them, as it is not susceptible of partition in kind between them; and that John's, the defendant's, share (if he so desires it) be laid off together, either from both tracts or wholly from one of them, as shall seem best, by commissioners appointed for that purpose; that the case may be referred to one of the commissioners of the court, to ascertain what amount each of said heirs (the plaintiffs, as heirs of William, Charles and Anna) have in each of said farms, and what amount the defendant has, as one of the heirs of Charles and as devisee of Rebecca, who has been in possession of said real estate since the death of Rebecca, the rents and profits, and who is entitled to same, what personal estate came into the hands of said John Stewart at the

death of Rebecca belonging to said John, as devisee, and these plaintiffs, and the amount coming to each.

In his answer to the plaintiffs' bill, the defendant, John Stewart, admits the allegations of the bill as to his being the son of Charles Stewart and the grandson of Robert Stewart, as well as the other allegations of the bill which states the names and number of the children of said Robert, and also as to the property left by the said Robert at the time he died intestate; that all of the children of said Robert are now dead, Rebecca being the last survivor, and that the order, as well as the time of the deaths of all of said children are about accurately stated; and claims that no one could administer upon the estate of any of them until after Rebecca's death, when he qualified as executor of her estate, as requested by her will. He also admits the facts stated in the bill as to the sale by William and wife, Charles and wife, and Anna Henthorne and husband to Mary, Susannah, Elizabeth, Jane, and Foster, and also as to the purchase of the Smith tract by said Foster Stewart and his sisters, Elizabeth, Susannah, Rebecca, and Jane, in which he says neither the said William nor Charles nor Anna had any interest whatever unless it be held that they inherited an interest therein at the death of said purchasers, respectively, which he does not admit. Respondent admits that the sisters and their brother made their homes together on said farm, but he denies that they all worked the farm. He says the females all aided in the housework, but that Rebecca was the best qualified to acquire or manage or dispose of property, and she was in fact the manager and controller of both of said farms, as well as of all the stock and other property on them, and rented said lands to respondent in her own name, and the other sisters seemed to be living there by the sufferance and pleasure of Rebecca; that he paid the rents to Rebecca or her order, and the rents were taken to the dwelling house on the home farm, and used there in the support of the family and in feeding the stock. The residue of the answer is somewhat argumentative, but puts in issue the material allegations of the bill, and in answer to the specific interrogatories propounded to him by the bill he says that, as he understands it, and understood it at the death of said Rebecca, each and all of the items described in said appraisal bill were, at the time of her death, the sole and separate property of the said Rebecca, and were so, as he believes and understood it, for years before she died, but he cannot say from whom she acquired or derived them, or how she obtained them; that he does not know and cannot say how much money was in fact saved from the fire except the 17¼ pounds of foreign and mutilated coin and a five or ten dollar gold piece picked up by some one afterwards near the burned house; nor can he remember

who in fact took the money so found from the said house, and all of the money so found after the death of Rebecca and after respondent's qualification came into his possession as such executor, to hold until the right thereto should be settled, and is still so held by him, except that he was advised to have said foreign coin valued by a competent person, and disposed of, and put into current funds, which he did, and the same was so found to be of \$43.35 less value than as so appraised; and that he has no knowledge of said Rebecca inheriting any property, real or personal, other than what she so inherited from her father, brother, and sisters; and he denies each and every allegation of said bill in conflict with this answer.

On the 12th day of February, 1892, the cause was heard upon the bill and exhibits supplied according to law, together with the affidavit of the loss of the original papers by fire in the law office of Dille & Son, and the answer of John Stewart in his own right and general replication thereto, and upon the statement of John J. Brown, commissioner in chancery, to whom the case had been referred at a former term of the court, setting out, according to the best recollection of said commissioner, the substance of his report in this case under the order of reference made therein, and exceptions to the supplied report of said commissioner by the plaintiffs indorsed thereon in writing, and upon the depositions for the plaintiff taken in the cause, and upon the orders and decrees made in the cause and depositions; upon consideration whereof the court was of the opinion that the exceptions to the statement or supplied report of John J. Brown, commissioner, as aforesaid, were well taken, and it was decreed that the cause be recommitted to L. G. Lazzell, a commissioner in chancery, to ascertain and report certain facts therein specified. On the 21st day of June, 1892, a decree was entered in said cause, when it appears to have been heard on the papers theretofore filed in the cause, and orders and decrees thereinbefore made, depositions and exhibits, and upon the report of John E. Price, surveyor, Joseph Reiner and William B. Long, commissioners, appointed at the February term, last, to go upon the lands in the bill and proceedings mentioned and described, and make partition thereof, according to quantity and value, among the plaintiffs in the suit 60 per centum of said lands, and to the defendant, John Stewart, 40 per centum of said lands; and, it appearing to the court that the report of the said commissioners, and the plat filed therewith, are regular on their face, and, there being no exception to the same, they were approved and confirmed, and it was decreed that the plaintiffs should take and hold in fee simple lot No. 2 as laid down in the plat and report of said commissioners, being 60 per centum of said land according to quantity and value bounded and described as set out by metes

and bounds in said decree, containing 85½ acres, more or less; and that the defendant, John Stewart, do hold in fee simple lot No. 1 as shown on said report and plat, being 40 per centum of said lands, bounded and described as set forth in said decree by metes and bounds, containing 72½ acres, more or less; and that a writ of possession do issue out of the office of the clerk of said court, and that the plaintiffs be placed in possession of the lands so assigned to them in this partition upon the application of any of said plaintiffs, and that the plaintiffs do pay 60 per centum of the costs of said partition and the defendant 40 per centum thereof; and it appearing to the court that I. G. Lazzell, to whom this cause was referred at a former term, had not made up his report, all matters so referred to said commissioner were reserved for future consideration of the court. On the 19th day of October, 1892, the final decree in the cause was entered, when the same was heard upon the papers and decrees before read therein, and upon the report of I. G. Lazzell, a commissioner in chancery, to whom the cause was referred, as before stated, and the depositions taken before said commissioner and other proper officers, and upon the exceptions to said report by counsel for defendant, overruling said exceptions in part and sustaining them in part, as appears from the face of said decree; and the said commissioner having found a net balance of personalty in the hands of John Stewart for distribution amounting to \$1,365.47, of which amount \$819.24 was to be paid to the 17 plaintiffs and \$546.23 to be retained by the defendant, John Stewart, and ordered that the said sum of \$819.24 be a lien upon the real estate of said John Stewart, and directed that said John Stewart pay the costs of said suit, except the costs of partition, which had been provided for in a former decree.

It appears from the record that the decree appointing commissioners to go upon the lands in controversy and partition them in the proportion of 60 per centum to the plaintiffs and 40 per centum to the defendant was a consent decree, appointing commissioners therein named to go upon said lands, and partition them in that proportion, which report was made by said commissioners, and confirmed without exception. The defendant, John Stewart, on the 18th day of February, 1893, had a notice served upon the plaintiffs of a motion to reverse the final decree rendered in said cause under the provisions of chapter 134 of the Code, which motion was supported by his own affidavit, in which he denies that any person was authorized to consent to said decree ascertaining the proportions in which the parties were entitled to the land in controversy. He is, however, contradicted by the affidavit of his attorney, who states that Keckson & Fast were the attorneys of record for the said Stewart, defendant in said suit, and they had full and complete authority to bind the

defendant, and that they did consent as shown by said decree. The errors, however, which are sought to be corrected under this notice are not such errors as may be so corrected under the statute. Upon this question, Minor, in his Institutes (volume 4, pt. 1, at page 854), says: "It is clear that the provision was intended to apply exclusively to those inadvertencies of the clerk which depend upon a comparison and calculation to be made by him, and which may be safely reformed by reference to other statements in writing obtained in the proceedings, and not at all to judicial errors growing out of a mistaken application of the law to the facts, notwithstanding such mistaken application be made by the clerk alone, and the court be not directly privy to it." So, in the case of *Compton v. Oline*, 5 Grat. 137, an action of debt on a bond for \$188 was described in the declaration as for \$108, and the defendant confessed judgment for "the debt in the declaration mentioned," and judgment was entered for \$108. This was held to be a judicial, and not a clerical, error, and not amendable at a subsequent term of the court. In the case of *Morris' Adm'r v. Peyton's Adm'r*, 29 W. Va. 201, 11 S. E. 954, this court held that "after the term at which a consent decree is entered it cannot be set aside, modified, or altered without the consent of the parties, except only to correct a clerical error, and that a clerical error is a mistake made by the clerk in entering such consent decree, and it may be corrected by the original draft of the decree furnished the clerk by the court; or it may be a miscalculation or mistake in some arithmetical operation, whereby a sum entered in such consent decree where all the parties are agreed on the basis of the calculation, and the mistake is simply an arithmetical mistake or a simple blunder in performing an arithmetical operation, all parties being agreed on the operation to be performed." The defendant, however, by this notice sought to reopen the merits of the case, and again determine the proportions in which the parties were entitled to the real estate in controversy, and to reverse and correct the decrees in that respect, which we think was not permissible, and the court acted properly in refusing to interfere with or set aside said decrees upon said notice. The action of the court in refusing to set aside said decrees is not assigned by the defendant as error, but, as it forms part of the record, we thought proper to make the above comment upon the action of the court.

The next step taken by the defendant, John Stewart, was to file a bill of review, in which, after reciting the proceedings had in said original cause, the destruction of the original papers by fire, and the manner in which they were supplied, he alleges that the papers supplied and filed in said cause are not the true and authenticated copies of the original papers filed in said cause, and

alleges that his original answer differed very materially in its allegations from what is alleged in his answer, and points out the particulars in which said difference consists, and says that, by reason of the omission and failure to set up, claim, and charge the same in said supplied answer, he was, by the decree of the court, deprived of all of the interest in the said 85 acres of land and personal property of which Rebecca Stewart died seised, and which was devised to him by her last will and testament. Said John Stewart also charges in said bill of review: That by reason of the failure and omission of his counsel to set up and state in said supplied answer the said allegations, claims, and interest of the said Rebecca Stewart as stated in said original answer, he was wrongfully deprived of a large portion of the interests, estate, and property willed and devised to him by the last will and testament of said Rebecca Stewart, and that the decrees entered in said cause upon said supplied papers therein as aforesaid, making partition and distribution of said estate, are erroneous, and prejudicial to the rights, interests, and claims of plaintiff, and, as he is advised and believes, ought to be reviewed, reversed, and set aside; and that the decree charging him with \$1,350.21, as executor of the last will of Rebecca Stewart, is also erroneous, and should be reviewed, reversed, and set aside. That the said will of Rebecca Stewart gives to him absolutely all of the personal estate of which said Rebecca died seised, including all of the personal property, money, and effects contained in said appraisement bill, a copy of which is exhibited. That on or about the 12th of November, 1892, a certain other decree was pronounced and entered in said cause, among other things decreeing and directing that said plaintiffs therein do recover from him a large sum of money, together with a large amount of costs attending the said proceeding, a copy of which decree is also exhibited; and that said last-named decree ought to be reviewed, reversed, and set aside for many apparent errors and imperfections appearing upon the face of said decree and upon the face of the commissioners' report filed in said cause, and from the record of all the proceedings had in said cause. That an execution under said decree had been issued against him, and placed in the hands of the sheriff of said county, directing the sheriff to collect the same out of the personal effects, goods, and chattels of his, and he is threatening to sell the same to satisfy said execution; and, inasmuch as such errors and imperfections appear in the body of said decrees and upon the face of said commissioners' report, he prays that said decrees may be reviewed, reversed, and set aside, and that the plaintiffs, and all persons acting for or under them, in levying and taking into possession his property under said decree, may be restrained and enjoined,

—which injunction was awarded as prayed for. The defendants in said bill of review appeared and demurred thereto, and also filed their answer, putting in issue all of the material allegations of said bill, and on the 26th day of June, 1893, the cause was heard upon the bill of review and exhibits therewith filed, and upon the demurrer to said bill and the answer of the defendants and exhibits and general replication of the plaintiff thereto, and upon the motion of the said defendants to dissolve the injunction awarded to the plaintiff therein, and was argued by counsel; upon consideration whereof the court sustained said demurrer, and dismissed the plaintiffs' bill of review, and also dissolved said injunction, and ascertained the amount of principal, interest, damages, and costs, including officers' fees and commissions, due on the decree enjoined by said injunction heretofore awarded the plaintiff, and found the sum of \$48.19 due to each of said parties to whom said decree is coming as principal, and the sum of \$1.05 to each of said parties as interest from the 19th of October, 1892, to the 30th day of March, 1893, and that the parties to whom said decree is coming are entitled to \$20.31 in the aggregate as damages in lieu of interest at the rate of 10 per cent. from the time the injunction took effect until the date of said decree, being \$1.19 to each of said 17 parties, and that there is due to said parties to whom said decree is coming the sum of \$360.77 in the aggregate as costs on said decree, including officers' fees to date, as taxed by the clerk of the court, being the sum of \$21.22 due to each of said 17 parties to whom said decree is coming, making in all due to said parties to whom said decree is coming of principal, interest, damages, and costs, including officers' fees at this date by reason of said decree, the aggregate sum of \$1,218.19, being the sum of \$71.68 coming to each of said 17 parties, and directed execution to issue therefor against said John Stewart, and also directing that they recover their costs about their defense in this cause expended, and that execution issue therefor; and the said John Stewart obtained this appeal.

The first error relied upon by the appellant is to the action of the court in directing a partition of the real estate in the first of said causes mentioned and described among the persons named in said decree of partition without first passing on the exception to the report of Commissioner John J. Brown, taken by both plaintiffs and defendant, for the reason that, if said exceptions had been passed on at that time, it would never have been proper to direct said partition in the manner that the same in said decree was and is directed. Now, it appears on the face of said decree that at the time the same was rendered the original papers, including the report of John J. Brown, and the exceptions indorsed thereon, had been consumed by fire



In the office of Dille & Son, attorneys for the plaintiffs, and that said John J. Brown had attempted to supply his former report from his best recollection, which supplied report had also been excepted to by the plaintiffs; and it further appears on the face of said decree that by consent of the plaintiffs and defendant, by their respective counsel, it was agreed that the plaintiffs were entitled to 60 per cent. (according to quantity and value) of the land in the bill and proceedings mentioned, and that the defendant, John Stewart, was entitled to 40 per centum (according to quantity and value) of the said lands as is reported by John J. Brown, to whom said matter, among others, was referred, as commissioner, to make report thereon. This consent, entered of record, then, can be construed in no other way than as a waiver of all exception as to the finding of said commissioner, John J. Brown, as to the proportion in which said parties plaintiff and defendant were entitled to said real estate, so that there can be nothing in the assertion made in said assignment of error that, if said exception to Brown's report had been passed on, said partition would not have been directed in the manner the same was directed, or that it would not have been proper to so direct it; and for the further reason that the same decree appointed commissioners to make said partition, whose report was confirmed without exception or objection.

The second assignment of error claims that the circuit court erred in making and entering the decree of reference of June 24, 1889, by therein directing that the commissioner should settle the accounts of the defendant as executor of the estate of Rebecca Stewart, deceased, while the suit was brought for the purpose of ascertaining the interest of the plaintiffs in the personal estate of Robert, John, Elizabeth, Mary, Susannah, Jane, and Foster Stewart, and it is shown by all the papers in the cause that the plaintiffs had no interests or rights in the estate of said Rebecca. As to this decree, it appears that it was entered before the papers were burnt, and, after the papers were supplied, a consent decree was entered, directing the commissioner then appointed to settle the accounts of defendant as executor of the estate of said Rebecca, and ascertain what came into his hands as such executor, what portion of it belonged to Rebecca Stewart, and what belongs to plaintiffs, if any, and what was done with the property; and the first exception indorsed on the report of I. G. Lazzell by the defendant is because it does not purport to settle the executorial account of said defendant as required by the order of reference, clause 10, as there cannot be any recovery here against him, or distribution decreed, until that is done. It is true, the commissioner did not settle said John Stewart's account as such executor, and he is now claiming that it was error in the court to have directed such settlement. The prop-

er answer to this assignment of error is that the defendant is not prejudiced by the failure of the commissioner to settle his said account, and he cannot be heard to complain of it here.

The next assignment of error is to the action of the court in allowing the papers to be supplied in the manner they were, instead of requiring a new suit to be brought, as was manifestly at the time unjust to the said petitioner; and because the supplying of the same in the manner they were attempted to be supplied was prejudicial to the rights of said petitioner, because the affidavit upon which the said papers were supplied was insufficient under the statute. Now, it is apparent that this assignment of error should not avail the defendant, for the reason that, if the defendant had wished it, and had so moved, the court might have required new pleadings to be made up under the provisions of section 14 of chapter 130, which says, among other things, that "the court may, at the instance of either party, or in its discretion, require new pleadings to be made up in whole or in part;" but the defendant in this case, so far as appears, made no suggestion in regard to new pleadings, but appeared promptly at rules, and filed his answer, thereby submitting himself to the jurisdiction of the court, and waiving the alleged irregularities in supplying the papers, if any such existed. See *Rittenhouse v. Harman*, 7 W. Va. 380, where it is held that, "though a bill be multifarious, and but vaguely state the matter on which relief is sought, consent by the parties to an interlocutory decree that the cause be referred to a commissioner to audit, state, and settle an account of the amount due each of the plaintiffs is a waiver of any objection to such irregularity, and a demurrer thereafter for such cause is properly disallowed."

The next assignment of error is that the court erred in the decree of partition as to the Smith land in the manner it was partitioned by said court, for the reason that the said Rebecca Stewart had far more interest in the same, as she had also in the home farm,—and which said interest also passed to defendant,—than had all of the plaintiffs combined, and than is allowed and ascertained by the court in the said final decree in said first-named chancery cause. This assignment of error is also met and overthrown by the consent decree, which ascertained the proportions in which the parties were entitled to said land; and the defendant, having consented on the record to said decree, cannot now be heard to object or complain after the matter has been referred to a commissioner under a consent decree, and the commissioner's report confirmed without exception.

The next assignment of error is that the "court erred in its final decree in the distribution of the personality left by Rebecca Stewart, because the heirs of John Stewart would



have no interest in any accumulations of personality of the life tenant from said real estate (not acquired more than two years after the death of John Stewart), nor would the plaintiffs have any interest as heirs in the personal estate of Rebecca Stewart, or any accumulations therein." This depends to some extent upon the facts which were submitted to the commissioner for ascertainment in pursuance of the agreement of record, and the facts having been ascertained by the commissioner, and reported to the court, and the report having been confirmed by the court. The question is determined by the case of *Handy v. Scott*, 28 W. Va. 710, in which this court held that: "When questions purely of fact are referred to a commissioner to be reported upon, the findings of the commissioner, while not as conclusive as the verdict of a jury, will be given great weight, and should be sustained unless it plainly appears that they are not warranted by the evidence. This rule operates with peculiar force in an appellate court, where the findings of the commissioner have been approved and sustained by the decree of the inferior court." See, also, *Moore v. Ligon*, 30 W. Va. 148, 8 S. E. 572; and *Reger v. O'Neal*, 33 W. Va. 159, 10 S. E. 875. And as to the distribution of the personal estate the Code provides (section 9, c. 78) that when any person shall die intestate as to his personal estate, or any part thereof, the surplus, after the payment of funeral expenses, charges of administration, and debts, shall pass and be distributed to and among the same persons, and in the same proportions, to whom and in which the real estate is directed to descend, etc. Now, in this case, the plaintiffs and the defendant, with all the facts before them, have seen proper by consent and agreement to fix the proportions in which the real estate in controversy should be divided, giving to the plaintiffs 60 per cent. and to the defendant 40 per cent. thereof, and no good reason is assigned why the personality should not be shared in the same proportion, although the court in this instance seems to have decreed the defendant 50 per cent. instead of 40 per cent.; and, if this is an error, it is one of which the defendant cannot complain. The weight of evidence clearly indicates that the children of Robert Stewart who became the purchasers of the home place from those that married and moved away lived on the farm as a family, and what was realized from their labor became a common fund, and this view of the case is sustained by the fact that John Stewart, Sr., in his last will and testament, gave his property to his brother Foster and five sisters, who were living on the farm, in equal proportions, and directed that in case of the death of either of them the others were to have his or her share, and to continue in the same way until the death of the last heir, then to be divided among his legal heirs; showing the intention to keep the property in the hands of those residing on the farm as long as they or any of

them lived. And when Rebecca came to dispose of her property by will she could dispose of no more than she was entitled to. If the personal property in her possession was the result of the joint labor and industry of herself and those who had lived and died on the farm, she would be entitled to no more than she inherited, and could dispose of no more than she was entitled to; so that the determination of the question as to the proper disposition or distribution of the personal property depends at last upon the facts proven, and the proper conclusion to be reached therefrom. This entire matter has been referred to a commissioner, who has reported, and whose report has been confirmed by the court. It is true, the report of the commissioner was excepted to, but the exceptions were overruled by the court, as we think, properly. The rule in regard to exceptions to commissioners' reports is laid down in the case of *Chapman v. Railroad Co.*, 18 W. Va. 185 (section 9 of syllabus), as follows: "Generally, exceptions to the reports of master commissioners partake of the nature of special demurrers, and, if the report is erroneous, the party complaining of the report or excepting thereto must point out the errors in his exceptions with reasonable certainty, so as to direct the mind of the court to them. When he does so, the parts not excepted to are admitted to be correct, not only as regards the principles, but also as relates to the evidence upon which they are founded." See, also, *McCarty v. Chalfant*, 14 W. Va. 531. The exceptions to this report are too general, and partake more of the nature of an argument upon the facts alleged to have been proven than they do to that of a special demurrer, and were properly overruled.

The question raised as to setting aside the final decree upon notice and motion has already been adverted to, and, in addition, it is only thought necessary to say that this was not a decree by default; nor, if any error existed, was it such an error as could be corrected under section 1 of chapter 134 of the Code, and the court committed no error in refusing to set aside said decree upon said notice and motion.

We come now to consider the last error assigned by the appellant, to wit, that the court erred in sustaining the demurrer to the appellant's bill of review, and dissolving the injunction granted in aid of the same. In discussing the questions arising in the original cause we have passed upon all of the questions raised by the bill of review, even if the court would entertain a bill of review under the circumstances of this case. Did the court err in sustaining the demurrer to said bill of review? We have seen that the land in controversy was partitioned under a consent decree, and the report of the commissioners appointed to make such partition was confirmed without exception; that by the same consent decree the cause was referred to a commissioner to report certain matters necessary to a

proper distribution of the personalty, who reported, and, although the report was excepted to, the exceptions, as we think, were properly overruled. Upon the question, then, as to whether said demurrer was properly sustained, we find the law stated in Sanders' Suit in Equity (page 695, § 631) as follows: "The causes for which a bill of review may be maintained are limited to these: (1) There must be error in law apparent upon the face of the decree;" citing 2 Rob. Prac. (Old) 414, etc. "(2) The party seeking to review the decree must allege and prove the discovery of new matter, which could not have been used at the time of making the decree in consequence of the parties' ignorance that such matters existed." See *Amiss v. McGinnis*, 12 W. Va. 371. The errors suggested by this bill of review, however, are claimed to be errors of fact, and not errors of law, and there is no claim as to after-discovered evidence. But again we find the law with reference to bills of this character stated in Daniell's Chancery Practice (volume 2, 6th Am. Ed., on page 974) as follows: "A decree or order made by consent cannot be set aside, either by rehearing or appeal or by bill of review, unless by clerical error anything has been inserted in the order as by consent, to which the party had not consented, in which case a bill of review might lie." See, also, *Thompson v. Railroad Co.*, 95 U. S. 391, where it is held that "none but parties and privies can have a bill of review, and it will not lie where the decree in question was passed by consent." See, also, 2 Daniell, Ch. Pr. p. 1576. And, while the final decree in the original cause was not a consent decree, the decree which settled the principles of the cause was a consent decree, and the final decree followed as a consequence. For these reasons my conclusion is that the court committed no error in sustaining the demurrer to said bill of review, and the decree complained of must be affirmed, with costs and damages.

(40 W. Va. 103)

#### FLOWERS v. FLETCHER.

(Supreme Court of Appeals of West Virginia.  
Dec. 15, 1894.)

#### EVIDENCE — GENUINENESS OF PAPER — PROOF OF HANDWRITING—REVIEW ON APPEAL—CON- FLICTING EVIDENCE.

1. In a controversy over a disputed paper, evidence which tends to impeach the truth of the matter contained in such paper is admissible.

2. To render a person a competent witness to testify as to the handwriting of another, it is not sufficient to show the receipt of friendly letters purporting to come from such person alone, but some admission or acquiescence equivalent to an acknowledgment that she was the writer of such letters must be shown on the part of such person, independent of their receipt and contents.

3. A judgment will not be reversed because of the admission of improper testimony plainly not prejudicial to a fair trial of the case.

(Syllabus by the Court.)

Error to circuit court, Harrison county.

Action by Ingaby Flowers against Jackson Fletcher. From a judgment for plaintiff, defendant brings error. Affirmed.

John Bassel and W. Scott, for plaintiff in error.

DENT, J. Plaintiff instituted an action of assumpsit against the defendant in the circuit court of Harrison county for breach of marriage contract. Defendant pleaded non-assumpsit and accord and satisfaction. Afterwards he withdrew the general issue, and the case was tried on the special plea, resulting in a verdict and judgment for \$500 in favor of plaintiff. The defendant, not being satisfied, brings the case to this court.

The motion for a new trial and the combination bill of exceptions and certificate of evidence are seriously open to the objections pointed out in the cases of *State v. Harr*, 38 W. Va. 58, 17 S. E. 794, and *Gregory's Adm'r v. Railroad Co.*, 37 W. Va. 606, 16 S. E. 819, and contravenes the rule laid down in the fourth syllabus of the former case, which is in these words: "To make available in the appellate court an objection taken during the trial to the admission of evidence, the point must be made and properly saved by some bill of exceptions. It is not enough merely to note the objection and exception in the certificate of evidence." It is true that the motion for a new trial is based on the grounds, as set out in the court's order, of the "rulings of the court during the trial in excluding certain testimony offered by the defendant, and permitting the introduction of certain testimony offered by the plaintiff;" but this is too general. See *Gregory's Adm'r v. Railroad Co.*, supra, and cases therein cited, and commented on in the opinion of Judge Brannon. During the progress of a hotly-contested trial, innumerable exceptions are taken to the rulings of the court, depending entirely on the ignorance, experience, and ability of the lawyers engaged. Many of these are very trivial. Others may be of great moment, and the trial judge has the right to have his attention especially called to the points on which the parties rely, and not be required to go over the whole evidence and search them out for himself, or for the parties to be in a condition to base their motion on certain rulings in the circuit court, and then rely on entirely different rulings in this court. While this is a case in which the rule could be applied, yet it is probably better to waive it, and decide the case on the merits, rather than give room for the complaint of a too strict enforcement of a rule, be it ever so efficacious.

In this case numerous exceptions are taken to the rulings of the court, both as to the admission and refusal to admit testimony. It does not appear whether any of these are waived; so the duty devolves upon the court of going over, reviewing, and weighing all these exceptions, to ascertain whether the

defendant has been prejudiced thereby. The defendant's plea of accord and satisfaction is founded on a paper writing, in words as follows, to wit: "Received March 5th, 1892, of Jackson Fletcher, fifty dollars, in full of all claims, demands, or rights of action, at law or otherwise, that I may now have against said Jackson Fletcher for breach of promise to marry, or that I may now have against said Jackson Fletcher to proceed against him, by virtue of the laws of the state of West Virginia, for the support and maintenance of any child with which I may now be conceived or may hereafter be delivered. It is expressly agreed between myself and the said Fletcher that this writing is in no wise or sense an acknowledgment by him that he is the father of any child with which I have been or am now conceived, or that he has promised to marry me, but only because that I desire to relieve him of any charge of that kind that may be made because he has been in my company. Inaby Flowers. [Seal.] Luticia Flowers, Witness." Plaintiff filed a special replication, denying the execution of this paper and the receipt of the money as therein recited, under oath. The jury were impeached to try the issue made upon this plea, and at the same time execute the writ of inquiry awarded.

The defendant objects, first, because the court allowed testimony to go before the jury tending to show that he, after the plaintiff became pregnant, furnished and wanted her to take medicine that would produce a miscarriage, and which she refused to take. He insists that this evidence was not admissible for any purpose, and only served to prejudice him in the minds of the jury. It is possibly true that this evidence was not admissible in aggravation of damages and the admitted promise of marriage and seduction, but it was admissible to contradict the truth of the paper on which the defendant was relying, and thus tend to sustain the nonexecution of the paper by the plaintiff. While the defendant, by his plea, admits the promise of marriage, he files and relies on, in satisfaction of it, a paper in which the plaintiff is made to admit that no such promise was ever made, and the defendant was not guilty of her seduction, nor the father of her unborn child, and for which truthful admissions on the part of the plaintiff he is willing to pay her the sum of \$50. Thus, he is made to appear before the jury generous to a fault, and a badly-treated man. There is no better way to discredit a paper than to show its falsity. And the fact that defendant wanted to destroy the fruit of his unbridled lust was proof positive that the paper was a written falsehood. The withdrawal of his plea of nonassumpsit was, in legal effect, an admission of his promise to marry, and yet he still had the denial of that promise before the jury in his plea of accord and satisfaction, contained in the paper filed as a part thereof. No doubt, that plea was withdrawn

for the very purpose, if possible, of preventing any evidence being introduced of his duplicity, and thus prejudicing him in the minds of the jury, contrary to his written release and certificate of character.

Defendant next objected to the evidence of Truman Gore. His testimony was to the effect that he was present at the home of defendant's mother while the plaintiff was living with her, and, when he went to leave, defendant invited him back, and said, when he came back he (defendant) expected to have a housekeeper of his own, but mentioned no name. This undoubtedly showed that defendant was contemplating matrimony at the time, but how that could prejudice his case it is hard to perceive, especially when, by his pleading, he admits that his mind was running in that direction. His plea appears to have been for the purpose of preventing any proof on this subject, but how was the jury in such case to execute the writ of inquiry and arrive at the damages. They were entitled to full information, to enable them to reach a proper verdict. This language was used in the presence and hearing of plaintiff, to carry out his deceitful conduct towards her, and is in full accord with his wicked scheme to satisfy his uncontrolled passions, and then cast aside his deluded victim.

The next two objections are to the refusal of the court to admit the testimony of the witnesses A. W. Barnes and John Johnson, as to the genuineness of the signature to the paper in controversy. The law is that a witness who has any personal knowledge of a signature in controversy, however slight, has the right to give his opinion, and the weight of that opinion is a question for the jury, and not for the court. A witness who has seen a person write but once, and then only his abbreviated signature, may testify regarding the same; or if he has seen a signature admitted by the owner to be genuine. *Rogers v. Ritter*, 12 Wall. 322; *Pepper v. Barnett*, 22 Gratt. 405; *Cody v. Conly*, 27 Gratt. 313; 1 Greenl. Ev. § 577. But he must have some knowledge, and the mere fact that he has received letters purporting to be from the person whose signature is in controversy is not sufficient, unless there has been some admission or acquiescence equivalent to an acknowledgment on the part of the supposed writer, other than the letters themselves, that said letters are genuine, and in the handwriting of the person from whom they purport to come. A person who has had business correspondence with another, acted upon by both parties, is competent to testify as to the handwriting of his correspondent, although he may never have seen him write. But where the letters have no relation to business transactions, but are letters of mere friendly or polite intercourse, some acknowledgment of handwriting, in some way other than the letters themselves, on the part of the supposed writer, must be shown. The knowledge of

the witness must be founded on some other means than the receipt and contents of the letters. 9 Am. & Eng. Enc. Law, 271. The testimony of the witness Johnson was to the effect that he had known plaintiff for 14 or 15 years; did not know whether he had ever seen her write; corresponded with her about 14 years ago, received about a dozen letters in answer to his own, with her name signed to them; had received no letters recently; had some of the letters with him. The question was then propounded to him: "From your knowledge of her handwriting, derived from having received letters from her, would you know the plaintiff's signature?" The court refused to allow this question to be asked, and rightly so, for the law answers this question that the witness could not know her handwriting from the mere fact that he had received letters purporting to come from her. His knowledge must be extraneous to the letters, sufficient to raise a presumption that the letters were not only from, but written by, the person whose name was signed to them.

A. W. Barnes testified that he was acquainted with the plaintiff; had known her since 1879; corresponded with her; received letters from her about four years ago, not all in the same handwriting, and were from different places; talked with her afterwards about the contents of the letters. The question was propounded to him: "State from your knowledge of her handwriting, derived from letters received from her, you believe the signature, 'Inahy Flowers,' to this paper, is plaintiff's handwriting." This question was bad, for the same reason as the one propounded to the other witness, and the court properly sustained plaintiff's objection to it. But there was still a further objection to this witness, and that is that he states the letters were in different handwritings. His evidence would therefore not have been admissible, unless he had shown that the plaintiff had pointed out and acknowledged which of the letters were in her handwriting; for it is not the receipt of nor the sending of the letters, but the handwriting, that is in controversy. A cashier of a bank who had, in the course of business, paid a great many checks drawn on the bank, was held to be incompetent to testify as to the drawer's handwriting, because among them were some forged checks, which he had honored and paid along with the rest. *Brigham v. Peters*, 1 Gray, 139. Having received various letters in different handwritings purporting to come from the same person, how was the witness to know, never having seen her write, which of the letters were in her handwriting? And, not knowing this, how was he to acquire from them such knowledge of her handwriting as to make him competent to testify concerning the same? To ask the question is to answer it.

The next objection urged is that the court admitted the testimony of Samuel Davis that about the 1st of March, 1892, wishing to em-

ploy plaintiff to live with him, he sent a boy to her father's house for her, and he returned with the information that she was not there. This was certainly improper hearsay testimony, but it amounted to nothing, and could not possibly have had any weight with the jury. About the 1st of March is very indefinite, and would mean any time from the 1st to the middle of the month, and that she was absent from home does not mean she had gone to Moundsville or any place particularly for any time. It is clear that this evidence did not affect the result in any manner, nor was the defendant prejudiced thereby. To reverse a judgment on account of the admission of objectionable testimony, there must be at least a doubt of its prejudicial character towards the exceptant. *Taylor v. Railroad Co.*, 33 W. Va. 40, 10 S. E. 29.

The next objection is to the refusal of the court to admit the testimony of John T. Williams that the defendant showed him the paper in controversy on March 4, 1892, and got some money changed, and said he was going over to the house of George Flowers to pay the plaintiff money, and have her sign the paper. This was strictly hearsay testimony, and not admissible as part of the *res gestae*, but has the appearance of being manufactured by the defendant. A man in ordinary circumstances who is going to pay another \$50 will hardly need to get money changed for the purpose. Even \$50 bills are rare in the country. If he was only going to pay her \$11, as testified to by the plaintiff, he might need change, but hardly to pay the larger sum.

The defendant's last assignment is founded on the refusal of the court to set aside the verdict and grant him a new trial. The case, in short, is to the following effect: About the 1st of March, 1891, the plaintiff, a humble country girl, went to live with defendant and his mother, he being a widower. He immediately began to show her attention, and, under the promise of marriage, seduced her, telling her at the same time: "It did not matter if they did do that way, as they were going to be married anyhow. Others had done so, and people had thought nothing the less of them." He continued this treatment of her until she became pregnant. Then he renewed his promises to marry her, and continued them up until February, 1892, when he finally refused to marry her, as he had become engaged to another. Admitting this to be true, defendant claims to have obtained from her whom he so shamefully treated, for the sum of \$50 paid, the certificate of innocence filed with his plea in this case. The jury, sustained by a decided preponderance of testimony, found against him on this plea, and assessed the plaintiff's damages at \$500. How the jury arrived at such sum from the evidence it is hard to tell, unless, owing to the defendant's pecuniary circumstances and inability to pay, a verdict of \$500 was considered equally as valuable as one for \$5,000.

Our law affords no adequate remedy for wrongs of this character, and this action, almost obsolete, is seldom resorted to except by the poor and friendless. The ordeal of such a trial is too great for the sensitive natures of the injured female and her relatives, who shrink from having her shame exposed to the idle and vicious gaze of the miserable hangers-on of a noisome court room. Owing to the impotency of our law, fathers and brothers, and even the betrayed, in her desperation, have too often had to assume the unwelcome role of self-appointed executioners, and demanded immediate reparation or the life of the seducer. Killing under such circumstances has invariably been excused by the juries of our own and all other countries as justifiable homicide, the law of the land to the contrary notwithstanding; thus vindicating the righteousness of the most ancient of all laws on this subject, as promulgated by the greatest of all human lawgivers. His penalties, in the light of modern civilization, appear extremely harsh, but, if they were now the law of the land, virtue would be exalted where none now exists, and the brazen, polished libertine, whose unfortunate and heartbroken victims go to swell the ranks of crime, and fill our houses of infamy, would no longer be held in check by the fear of the jealous rage of man alone, but would curb his unhallowed passions in obedience to the dread of a punishment in some degree at least commensurate with his offense.

Of the judgment in this case the defendant has no reason to complain, and it is therefore affirmed.

(40 W. Va. 1)

#### STATE v. SHAWEN.

(Supreme Court of Appeals of West Virginia.  
Nov. 24, 1894.)

##### CRIMINAL LAW—ARGUMENTS OF COUNSEL.

1. Counsel necessarily must be allowed considerable latitude in the argument of a case, and, unless the court in a felony trial permits counsel for the state to so far transgress the rule of propriety as clearly to prejudice the prisoner, the judgment will not be reversed because of improper remarks by counsel made to the jury in argument.

2. Where a criminal trial is in other respects fair, a verdict of conviction will not be set aside by this court for improper remarks of counsel, where it is plainly warranted by the evidence in the case under the law, and no other verdict could have been found without misconduct by the jury.

Dent, J., dissenting.

(Syllabus by the Court.)

Error to circuit court, Hampshire county.

Daniel Shawen, convicted of murder, brings error. Affirmed.

Monroe & Woods, for plaintiff in error.  
W. B. Cornwell and Atty. Gen. T. S. Riley, for the State.

BRANNON, P. Statement of facts: Daniel Shawen and Absolom Izer were brothers-

in-law, having married sisters. They lived in McDowell's Hollow, about four miles south of the town of Romney, and about three-fourths of a mile east of the "river road." Their houses were about 200 yards apart. They were engaged in getting out and hauling tan bark together, each man having for this purpose a team of two horses and a wagon. To get to their place from Romney, it is necessary to pass through the tollgate about a mile and a quarter from the town, and, keeping the river road for two or three miles, to turn to the left through a gate known as "McDowell's Gate," into the said McDowell's Hollow. From the said gate the road leads through the woods through said hollow for about three-fourths of a mile, to the houses of said Shawen and Izer. Izer was a larger and stronger man than Shawen. On the 23d day of June, 1893, both men were in Romney with their horses and wagons and their wives, Izer having also his son, and taking out with him in his wagon several friends. They had both been drinking during the day. Shawen needed another horse. A certain Abel High, having a horse to sell, was in town on the aforesaid 23d day of June, and was told by one Joseph A. Pancake that Shawen wanted to buy a horse, whereupon the said Pancake and High went to hunt for Shawen. They found him standing with Izer in front of the courthouse. High and Shawen then began to arrange the terms upon which the horse should be sold. Shawen stated he would like to have six months in which to pay for it; whereupon Izer interfered, and told Shawen that he should not have but till December; that he must have his (Izer's) bark hauled in by that time. Shawen replied that, by the terms of his contract with Izer, he had till the 1st of the next June to haul in said bark. Pancake advised them to go home and cool off, upon which Izer told him to shut his mouth, or he would slap it for him. To this Shawen made no reply whatever, but turned and left in a peaceable manner. Soon after, he left town in his wagon, with his wife. A witness, one Harmison, testified that, on the day aforesaid, he was out in his stable, and heard loud talking and swearing. He looked out of the stable door, and saw Shawen driving furiously out of town, and heard him say, with an oath, "Some people can have anything they want, but I can't have anything." The witness heard Shawen's wife remind him that he was still within the corporation. Shawen replied that he would fix him at the tollgate. Shawen was beating his horse, and swearing. Witness heard prisoner mention no names, and could not say whether he referred to Izer or not. Witness was about 200 yards from the prisoner. Shawen testified that he was exasperated at one of his horses at the time Harmison saw him, and that he was beating it, and swearing at it, and did not have a thought in reference to Izer at that time. When the prisoner got

to the aforesaid McDowell's gate, he unhitched his horses, and left his wagon there, as was his custom; took the horses on up the hollow, and put them away. He then went into the house, took down his gun, and told his wife and mother that he was going to see Joe Pancake, and give him back his horse (which he had bought from him some time before, and had not paid for) and gears; that he was tired of this place; that he could not live here in peace; and that he was going some place where he could live in peace. He then went on down the hollow, and was next seen on the "river road," at the aforesaid McDowell's gate. It was a habit of the prisoner to take his gun with him when walking alone. Just before the shooting, one James P. Stump passed Shawen sitting on the roadside at the aforesaid gate. Witness asked the prisoner what he was waiting for, and prisoner answered that he was waiting to see Joe A. Pancake. Said Pancake had to pass along the river road to get to his home, from Romney. About five minutes after the witness Stump passed, Izer drove up in his wagon with his wife, little son, and several friends. His nephew was riding one of the horses, and driving. When Shawen saw Izer, he rose up, and said, "Aps Izer, what in the hell are you always putting your mouth in my business for?" Izer replied, "I haven't, Dan." Shawen then proceeded to swear some more, and make threats. Mrs. Izer testified that she got out of the wagon, and caught hold of the prisoner, and told him that his gun was scaring her son into spasms, and he answered that the gun would do no harm. She further entreated him for her sake, if not for "Aps," not to shoot. The prisoner answered again that the gun would do no harm, and he pointed it to the ground. Izer told the boy to drive on. After a few more angry words addressed to Izer, he (Shawen) kneeled on one knee, and shot just as the wagon was going through the gate. Izer fell out of the wagon, upon the side of the road, dead. Shawen threw his gun down, almost striking Izer in the face, and said, "There's the damned old gun;" then, turning to Izer's wife, said, "Now, you can hang me, or do what you please with me," after which he ran. Shawen himself testified that the above, as told by the witnesses for the state, was in the main correct, but that he was leaving the wagon when Izer, swearing at him, attempted to get out of the wagon, threatening to whip him, saying, "God damn you, son of a bitch; if I get out, I will fix you," when he shot. He also denied getting on one knee to shoot. Shawen had been sitting on the right side of the road, and Izer was on the right side of the wagon, during the quarrel at the said McDowell's gate. The shot took effect in the right side of the head, behind the ear, and in the right shoulder, rather behind. Some of the shot penetrated the brain, and caused death. Dr. Berkley, who held the post

mortem examination, testified that Izer, in his opinion, had his back to prisoner, and was looking back at him. On the morning, Shawen came to town, and gave himself up. There was no evidence produced on the trial as to the previous reputation of either Izer or Shawen.

The prisoner's motion for a new trial, because the verdict finding him guilty of murder in the first degree was not warranted by the evidence, must be overruled, for that verdict is fully and decidedly sustained by the facts. But the chief ground on which the prisoner's counsel asks relief from his client's death sentence is on account of certain improper remarks by the prosecuting attorney in his closing argument before the jury. When the prosecuting attorney had finished his opening argument to the jury, in which he asked them to find an unqualified verdict of murder of the first degree, so that the penalty of death should be inflicted upon the prisoner, the counsel for the prisoner, admitting in their arguments that the evidence warranted a verdict of murder in the second degree, argued against the infliction of the death penalty, as asked for by the prosecuting attorney, and in favor of the alternative punishment of confinement for life in the state penitentiary. After the counsel for the prisoner had concluded their arguments to the jury, and when the prosecuting attorney was closing the argument for the state, having demanded in his argument an "unqualified verdict of murder in the first degree," or "the death penalty," he proceeded to argue against the alternative penalty of a life sentence in the penitentiary, because of the assumed fact that the prisoner, if sentenced to life imprisonment, would be liberated in a few years, and in this connection called the attention of the jury to the anarchists of Chicago and the action of the governor of Illinois, to which the prisoner, by his counsel, objected; and the court "suggested that the attorney was perhaps going too far away for examples," but gave the jury no instructions in reference thereto. Proceeding, he said: "If you sentence him to the penitentiary for life, it won't be five years till he will be let out on some excuse or pretext, and return home, to enter upon a new course of crime." He further said: "This [meaning the homicide for which prisoner was on trial] is the grand culmination of an epidemic of crimes that have been committed in this county." He further said, referring to the prisoner: "He is so steeped in crime that he has no friend to sit beside him during the trial."

There have been very many decisions in different states as to when improper remarks by counsel in advocacy before juries shall call for reversal and new trial. Detailed reference at large to them would be wearisome and useless. It is impossible upon such a subject to formulate a general rule infallibly applicable in all cases. Each case is tested by itself in a measure. In *Shores' Case*.

31 W. Va. 491, 7 S. E. 418, this court said that "counsel must necessarily be allowed considerable latitude in the argument of a case, and unless the court, in a felony trial, permits counsel for the state to so far transgress the rule of propriety as clearly to prejudice the prisoner, the judgment will not be reversed because of improper remarks by counsel made to the jury." The occurrences in great criminal trials are so many and diverse, the pressure, heat, and excitement of counsel in the struggle are often so intense, that it is well-nigh impossible for counsel to guard themselves so exactly and scrupulously as to avoid some remarks outside the boundary of exact propriety, or for the court to be so actively alert as to prevent them; and, if this court were in all cases of irregularity in this respect to overturn verdicts, few convictions would stand. Great latitude of argument is allowed in trials in this state; too much, I think. Counsel charged with the responsible duty of prosecuting parties charged with crime should remember that they are not merely advocates, but public officers, not bound to convict, but to do the prisoner justice as a debt due to him, and give him a calm, deliberate, fair trial, even though his counsel in his defense has transgressed the true line of advocacy. Their closing arguments are tremendous weapons against the unfortunate prisoner, tremendous to vindicate the cause of public justice, and tremendous to inflict injustice upon the helpless accused, if they are charged with passion and prejudice, or distort the law or facts, or bring in irrelevant or unproven facts. Some courts have been very sensitive upon this subject, and have reversed convictions in a few instances upon apparently inadequate causes; but, as a general thing, reversals for this cause have been gross abuses of the privilege of counsel. We must in each case look to the circumstances. Under the rule in this state, as propounded in *Shores' Case*, we must see that the case is one of improper conduct in counsel, and the impropriety such as "clearly to prejudice the prisoner." The Texas court, which has in various cases been very liberal to defendants in this matter, lays down the rule that "the abuse of counsel's privilege in argument, in order to warrant a new trial, must have been so gross as to prejudice the prisoner's rights." *McConnell v. State*, 58 Am. Rep. 647, and note (3 S. W. 899). In North Carolina the abuse by counsel must be gross and manifestly prejudicial to the prisoner. *State v. Underwood*, 77 N. C. 502. The current of authority elsewhere corresponds with these principles. In most instances where reversals have been ordered for remarks of counsel, the counsel stated and argued upon facts not in evidence bearing on the guilt of the accused, and in a few for intemperate abuse of the accused. As a case must be tried by the evidence, the assertion of facts not proven calculated to influence the jury is generally effectual to es-

tablish error. But, with the exception of perhaps the statement that the prisoner was so steeped in crime that he had no one to sit beside him during his trial, such is not the case in this instance, and that statement was one based on and derivative from the evidence. Surely, we ought not to reverse a conviction, for what is simply a claimed inference or deduction from facts in evidence. The evidence showed a sedate and atrocious murder by the accused, and that his mind was so bent upon the bloody deed that the prayers and wails of the wife and child of his victim were powerless to stay his hand; and can it be that we must annul this trial because the prosecuting attorney, on these facts, declared him steeped in crime so that no friend was present to comfort him in his hour of trial? The evidence showed him wicked, and desperately bent on great crime. Strong language, but the facts were strong, and such language is common in the warmth and feeling of such trials. Must a court reverse for every such passage?

The declaration by the prosecutor that, if the prisoner were sentenced to life imprisonment, he would be liberated in a few years, and would return home to enter upon a new course of crime, was no statement of fact bearing on the guilt of the accused, but a mere expression of opinion or guess, which the intelligence of the jury would rate only as such. And, indeed, was it a reprehensible opinion? The jury was the sole judge whether the prisoner should die or suffer lifelong imprisonment, as the law lodges that discretion with it. By what considerations is the jury to exercise this discretion? Certainly, it can look at the hue of the crime as revealed by the evidence; and cannot the jury consider whether the circumstances of the crime show its perpetrator to be a desperate man, and an enemy of society, and dangerous, should he escape or be pardoned? The choice between the two modes of punishment in case the jury find the crime murder in the first degree is absolute with the jury, and it is difficult to limit the considerations which shall govern a jury if deducible from the nature of the crime and its perpetrator as manifested by the evidence. For myself, I cannot say the remarks of counsel now in hand were legally condemnable. The reference to the pardon of the Chicago anarchists by the governor of Illinois was discounted and neutralized by the judge, and besides, and while irrelevant, the common sense of the jury would reject it; and it would be going far and according it undue influence to say that it figured as a factor in the decision of the jury. And, in addition to the weakness of the remarks above spoken of to affect the jury to the prisoner's prejudice, it is important to remember that they were called out from the prosecuting attorney by the fact that the prisoner's counsel had insisted upon a verdict in favor of life imprisonment instead of death; as I find it laid down in de-

cisions in Michigan, North Carolina, and Vermont that improper remarks of counsel provoked by like remarks of opposing counsel, or in reply to such remarks, are not generally regarded as calling for a reversal. Note on page 569, 9 Am. St. Rep. (McDonald v. People [Ill. Sup.] 18 N. E. 817).

The statement by the prosecuting attorney that the crime was "the grand culmination of an epidemic of crimes that have been committed in this county" may be considered an appeal to local prejudice, was irrelevant, and ought not to have been made. It is the only matter that presents to me any question of seriousness in the case. But as to this and all the other remarks above stated we cannot say that the prisoner was manifestly prejudiced or the verdict influenced by them. Here I refer again to the holding of this court in Shores' Case, 31 W. Va. 491, 7 S. E. 413, that counsel must be allowed considerable latitude in argument, and, unless improper remarks are clearly to the prejudice of the defendant, there is no ground for a new trial; and that is especially the case with this court. To justify reversal, it must appear that substantial rights of the party were prejudiced by the misconduct. Note to McDonald's Case (Ill. Sup.; 18 N. E. 817), 9 Am. St. Rep. 569, citing Shular v. State, 105 Ind. 289, 4 N. E. 870; Boyle v. State, 105 Ind. 469, 5 N. E. 203; Porter v. Throop, 47 Mich. 313, 11 N. W. 174; and State v. Robertson, 26 S. C. 117, 1 S. E. 443. And, besides, it is important to consider that the circuit judge saw all the circumstances, surroundings, and phases of the trial, and did not regard these objections as calling for a new trial. It was well said in Combs v. State, 75 Ind. 221, that "to rigidly require counsel to confine themselves directly to the evidence would be a delicate task, both for the trial and appellate courts, and it is far better to commit something to the discretion of the trial court than to attempt to lay down or enforce a general rule defining the precise limits of the argument. If counsel make material statements outside of the evidence, which are likely to do the accused injury, it should be deemed an abuse of discretion and a cause of reversal; but when the statement is a general one, and of a character not likely to prejudice the accused in the minds of honest men of fair intelligence, the failure of the court to check counsel should not be deemed such an abuse of discretion as to require a reversal." In Huckshold v. Railway Co., 90 Mo. 548, 2 S. W. 794, the court said: "The trial judge, who had heard the speeches of opposing counsel, and knew what, if anything, was said to provoke the last remarks of counsel in his closing speech, was in a better position than we are to determine whether he should or should not interfere; and as to when, how, and to what a trial judge may interfere in any case must depend on a sound discretion." In Railroad Co. v. Gurley, 12 La. 46, cited in Martin v. State, 56 Am. Rep. 917, the court said: "The conduct of the trial

must necessarily be left largely to the discretion of the presiding judge,—a discretion which cannot, in its very nature, be made a subject of review by this court, except in a clear case of abuse of that discretion. If new trials were granted for remarks of counsel in the heat of debate merely because they exaggerated the rights of the client, or went beyond the strict letter of the law, very few verdicts, we fear, would stand. These departures may generally be left to the criticism of opposing counsel in reply and the good sense of the jury in making allowance for the zeal of the speaker." Must we not attribute intelligence and discrimination to juries? They are capable of discarding improprieties. It would be impossible to carry on judicial proceedings upon the theory that everything, even if somewhat improper, that reaches the ears of jurors, affects their final determination beyond all power of resistance on their part. And there is a further weighty or conclusive consideration,—the case made by the evidence was so strong against the accused that his counsel conceded before the jury that he was guilty of murder in the second degree, and virtually conceded it in the first degree, and only asked a verdict for a life term in the penitentiary, rather than death; and the evidence abundantly sustains the finding of murder in the first degree. If the remarks of counsel had not been made, the verdict ought to have been murder in the first degree. They could only bear on the mode of punishment, and we see that death is not an undue punishment for the deed, and the jury was vested with absolute discretion to impose it or not. This being so, ought we to set aside a verdict plainly right under the evidence, merely for those remarks? There is no objection to the trial in any other respect. If the trial is in all other respects fairly conducted,—and it is apparent that no other verdict could have been rendered without misconduct on the part of the jury,—the verdict will not be set aside. Note to McDonald's Case (Ill. Sup.; 18 N. E. 817) 9 Am. St. Rep. 569; Lamar v. State, 65 Miss. 93, 3 South. 78; State v. Wiener, 66 Mo. 13. In Pence v. State (Ind.) 58 Am. R. 651, note, the court said: "Upon the evidence, it seems to us that the conviction was at all events inevitable; and, as the punishment does not seem to have been out of proportion with the offense, we cannot see that there could have been any prejudice to the substantial rights of the appellant. In such a case we are not authorized to reverse." Abb. Cr. Tr. Brief, § 712, is referred to as sustaining this doctrine, but it is not in our library. Therefore, we are compelled to affirm the sentence.

As the day fixed in the judgment for the execution of the sentence of death has passed, owing to the pendency of this writ of error, the circuit court must cause the prisoner to be brought before it, and fix another day for execution, for which purpose the case is remanded to that court. Whart. Cr. Pl. & Pr.



916; 2 Hawk. P. C. c. 51, § 7; 2 Bish. Cr. Proc. § 1311. As judgments imposing the death penalty usually, if not invariably, in this state, specify the date of execution, it often happens that, owing to appellate proceedings, that day passes, necessitating the fixing of another date. Just how this practice of naming the day in the sentence became established in Virginia is not certain, it likely from the form of judgment in murder cases adopted in June, 1752, by the judges of England, under section 3, c. 37, the statute 25 Geo. II., which required a judgment to specify the day of execution. 1 East, Cr. Law, 373; 4 Bl. Comm. 2. And even under that act it was held at the requirement that the day be fixed the judgment was directory, and did not form a necessary part of the sentence. Rex Wyatt (1812) Russ. & R. 229; 1 Chit. Cr. Law, 782. That statute is not in force here, it having been once in force in Virginia, a practice under it has likely continued in this state. Then, what is the English common law on the point? It is certain that, before said statute of Geo. II., the time and place of the execution of the death penalty constituted no part of the judgment. 1 Chit. Cr. Law, 782; Hale, P. C. 399; Rex v. Rogers, 3 Burrows, 2; Whart. Cr. Pl. & Pr. § 916; 1 Bish. Proc. § 1311; Cathcart v. Com., 37 Pa. St. 5; 4 Am. & Eng. Enc. Law, 728; Webster Com., 5 Cush. 386. It is left to the sheriff to fix the time of execution, since, when the sentence is pronounced, he is charged in general language by the statute with simply the duty of execution, and it is not an essential part of the judgment. Act Va. Dec. 12, 1792, § 17 (1 Va. Rev. Code 1803, § 19) enacts that, "to prevent misconstruction, it is hereby declared that the sheriff of the county in which any district court shall sit shall execute judgments rendered by such court in any criminal case." So said 1 Rev. Code 1819, c. § 40, as to sentences by circuit courts. 1 Va. (Ed. 1849 and 1860), c. 209, § 9, actually provides that a copy of the death sentence shall be delivered to the sheriff, "who shall cause the sentence to be executed." That so is section 9, c. 160, of our own Code. The statute contains nothing requiring the day to be fixed in the judgment, which need only conform to the common law. As said the California court, delay and inconvenience would be avoided by omitting the date of execution in the judgment. Murphy's case, 45 Cal. 137.

MR. JUSTICE BENT, J. (dissenting). While I concur in the syllabus, I desire to enter my protest and dissent against the argument contained in the opinion and the conclusion reached by the court in this case. The error complained of is that the prosecuting attorney, in his closing argument, having referred to the conviction, punishment, and pardon of the Chicago anarchists, said: "If you sentence the prisoner to the penitentiary for life, it won't be

five years till he will be let out on some excuse or pretext, and return home to enter on a new course of crime." "This is the grand culmination of an epidemic of crimes that have been committed in this county." "He is so steeped in crime that he has no friend to sit beside him during his trial." There was no evidence before the jury to justify any of these expressions. From them the jury might infer—and for this purpose they were evidently uttered—that the accused was guilty of many crimes, and this was the grand culmination of his wicked career, and that, if sent to the penitentiary, he would be back in five years, to repeat these crimes. What language could be stronger or more reprehensible? It was used for no other purpose than to arouse human passion, and prejudice the prisoner in the minds of the jury, converting them into an unreasonable mob, with vengeance in their hearts, rather than a calm, deliberate tribunal of his fellow men, coolly reaching the unbiased verdict to which the law and evidence unerringly point. The rule of the law is well settled that an attorney, through undue ardor to secure a conviction in accordance with his desires, has no right to stir up the passion and prejudice of the jury by referring to matters irrelevant or facts not in proof. Hatch v. State, 34 Am. Rep. 751. Granting that the prisoner was guilty of murder in the first degree,—which I do not pretend to dispute,—the law, in tender consideration of human frailties, seeks to distinguish between the different degrees of depravity entering into each particular commission of the highest of crimes, and, in doing so, weighs the motives that led to the criminal act. That is to say, the man who kills because of bitter feelings rankling in his breast from a wrong or injury done him by his victim, even though it be imaginary, is not equally guilty with the man who kills in the commission of a felony; or for hatred of human kind generally, or for the love of human gore; hence the leniency of the law in permitting a jury to discriminate and fix the punishment at confinement in the penitentiary for life. The intemperate and unjustifiable language used by the prosecutor was to inflame the minds of the jury, and prevent this discrimination on their part. He accomplished his purpose, which is the best evidence possible that the prisoner was prejudiced by his conduct.

In this case, while the killing was deliberate, the prisoner, from his words and conduct, had even recently publicly suffered contumely and abuse on the part of his unfortunate victim, until life had become to him unbearable, and this injury, rankling in his heart, had driven him to desperation. His expression after the shooting is proof positive of this, when he says to his sister-in-law, "Now, you can hang me, or do what you please with me." These are the words of a man driven to despair, and fully conscious that he had placed his life in jeopardy, and,

without attempting to escape, he gave himself up to be dealt with as his fellow men should determine. Can such a man be equally guilty with the monster who destroys children because he hates the human race, or kills his wife and mother for their money, or, to satisfy his brutal lust, first outrages and then murders the victim of his horrible crime? Cain was a guiltier man, for he slew his innocent and confiding brother for an imaginary wrong; yet his Maker permitted him to go free, though he denied his crime, with the admonition that "whosoever slayeth Cain, vengeance shall be taken on him sevenfold."

The most solemn and awful duty that men are called upon to perform is to inflict the death penalty on their fellows, and it should be done only in extreme cases, when no other punishment will vindicate the law, and protect society against the totally depraved. The unwarranted cruel and diabolical destruction of human life under the forms of law, even in the name of religion, by human agencies, has already been so great that, if entered up by divine justice against the human race as a race, must seal its eternal and everlasting condemnation. How careful, then, should we be, before we lend our sanction to the taking of life, that the accused has, beyond all reasonable doubt, had a fair and impartial trial before an unbiased jury of his fellow men, free from any undue influence of prejudice or passion. It is better that the guilty escape than any should be unjustly punished. And no man who is not totally depraved should be denied the opportunity which imprisonment for life affords him of repenting of his crimes, redeeming his life, and making preparation to stand before the bar of that all-wise Judge, from whom no secret thing can be hidden, and who will condemn our disobedience to His statutes according to the standards we have created for our fellow men.

May He have mercy on the soul of Daniel D. Shawen when it is ushered into His presence in obedience to the final judgment of this court.

(40 W. Va. 122)

THOMAS v. LINN et al.

(Supreme Court of Appeals of West Virginia.  
Dec. 15, 1894.)

DEED OF TRUST TO SECURE NOTE—LIABILITIES OF ASSIGNOR OF NOTE—PAYMENT TO WRONG PERSON—SUIT BY RIGHTFUL PAYEE—RECOVERY.

1. The assignment of a bond or note secured by deed of trust carries with it, as an incident of such assignment, the benefit of the lien of the deed of trust, unless excluded expressly or by fair and reasonable implication.

2. A credit properly indorsed on such bond of an unconditional payment made by the trust debtor, and so entered at his instance, extinguishes the debt and lien to that extent; but it may be erased by the express agreement of the creditor, the debtor, and the party to whom the bond is then assigned; but the question whether the benefit of the deed of trust also passes thereby, the assignment being silent on the subject, is open to independent proof.

3. In the absence of an express agreement to the contrary, the assignment of a bond or nonnegotiable note imports a guaranty that the assignee shall receive the full amount of the bond or note assigned, if he fail to collect the same by the exercise of due diligence.

4. But if the amount paid for the bond is shown, that, with its interest, is the true measure of the recovery.

5. And he cannot recover merely on default of the debtor, but only after legal recourse against him has been exhausted, unless it appears that before the bond fell due the debtor became insolvent, or from some cause a suit against him would have been unavailing.

6. Where a trustee pays a trust fund to one who receives it knowing he is not entitled, the true beneficiary may bring his suit in equity against both; but the decree should be against the one improperly receiving it as the principal debtor, and against the trustee, treated as his surety, to make good any deficiency.

(Syllabus by the Court.)

Appeal from circuit court, Marion county.

Bill by Benjamin P. Thomas against Hugh R. Linn and another. From a decree for plaintiff for a part, only, of his claim, he appeals. Affirmed.

C. A. Snodgrass, for appellant. W. S. Meredith and H. G. Linn, for appellees.

HOLT, J. On appeal from a decree of the circuit court of Marion county rendered against H. R. Linn et al. in favor of Benjamin P. Thomas, on March 17, 1893, for \$163.50 and costs. The cause was referred to a commissioner, and from his report, and the pleadings and evidence, the facts are as follows:

On the 1st day of October, 1885, Valentine Nichols sold and conveyed to A. W. Henderson, for the sum of \$4,000, a certain tract of land containing 155 acres, situate in Monongalia county, W. Va., on the Middle Fork of Dunkard creek. Henderson executed to Nichols his eight single bills, for \$500 each, all dated October 1, 1885, bearing interest from date, and due, respectively, in 1, 2, 3, 4, 5, 6, 7, and 8 years after date; and to secure the payment thereof, on the same day, together with his wife, conveyed the land in trust to Wilson Haight, trustee. Being silent as to the terms of sale, they were determined by the statute on the subject then in force, viz. the act of 1882. See Acts 1882, c. 140. On the 29th day of March, 1886, the deed of trust was admitted to record; and on the 26th day of April, 1886, Valentine Nichols assigned and transferred these eight purchase-money bonds to Henry Haight, but without recourse. Such assignment was written out in full on the back, and signed by Nichols, and also signed by Haight, saying that "he accepted them as assigned without recourse." On the 5th day of February, 1887, A. W. Henderson paid Haight \$35, which was credited on the bond due one year after date. On the — day of —, 1887, Henry Haight assigned and transferred these bonds to defendant H. R. Linn, to be collected, and proceeds applied in payment of a debt due from Haight to Linn. On the 1st day of September, 1887, the obligor, Henderson, paid

Linn the sum of \$400, which was in his presence credited on the bond first due. This money Henderson borrowed from the plaintiff, Thomas. Henderson was to lift the bond for Thomas to hold as his security. But such a proposition was not made to Linn, or to Haught, who had no knowledge of such arrangement, but the payment of the \$400 was absolute and unconditional. The land is shown not to have been worth enough to pay the deed of trust, and that Henderson, the debtor, had no other means of payment. (Such payment of the \$400 was equivalent to getting that much on an insolvent debt, whereas an assignment would have given the assignee the first payment out of the proceeds of the sale of the land under the trust deed, and thus be to the disadvantage of the trust creditor making such an assignment, and retaining, as is this case, the other seven bonds.) On the 21st day of September, 1887, W. E. Mallory, as attorney at law for plaintiff, Thomas, having the claim of \$400 to collect for his client, B. P. Thomas, went to Monongalia county to see Henderson. He found him to be insolvent, as his farm was covered by the deed of trust, which was for its full value and more. He and Henderson then went to H. R. Linn, and Mallory, for Thomas, paid Linn \$123.15, the balance of the first bond, and Linn, according to his testimony, only wrote his name across the back, and delivered it to Mallory, who delivered it to his client, Thomas. The credit of \$400 was erased, and on the bond was written the following assignment: "In consideration of five hundred and twenty-three dollars and fifteen cents, I hereby assign and transfer the within note to Benjamin P. Thomas. Sept. 21st, 1887. [Signed] H. R. Linn." The facts in controversy relate to this real or apparent assignment, Mallory and Henderson testifying that the \$400 credit was erased with Linn's consent, and the assignment, as written by Mallory, was signed by Linn, and all done with the consent of Henderson, who was present; whereas Linn says he did not erase the credit of \$400, did not consent to it, and does not know who made the erasure, but on payment of the balance signed his name in blank, so that the note could be shown and delivered to Thomas as paid by him for Henderson. This bond Mallory delivered to Thomas, who notified the trustee, Haught, that he was the holder and assignee. In pursuance of notice given and of the deed of trust, the trustee, Wilson Haught, on the 10th day of February, 1891, and in front of the courthouse of Monongalia county, sold the land at public auction to the highest bidder on the terms that one-third was to be paid in cash, one-third in one year, and one-third in two years, with interest. Of the time and place of this sale plaintiff had actual notice. Defendant Linn became the purchaser, at the price of \$3,900, of which sum he paid \$95.80, amount of commission and costs of sale, leaving as net pro-

ceeds \$3,804.20, which was applied in discharge, to that extent, of the trust-deed bonds, seven in number, held by Linn. These bonds, principal and interest, on that day amounted to \$4,625.25, and the net proceeds of sale left the sum of \$821.05 unpaid. By deed of that date, viz. February 10, 1891, the trustee, Wilson Haught, by apt and proper deed conveyed the land to Linn, the purchaser. On the 11th day of August, 1891, plaintiff, Benjamin P. Thomas, brought this suit in chancery against Hugh R. Linn and Wilson Haught, trustee, setting out the facts already stated, and, in addition, that defendant Linn, on the 21st day of September, 1887, assigned to him the bond already mentioned, setting out the assignment in *haec verba*, and making an exhibit of the bond on which it was written, charging that no part of said bond had been paid except the credit indorsed of \$35, and that the residue was due and should be paid to plaintiff first out of the proceeds of the sale of the land; that the trustee refused to pay the same, but permitted Linn, the assignor of this bond and the holder of the others, to retain the purchase money for the payment of what was due him, in violation of plaintiff's right to be first paid, etc.; and he prayed that Linn and Haught might be compelled to account for the proceeds of sale, etc., and for general relief. Defendant Linn answered, giving the facts as already stated, and the assignment as he claimed it. The bill was taken for confessed as to defendant Haught. Defendant Linn offered to pay and did pay into court \$156, to be paid to plaintiff, being the amount, with interest, of the sum paid to him by Mallory; protesting that he did not owe it, but was willing to pay it, etc., to avoid further litigation. By order of 22d day of November, 1891, the circuit court referred the cause to a commissioner in chancery, who was directed (1) to settle the accounts of Wilson Haught as trustee, ascertain what funds had come into his hands, how he had disposed of the same, and the liens on the fund, with amounts and priorities; (2) take such evidence as either party might desire touching the matters in issue; (3) and report to court, together with such other matters, specially stated, as he might deem pertinent, or any party in interest require, and return with his report all evidence by him taken or read. On the 6th day of March, 1893, the commissioner filed his report, to which no exception was taken; and on the 17th day of March, the cause coming on to be finally heard on the papers formerly read and the report of the commissioner, the court pronounced the decree for plaintiff against defendant Hugh R. Linn as the one primarily liable, and the defendant Wilson Haught as his surety, for the sum of \$163.50, with interest and costs, with leave to sue out execution. And from this decree the appeal was allowed plaintiff, Thomas, as already stated.

"Where questions purely of fact are re-

ferred to a commissioner, his findings, while not as conclusive as the verdict of a jury, will be given great weight, and should be sustained, unless it plainly appears that they are not warranted by any reasonable view of the evidence. This rule operates with peculiar force in an appellate court, where the findings of the commissioner have been approved and sustained by the decree of the inferior court." *Handy v. Scott*, 26 W. Va. 710. Each party in his argument insists on the finding of the commissioner as correct, and as favorable to his view; so that we may infer that his statement as to the one main disputed matter of fact is either not quite full or not quite clear. As to this we shall see further on. The instrument in this case set up by plaintiff is a bond, or, more properly, a single bill, being under seal,—having a scroll affixed thereto by way of a seal, which is recognized as such in the body of the instrument (section 15, c. 13, p. 97, Code); but the sum to be paid is not by way of penalty, and it has no condition; hence it is properly a single bond or single bill. See *Clegg v. Lemesurier*, 15 Gratt. 108. It is a specialty, and therefore nonnegotiable by our decisions (see *Laidley's Adm'r v. Bright's Adm'r*, 17 W. Va. 779); and also because it is not payable at a particular bank, etc., as required by section 7, c. 99, Code, which defines what shall be negotiable paper when payable in this state. Being nonnegotiable, the legal title cannot pass by assignment,—death alone can pass the legal title,—but the equitable owner by assignment may sue in his own name at law, under our statute (see section 14, c. 99, Code); and, whether overdue or not, the assignee steps into the shoes of the assignor, taking it subject to all prior equities between previous parties (see 1 Daniel, Neg. Inst. §§ 1-31), being in no better situation than the assignor; for the holder can only sell and transfer such interest as he has (*Stockton v. Cook*, 3 Munf. 68), but it seems not subject to any equity of a third person not a party to the bond, of which he had no notice (*Broadus v. Rosson*, 3 Leigh, 12). Where a trustee misapplies trust funds by paying them to a person who is not entitled to receive them, and the person thus receiving them knows that such payment is in violation of the trust, the trustee alone may be made to account for the misapplied funds; but the first liability is upon the one improperly receiving the funds, if before the court, and he should be decreed to refund, and the trustee be treated as his surety. See *Vance v. Kirk*, 29 W. Va. 344, 353, 1 S. E. 717. The assignor of a bond is in this state liable to the assignee, who, having used due diligence to recover the money from the obligor, has failed to do so. *Mackie v. Davis*, 2 Wash. (Va.) 281. And by statute he may sue the remote as well as the immediate assignor, but not merely on default of payment of the principal debtor, but only when legal

recourse against him has been exhausted (4 Minor, Inst. pt. 1, p. 26), or the debtor was insolvent, so that a suit would have been unavailing (see *Peay v. Morrison*, 10 Gratt. 149).

After the bonds had been transferred by Henry Haught to defendant Linn, the trust debtor, Henderson, on September 1, 1887, made to Linn an absolute and unconditional payment of \$400, which he caused to be and saw entered by Linn as a credit, as follows: "Benton's Ferry, Sept. 1, 1887. Cr., by cash, four hundred dollars (\$400.00)." This fact the commissioner reports. It is conceded that this credit was properly entered according to the fact. That much cash was paid by the debtor, and received by the creditor, in extinguishment of that amount of the debt. It was an absolute discharge pro tanto of the obligation. Could it be resuscitated or revived? the commissioner asks. If it could be revived, the commissioner says there remained due to plaintiff on that bond the balance, to wit, \$123.15, with interest from September 1, 1887, till paid, and that to that extent plaintiff, Thomas, had at the time of the sale by the trustee a lien on the land, and on the proceeds of sale, and defendant Linn had the next lien, amounting, on 10th of February, 1891, to \$4,630.66. Next comes that part of the report which seems to be somewhat obscure. By some transposition and paraphrase, I take it to mean, in substance, as if it read as follows: "Your commissioner, in consideration of the evidence, is of opinion that the proofs establish the fact to be that the assignment of said bond, as claimed by plaintiff to have been made by defendant H. R. Linn, on the 21st day of September, 1887, was actually made by defendant Linn under certain circumstances, one of which is that, when the assignment was made, Henderson, the debtor, had made a payment thereon of \$400, leaving at the date of the assignment only the unpaid balance of \$123.15 capable of being assigned, if the part thus discharged by payment could not be and was not revived and restored to its original binding force as an unpaid part of the debt by the erasure of the credit of \$400." Defendant Linn received this money as being the money of Henderson. It was not paid as advanced by any one. He was not asked to receive it, and did not receive it, under any special promise or agreement that the plaintiff or any one else should be to that extent substituted to the rights and remedies of Linn, as the trust creditor under the deed of trust. Plaintiff, if he advanced the money, was then unknown in the transaction; was a stranger, under no obligation to pay; and could not and did not thereby acquire the right to be substituted or subrogated to the place of the creditor, thus to that extent paid. In fact, we may presume that the creditor, if he knew the legal effect, would not have received that amount on any

such condition; for he had nothing to look to for the payment of his debt except the land, and that was confessedly insufficient. But it is said that such is the legal effect of the assignment of the first bond, which Linn did make to plaintiff on the 21st day of September, 1887, in consideration of the \$123.15 actually paid or of the \$523.15 recited as the consideration of the assignment. But the written assignment could not transfer that which the assignor did not have, and \$123.15 was all that was left of the bond. He is not concluded by the recital of the amount of the consideration, for the true consideration in such cases is open to proof; for it, with its interest, measures the amount of the recovery in a suit to recouse it against the assignor. *Mackie v. Davis*, 2 Wash. (Va.) 219; 2 Sedg. Dam. (8th Ed.) § 704. Besides, it would be but a receipt, and a receipt is but a fact open, as other facts, to independent proof. The \$400, as secured, only passed through Linn as a conduit. It really emanated from Henderson, and was assigned, in substance, as his, and for him, in payment of his debt to plaintiff. The law is well settled that, in general, the assignee for value of a bond or note nonnegotiable, secured by deed of trust, although assigned without recourse (*Jenkins v. Hawkins*, 34 W. Va. 799, 12 S. E. 1090), takes the benefit of such security as an incident of the assignment (*Tingle v. Fisher*, 20 W. Va. 497); and in this state the order of payment out of the proceeds of sale is determined by the order of time of assignment, and not by the order in which the bonds fall due, unless otherwise provided expressly, or to be plainly inferred from the transaction (*Schofield v. Cox*, 8 Grat. 533). Neither, as a general rule, can such legal effect of a written assignment be contradicted or changed by parol evidence, but the true consideration can be shown to be other than that recited in the assignment. But where the assignment constitutes only a part of the one transaction, it must be open to that extent, at least, to parol proof. *De La Vergne v. Evertson*, 1 Paige, 181. A stranger, or one who is under no obligation to pay the deed of trust, may have the right of subrogation by contract with the trust debtor, or, where it is his interest or duty to pay, he may have such right, as matter of law, so far as it does not conflict with some superior equity. But a proper unconditional payment by the trust debtor is an extinguishment pro tanto of the trust debt.

And this brings us to the first question here involved. Can such extinguished debt be revived, and, if so, how and with what effect on the lien? In this case, looking at it from the standpoint claimed by plaintiff to be the correct one, the credit of \$400 was erased with the consent of the owner of the bond to whom the payment had been made, at the instance and in the presence of the trust debtor, so that the creditor might assign the

whole bond thus relieved of the credit to the plaintiff, which was done. It is well settled that the lien of the deed of trust could not be thus revived by the mere agreement of the trust debtor and trust creditor, as against third persons who have liens on the property. See *Marvin v. Vedder*, 5 Cow. 671; *Winslow v. Clark*, 2 Lans. 377; *Averill v. Loucks*, 6 Barb. 20; *De La Vergne v. Evertson*, 1 Paige, 181. But I know of no rule of law that forbids the making of such new contract in the way in which this one was made, except that it is liable to be scrutinized closely, and raise a demand for certainty of proof, owing to the obvious facilities it affords for fraud and abuse. I also take for granted that the benefit of the deed of trust would pass as an incident of such assignment of the debt, unless a different intent was manifest from the whole transaction; and, as the vital point—the fact and purpose of the erasure of the credit—lies in parol, such different intent may be presumed from the circumstances of the case; for the subject-matter assigned is the amount of an erased credit. (1) The avowed object of the erasure and assignment of the bond to plaintiff was that it might stand as security for a still subsisting debt due from Henderson, the debtor to Thomas, from whom the money had been borrowed to make the \$400 payment. (2) Would that object be subserved without reviving the lien of the deed of trust, which was separable from and was not a necessary part of it? (3) Defendant Linn says in his testimony that he signed his name in blank on the note, and intended thereby to assign the same to Thomas to the extent of \$123.15. In such an exceptional case, it is no answer to say that he did it with his eyes open, and under a misapprehension of the law, which passed the benefit of the deed of trust, with the assignment as an incident; and he cannot complain of a mistake resulting from his own ignorance of the law, but must suffer the consequences. It is the true subject-matter of the assignment that we are looking for, and when Linn, the owner of the trust debt by his assignment, transferred the bond thus resuscitated to the plaintiff, Thomas, is there anything in the transaction to show that it was not intended that the benefit of the deed of trust was to go with it? That is the question. It is true that rules of law, as well as rules of language, may interfere to prevent a construction of the instrument in accordance with the intent of the parties (2 Para. Cont. [8th Ed.] top p. 498); and that, except in a limited sense, we cannot travel outside the "four corners of the paper," but must take the words as there written, in their ordinary sense, as indicating the intent and incidents the law imputes. Yet it is often impossible to tell what a man has said, as to the subject-matter of the contract, until the words used have been translated into things and facts by parol evidence, thus ascertaining what he meant to say. Any rele-

vant evidence, therefore, which fairly partakes of the nature of explanation of the subject-matter, and is reasonably calculated to place the court in the situation of the contracting parties, will, in general, be received. See *Best, Ev.* (Chamberlayne's Ed.) § 230, note c, and cases cited. While the subject-matter of the assignment, viz. the bond, cannot be varied or contradicted, or even qualified, inconsistently with the written terms of the contract, yet that does not prevent the court from putting itself in the place of the contracting parties, and, thus placed, read the assignment, and apply it to the resuscitated bond as its proper subject-matter shorn of the trust lien, which would have been its incident in the case of an ordinary assignment; for it is by no means a necessary or inseparable incident. The erasure of the credit is not mentioned in the assignment. Such erasure, as matter of fact, when, by whom, and for what purpose done, lies in parol wholly, and is, besides, a matter about which the recollection of some of the witnesses is greatly at variance. Plaintiff sets up no claim to the benefit of the deed of trust, except as an incident of the assignment of the bond. Defendant Linn says that the credit was not erased by him, or with his consent; that he assigned to plaintiff the balance due on the bond, and no more, and delivered the bond to the agent of plaintiff, to show how the bond and its payment stood as between plaintiff and Henderson, the debtor. Even in plaintiff's view, it was a new contract between these three parties, and, viewed by the light of all the facts surrounding it, did not have the effect, by any reasonable or necessary implication, of reviving and passing the benefit of the deed of trust as to that part which had been unconditionally and properly paid, and which was thereby discharged and extinguished. Owing to the peculiar circumstances of the case, I have reached this conclusion, but not without great hesitation and doubt. But, however this may be, this contract as to the lien depends for its one efficient factor upon the mere fact of running a pen through a credit indorsed on the bond; and that is, at least, brought into some doubt and dispute as to reviving and passing the lien for the \$400. It is an improbable contract, except on the theory that the one who made such an assignment did not suppose it could have any such legal effect. It would be a hard bargain; taking from defendant Linn, without any but a technical consideration, a substantial part of the only security he has for the rest of his debt,—a security already insufficient. The plaintiff asks what, under some circumstances, would be akin to the specific performance of a contract in the matter of the cession of a real-estate security. The court would refuse such relief, unless made quite sure of its real merit, as well as of such disputed fact. The circuit court gave the plaintiff all he had any right in conscience, at

least, to ask,—the money he had paid defendant Linn, with its interest; and, if it were recouring the land, the amount paid, when it affirmatively appears, is the true measure of the sum to be recovered. Defendant Linn assigns as cross error that there should not have been a decree against him for costs, but in this there was no error. He admitted his liability to pay the sum of \$123.15 and interest, and appeared to pay and did pay it into court, but he had not tendered it to plaintiff before suit brought. Costs were incurred after the tender. The decree complained of should be affirmed.

#### On Reargument.

The finding of the commissioner is not excepted to. On the contrary, each party relies upon it as a finding in his favor. That part reads as follows: "Your commissioner believes, considering the evidence of W. E. Mallory, which is objected to, that the proof sustains the fact that the assignment made by the defendant H. R. Linn, as claimed to be made under certain circumstances on the 21st day of September, 1887, was actually made, but is further of opinion from the evidence that the credit of four hundred dollars on said note paid by the maker, A. W. Henderson, was an actual payment by him on said note. As to the reviving the same in favor of the plaintiff, Benjamin P. Thomas, is a question your commissioner refers to your honor for his decision." The fair meaning of it is, considering evidence to which no exception was taken, the credit of \$400 was erased, and the assignment on the bond written and signed in the presence of the three parties to the agreement,—plaintiff, the general creditor; Henderson, the trust debtor; and Linn, the trust creditor by assignment from Haight,—but that the \$400 was a payment, theretofore independently made, and thereby extinguished the lien of the trust deed to that extent. Whether the lien could be so revived as to affect Linn's lien for the part still held by him, the commissioner submitted to the court as a question of law. There is a certain class of cases in which the lien may be revived, or, if not revived, effect may be given to the agreement to charge the land as an equitable mortgage. As a case of this kind, see *Packham v. Haddock*, 36 Ill. 38. In *Wayt v. Carwithen*, 21 W. Va. 516, the cases are examined, and the doctrine discussed by Judge Snyder, and the general principle stated as follows: "Any deed or written contract used by the parties for the purpose of pledging real property, or some interest therein, as security for a debt or obligation, which is informal and insufficient as a common-law mortgage, but which by its terms shows that the parties intended that it should operate as a lien or charge upon specific property, will constitute an equitable mortgage, and may be enforced in a court of equity." A mortgage, after payment, becomes functus

lido, and neither the mortgagee, nor any else, as a general rule, has any power to transfer it as a subsisting security, or to revive it to secure the same or any other liability. 1 Jones, *Mortg.* § 943; 2 Minor, *Inst.* 5; Pelton v. Knapp, 21 Wis. 64; McGiven Wheelock, 7 Barb. 22. And the lien may be discharged or extinguished, and the debt main, and the debt may be revived without reviving the lien. See Edgington v. Hefner, 1 Ill. 341; Sherwood v. Dunbar, 6 Cal. 58; 1 Am. & Eng. Enc. Law, p. 877. In ordinary cases of assignment, the rule is well settled in this state that, unless there be an agreement to that effect, the assignor will not be permitted to come in competition with his assignee, if the proceeds of sale of the trust property are insufficient to pay the whole; and that rule the circuit court applied in this case to the extent of that part really owned and assigned as for himself by Linn, to wit, the balance unpaid, \$123.15. The \$400 credit was erased at the instance and for the benefit of Henderson and his general creditor, the plaintiff, and the amount then assigned for their benefit and at their instance by Linn to Thomas, in payment or security of Henderson's general debt to Thomas. Linn was the mere trustee or conduit through whom the parties giving and taking carried out the transaction, and if by implication (for there was no writing on the subject), and without writing,—for Henderson, the owner of the land, signed none,—the erasure had the effect to revive the extinguished lien. It was done, in the view of a court of equity, by Henderson, and for Thomas, and for their benefit, and not by or for defendant Linn. Plaintiff, in proving his case, proves this; but the case proved is by no means the case alleged in the bill. Linn had no right to the \$400 that had been once paid to him by Henderson in absolute extinguishment pro tanto of the deed of trust. If Henderson had the \$400 by erasure of the credit brought to life in Linn, it was but for an instant, as a means of transferring it to plaintiff, Thomas, in security of his unsecured debt; for all that Linn assigned as owner, all that he owned and could thus assign, the court, by the decree complained of, gave Thomas the priority of payment. If so many points can be strained and legal difficulties be tided over, to revive an extinguished lien, or create a new equitable one, in order that plaintiff may have a lien against the land of his debtor, Henderson, for his general previously contracted debt, why may not the facts be taken as plaintiff has proved them, and his demand be thus limited, as equity and good conscience require? for he is in a court of equity, on a purely equitable demand. No rule of evidence stands in the way of getting at the truth. If there was, plaintiff himself has opened the door, and let in the light. If a parting line has to be made separating what Linn owned and assigned as his own from what he did not own

but as trustee or conduit, plaintiff has drawn such line, safely distinct, showing what part of the fund is his, and what part he cannot take, without overriding a higher equity than his own; and, for the same reason that plaintiff takes priority over Linn as to the part assigned by him as owner, he does not take priority as to the part assigned by Linn as Henderson's quasi trustee. Such limitation of the rule proves the rule by giving the reason for it, for, in showing where the rule stops, it shows why it goes thus far; for the lien of the \$400, if resuscitated at all, is the incident and accessory of that part of the debt assigned which only belonged to Linn as Henderson's trustee. What Linn did under such circumstances did not, in legal effect, by any fair intentment, operate as a waiver on his part of his right of priority over the equitable mortgage for the \$400. See *Morrow v. Mortgage Co.*, 96 Ind. 21, 26; *Sheld. Subr.* If this case falls within the principle laid down in *Wayt v. Carwithen*, it would be because Henderson has given a new equitable mortgage on his land to plaintiff for the payment of the \$400 revived by erasure for his benefit, and the benefit of the plaintiff, his general creditor. The extinguished lien was not expressly revived, nor its revival in any way sought or mentioned expressly, when we might reasonably have expected it, or for something, at least, to have been said about the erased credit, and not leave it to stand apparently without having had anything to do with the transaction,—a dangerous proceeding, and liable to great abuse,—and the debt, when revived, could well stand alone, and the bond subserve a purpose, without the lien on the land. But no doubt Henderson's object was to create a new equitable lien for the debt of his general creditor, the plaintiff. Whether he succeeded in such purpose we need not discuss, for, according to the plain meaning of the general doctrine laid down in *Wayt v. Carwithen*, his equitable mortgage would only begin where the subsisting one for \$123.15 stopped; and where the consideration was exhausted, and from that on, a court of chancery would only treat it as good and as a lien in subordination to the higher equity of Haight, Linn, and other assignees of the unpaid purchase money secured by deed of trust, and would not create for plaintiff, Thomas, or subrogate him to, any lien to the manifest prejudice of those standing on higher ground. The \$400 was not paid by Henderson or received by Linn with any agreement or understanding of subrogation, expressed or implied, in fact or in law, but in absolute extinguishment, thus far, of the trust debt. Haight, the mortgagee, was not a party to the transaction at all; is not a party to the suit. How do we know how defendant Linn can or will account to him as to the unpaid balance of the deed of trust? And the trust debt was thus in-

creased in favor of a stranger to the extent of \$400, and the proceeds of the sale of the land fell short much more than that amount of paying off the trust debt. This three-sided agreement between Henderson, Thomas, and Linn, put forward in the proof, and the sole foundation of any further or other relief than the relief the circuit court gave, is not alleged or in any way alluded to in plaintiff's bill, or in any other pleading; and Henderson, the revivor of the extinguished lien, or creator of the equitable mortgage sought to be enforced, was not and is not before the court. His name is not in the record except as a witness, nor does the bill show any necessity for making Henderson a party by reason of the tripartite contract, for that is not mentioned. Still Henderson was the owner of the land sold under the trust deed, and interested in the distribution of the fund. The decree now asked for, nor any other than the one pronounced and complained of here, would not be justified by either the pleadings or the proof. The pleadings might have been amended, and the missing party brought in, but it was not asked for, and, if given, would, as far as I can see, have led to the same result. As it stands, it violates no rule of law, and, though not free from doubt, does substantial justice between the parties, and ought to be affirmed.

(91 Va. 1)

BLANTON et al. v. COMMONWEALTH.<sup>1</sup>  
(Supreme Court of Appeals of Virginia. Jan. 17, 1895.)

**ACTION ON COUNTY TREASURER'S BOND—VARIANCE—OMISSION OF SURETY'S SIGNATURE—EFFECT.**

1. The commonwealth served notice upon C. and upon seven sureties on his official bond as county treasurer that it would ask judgment against them for a certain sum, due for taxes collected. The original bond had a blank space among the signatures, with a seal opposite, which the clerk of court testified was intended as the place where one T. was to sign as surety. The record of court showed that C., the treasurer-elect, appeared in court, entered into and acknowledged a bond, with eight others, including T., as sureties, who duly signed and acknowledged the bond, and thereupon C. duly qualified and took oath; but the bond as actually produced did not have T.'s signature to it. *Held*, that a plea of nul tiel record by the seven sureties should have been sustained, there being a material variance between the record relied upon in the notice and that produced upon trial.

2. When the court has designated and approved certain persons as sureties upon the bond of a county officer, which bond must be so sanctioned and approved by the court before it is valid, no alteration can be made by leaving off a name or substituting another therefor; and unless the bond is prepared and executed as approved it is wholly unauthorized, and the clerk's attestation is of no validity.

3. Any variation in the agreement to which the surety has subscribed, made without his knowledge, and which may prejudice him, or

which may amount to the substitution of a new agreement for the one subscribed, will discharge the surety.

Error to circuit court of city of Richmond.

Proceedings by the commonwealth against one Blanton and six others, as sureties upon an official bond of P. B. Crowder, county treasurer. A judgment was rendered in favor of the commonwealth, and defendants bring error. Reversed.

Wm. Hodges Mann, Meade Haskins, and W. M. Flannigan, for plaintiffs in error. R. Taylor Scott, Atty. Gen., for the Commonwealth.

KEITH, P. The commonwealth of Virginia, through its attorney general, gave notice to P. B. Crowder, principal, and R. W. Blanton, M. A. Blanton, Jacob Schlegel, R. E. Bridgeforth, J. A. Wallace, W. L. Scott, and Samuel D. Vaughan, sureties on his official bond as treasurer of Amelia county, bearing date 23d of June, 1887, that on the 16th day of May, 1892, the circuit court of the city of Richmond, then in session, would be asked to render judgment against them for \$4,386.93, due the commonwealth for taxes, with interest on the several sums constituting that aggregate from the dates set out in said notice. The notice was returned duly executed by the sheriff of Amelia county, and the parties thereto appeared through their attorneys, and moved the court to quash the notice, and also demurred, which motion and demurrer the circuit court overruled. At another day the defendants filed a special demurrer in writing to the notice of the motion, in which demurrer the commonwealth joined, and that demurrer was also overruled by the circuit court. These rulings constitute the subject of the defendants' first bill of exceptions. The defendants subsequently presented to the court three special pleas in writing, numbered 1, 2, and 3, to the filing of which the commonwealth, by counsel, objected, and the objection was sustained; and this action of the court constitutes the subject of the defendants' bills of exceptions Nos. 2, 3, and 4. Upon plea No. 4, which is the plea of nul tiel record, the commonwealth joined issue.

There can be no doubt as to the correctness of the court in overruling the motion to quash the notice, and also in overruling the several demurrers. The notice is in the usual form, is sufficiently accurate and full, and gives the defendants all needful information as to the grounds of the commonwealth's complaint against them. See *Board v. Dunn*, reported in 27 Grat. 608. Upon the ruling of the circuit court rejecting the special pleas offered by the defendants this court expresses no opinion, deeming it unnecessary, in the view that is taken of this case, to do so. The circuit court doubtless proceeded upon the idea that the qualification of the treasurer under the laws of the commonwealth of Virginia, including the execution of his bond as such, constitutes a record which can only be im-

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.



peached by a plea alleging fraud in its procurement. But, as before observed, this court at this time expresses no opinion as to the correctness of the ruling upon this point. The only plea presented in the circuit court upon which issue was joined is that of nul tiel record. Upon the trial of this issue the defendants offered to prove certain facts by E. H. Coleman, clerk of the county court of Amelia county, and by Jacob Schlegel, one of the parties defendant, but upon motion of the commonwealth, through her attorney general, Jacob Schlegel was rejected as a witness, and this action of the court in excluding the evidence of Jacob Schlegel and refusing to allow him to testify is the subject of the defendants' sixth bill of exceptions. The clerk, Mr. E. H. Coleman, went upon the stand, and stated that the records mentioned were the original records of the qualification of P. B. Crowder, treasurer of Amelia county, and that the blank seal left with no signature opposite thereto, and between the signatures of J. A. Wallace and Samuel D. Vaughan, was so made and left blank for the signature of A. C. Tucker, who never signed the same; and that the certificate at the end or foot of said supposed official bond in these words, namely: "In Amelia County Court, June 23d, 1887. This bond was executed and acknowledged in open court by the obligors to the same, and ordered to be recorded. Teste: E. H. Coleman, C. C.,"—was not written, or the blanks thereof filled up, until some time thereafter; and he thought it was after May, 1892; and that the interlineations of the names of R. W. Blanton and M. A. Blanton were written in the said order of Amelia county court before the judge thereof signed it. The only plea, then, being that of nul tiel record, and the only evidence in support of that plea being the testimony of E. H. Coleman, just referred to, and the record of the county court of Amelia county of June 23, 1887, together with the bond produced with said record, the circuit court decided against the defendants upon the plea, and held that there was such a record as the commonwealth had declared upon, and, neither party demanding a jury, proceeded to ascertain the amount claimed to be due to the commonwealth.

It is insisted here that this judgment is erroneous, and that there is a material variance between the record relied upon by the commonwealth in its notice and that produced upon the trial, and that the plea of nul tiel record should have been sustained. We will therefore inquire: First, was there a variance? and, secondly, was it material? It will be observed that the notice filed by the attorney general at the institution of this proceeding in the circuit court is given to P. B. Crowder, principal, and R. W. Blanton and six others as sureties on his official bond as treasurer of Amelia county, bearing date the 23d of June, 1887, and that the name of A. C. Tucker nowhere appears in this notice. The record which is

produced in support of the plea sets out that "In Amelia county court, June 23, 1887, Peter B. Crowder, who was, on the fourth Thursday in May, 1887, duly elected, by the qualified voters of the county of Amelia, treasurer for said county for the term of four years commencing on the 1st day of July, 1887, this day appeared in open court, entered into and acknowledged a bond in the penalty of \$40,000, conditioned according to law, with R. W. Blanton, M. A. Blanton, R. E. Bridgeforth, Jacob Schlegel, W. L. Scott, A. C. Tucker, J. A. Wallace, and Saml. D. Vaughan, as his securities, who waived the benefit of their homestead exemption, and made oath as to their sufficiency, and thereupon the said Peter B. Crowder appeared in court, and qualified by taking the several oaths prescribed by law." That is the record. It is contended by the defendant in error that it imports absolute verity; and from that record it appears that the bond of the treasurer, executed by the principal and his sureties, and accepted for the commonwealth by the county court of Amelia, without which acceptance it could not be a completed instrument, contained the name of A. C. Tucker as one of the sureties. Upon the bond which accompanies the record vouched by the commonwealth in support of its contention the name of A. C. Tucker does not appear. That there is a variance cannot be denied; nor is there in this record one word of explanation with respect to it, save the statement by the clerk of the court, and that is that the vacant place opposite the signature immediately following that of J. A. Wallace was left blank in order that it might be executed by A. C. Tucker; but, if this be a record, the evidence of E. H. Coleman cannot be considered, and if it is to be considered, its tendency is to show that it was an uncompleted transaction, and would have the effect rather to discredit than to establish the bond.

In the case of Fletcher v. Leight, reported in 4 Bush, 303,—a case very similar to this in many of its features,—it appeared that one W. N. Peterson, who had been elected sheriff of Marshall county, Ky., appeared in the county court with a certificate of election, and was thereupon duly sworn into office, and, with Fletcher, Palmer, Stone, Harrell, Thompson, W. B. Ely, Johnson, and Mathis as his sureties, executed covenant as required by law. He entered upon the discharge of his office, and had in his hands an execution in favor of the appellees, which he failed to return as required by law; and for that delinquency the appellees brought suit. The sureties made defense substantially on the pleas of non est factum and nul tiel record, and the circuit court found against them on the plea of nul tiel record, and the proceedings on the other plea are not necessary to be here noticed. It appears that in Kentucky the sheriff had to give three bonds,—a county levy bond, a state revenue bond, and a general official bond. Ely, supposing that:

he had signed them all,—all that were to be executed by the sheriff,—left the court without executing the general official bond, upon which suit was afterwards instituted, and the court say: "As he did not sign the bond sued on, and there is no county-court order approving this bond without Ely's name, we are called on to determine whether it was obligatory on the other securities. The county court, being a court of record, can only speak by its record, especially in the absence of any issue by the pleadings of mistake or fraud. The approval, therefore, by the county court, of an officer's securities, must appear of record. However numerous and solvent the proposed securities may be, this does not make the bond obligatory until the court has passed its judgment of approval. Indeed, until this is done, it is not delivered to the commonwealth, nor can be. It is this approval by the tribunal designated by law which completes its execution and delivery, and makes it obligatory." This language is as applicable to the case at bar as to that in which it was used. The duty of the county court of Amelia county is essentially the same as that of the county court of Marshall county, Ky.; and if the name of W. B. Ely is substituted for that of A. C. Tucker we have a substantially identical state of facts. There, as here, the county court was charged with the duty of superintending the execution of official bonds. The county court here, as in Kentucky, speaks only by its record, and its approval is with us as necessary as it appears to have been in that case; and it may be said here, as it was declared there, "that it is the approval of the bond by the tribunal designated by law to superintend its execution which completes its execution and delivery, and makes it obligatory." The court goes on to say: "When the county court, therefore, approves the proposed names and individuals as sureties in a bond, and directs its clerk to prepare the bond, he has no more authority to witness and accept it, until all the named sureties sign it, than he has to accept it without the principal's signature. If he may waive the signature of one surety, he may waive all. When the court has designated certain persons, and approved them as sureties, no alteration can be made by leaving off a name or substituting another therefor. The bond must be prepared and executed in conformity to the judgment of approval, else it is not the bond approved and accepted by the court; and every alteration by the clerk, either in admitting a designated party or substituting another, is wholly unauthorized, and his attestation to such a bond of no validity." There would, then, appear to be a variance. It remains to be considered whether that variance is material. In the case just quoted in 4 Bush, 303, the court says: "When the principal has proposed certain names as his sureties, and these have been approved by the court, each of the sure-

ties, as he signs, has both the legal and moral right to expect and rely upon the officers to see that each approved party shall sign it, and not to regard it as executed and delivered until so perfected." Now, here, the bond as prepared contains the names of eight sureties. The burden and responsibility which they assumed was to be distributed among eight, whereas the bond sought here to be enforced distributes that liability among seven. Surely, this most seriously affects the rights of the sureties in respect to contribution among themselves in the event of the default of their principal.

In conclusion, I will say, that it must always be borne in mind that there is no evidence to fix any liability upon the plaintiffs in error save the record of Amelia county, and that issue was joined upon no plea save that of nul tiel record. All other pleas and all other evidence which might have thrown light upon this transaction were excluded at the instance of the commonwealth. Upon the record adduced the parties must stand or fall, and that record shows the acceptance by the court charged with the duty of seeing to its execution of the bond with the signatures of eight sureties thereto, while the bond produced presents signatures of but seven. On principle and authority, those sureties had a right to expect and require that every name presented and accepted should appear upon the bond. The commonwealth, through its officers, had notice, as appears on the face of the record, of the names agreed to be taken. It was the duty of her officers to see to it that the bond agreed to by the parties should be executed, and none other; and these defendants had a right to rely—as was said in 4 Bush, 303, a right in morals and law to rely—upon the due performance by the agents and officers of the state of the duties of which they were charged by law. By inadvertence, doubtless, innocently and without any wrongful intent, that duty was neglected. Who shall bear the consequences,—innocent parties, or the commonwealth, by whose agents and officers the mistake was committed? Sureties stand upon the letter of their contract. Their liability is always strictissimi juris, as was said in McClusky v. Cromwell, 11 N. Y. 593, and cannot be extended by construction. To the same effect, see Smith v. U. S., 2 Wall. 235. The correct rule, says the supreme court of the United States in the case just cited, is that "any variation in the agreement to which the surety has subscribed, which was made without the surety's knowledge or consent, and which may prejudice him, or which may amount to the substitution of a new agreement for the one subscribed, will discharge the surety." Here, we have seen, the sureties subscribed to a bond duly accepted by the county court of Amelia county, in which their liability was divided among eight. The attempt here is to enforce a liability upon a bond, in which there are but seven obligors.

There is no evidence in this case which suggests the idea or creates a suspicion that the sureties, or either of them, consented or assented to the material change thus made in the contract by which they had agreed to be bound, or that they had any knowledge thereof, or were in possession of any fact which should have put them upon inquiry. For these reasons, we are of opinion that the judgment of the circuit court should be reversed, and this court, proceeding to render such judgment as the circuit court should have rendered, will direct that the notice by which the proceeding in the circuit court was commenced shall be dismissed.

PROFFIT v. ANDERSON, Deputy Sheriff.<sup>1</sup>  
(Supreme Court of Appeals of Virginia. Feb. 1, 1894.)

LOUISA COUNTY ROAD LAW — CONSTITUTIONALITY  
—CAPITATION TAX.

The road law for Louisa county (Acts 1891-92, c. 417, p. 686, requiring all able-bodied men between 16 and 60 years old to work the roads 2 days in each year, and conferring authority on the overseer of roads to impose a fine upon persons refusing so to work, and to collect it by levy as in case of taxes, and providing for the imprisonment of one so refusing, is void, under Const. art. 10, § 5, which authorizes the general assembly to assess a capitation tax, not exceeding \$1 per annum, on every male citizen over 21 years old, to be dedicated to the public schools, and confers on counties and corporations the power to impose a capitation tax, not exceeding 50 cents, for all purposes. Lewis, P., and Lacy, J., dissenting.

William F. Proffit was imprisoned by order of the county court for refusing to work the roads in Louisa county, as required by law. He applied to the supreme court for a writ of habeas corpus, and was ordered to be discharged from custody.

W. E. Bibb, A. K. Leake, and R. R. Fauntleroy, for petitioner. R. Taylor Scott, Atty. Gen., for respondent.

PER CURIAM. The court is of opinion, for the reasons hereinafter stated, that the petitioner, William F. Proffit, a citizen of Louisa county, Va., was on the 3d day of November unlawfully arrested and imprisoned in the county jail of said county by F. H. Anderson, deputy sheriff for J. H. Woolfork, sheriff of said county, under a *capias pro fine* issued by the clerk of said county under and in pursuance of an order of the county court of said county made and entered on the 11th day of July, 1892, to recover of said petitioner the road fine and costs mentioned in said order and *capias*, and imposed upon him for failing to work on the public roads in Cuckoo road district, in said county, when warned thereto, as required by an act of the general assembly of Virginia approved on the 29th day of Febru-

ary, 1892, entitled "An act to provide for working and keeping in repair the public roads in the county of Louisa" (Acts 1891-92, c. 417, p. 686), and that said petitioner is illegally restrained of his liberty.

2. The court is of opinion that said act, so far as it undertakes to require that all able-bodied male citizens, between the ages of 16 and 60, in each road district of said county, shall be compelled to work on the roads a period of time aggregating 2 days, of 10 hours each, in each year, when warned by the overseer of the precinct to which they belong, with certain exceptions, which need not be here mentioned; and in so far as said act undertakes to confer upon the overseer of any such precinct authority to impose upon and collect from any person so warned, who shall fail to attend and work as required by such overseer, a fine of \$1 for such failure, unless good and sufficient cause be shown, and authorizing such overseer to make out an account against any party so failing, and providing that such account shall have the force and effect of a tax ticket due the commonwealth, and conferring upon said overseer power to collect such fines by distress or levy, in the same manner and upon the same property as in the case of distress or levy for taxes, and further requiring such overseers to return a list of all fines collected, and of the persons delinquent, etc.; and in so far as the said act provides that "if the said account is returned to the clerk's office as afore provided, as delinquent, it shall be the duty of the said court to issue a *capias pro fine* against the delinquent party, and place the same in the hands of the sheriff or any constable of the county, who shall proceed to arrest the said party, and place him under the control of the road commissioner of his district, who shall see that he works out the amount of his fine and costs, allowing him credit for 75 cents per day for each day of 10 hours employed, and the costs shall be the same as allowed by law on an indictment for misdemeanor; if such party refuse to do the work, he shall be liable to enforced labor on the county roads by order of the county court, under the general law,"—the same, we hold, is void, because repugnant to section 5 of article 10 of the constitution of Virginia, which declares: "The general assembly may levy a tax not exceeding one dollar per annum on every male citizen who has attained the age of twenty-one years, which shall be applied exclusively in aid of public free schools; and counties and corporations shall have power to impose a capitation tax, not exceeding fifty cents per annum, for all purposes." This provision of the constitution effects two purposes: (1) It authorizes the general assembly to assess a capitation tax, not exceeding \$1 per annum, on every male citizen who has attained the age of 21 years, and expressly dedicates such tax to the public free schools. (2) It confers directly upon the counties and corporations

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

the power to impose a capitation tax, not exceeding 50 cents, for all purposes. The provision in respect to counties is not subject to the will of the legislature in any respect, but confers the power directly upon the counties, respectively. The question is, does the act in question impose a capitation tax in the form of road service? This question can only receive an affirmative answer. It is undeniably true that taxes may be levied in money, in service, or in kind, and, whether in the one form or other, it is none the less a tax. "Taxation exacts money or services from individuals as and for their respective shares of contribution to any public burden." Mr. Justice Ruggles in *People v. Mayor, etc., of Brooklyn*, 4 N. Y. 419. In the present case the burden imposed is in form and substance a per capita requisition for road service, and cannot, upon principle, be distinguished from the ordinary capitation tax. In other words, it is a requisition tax, and nothing else; and, being in excess of the capitation tax prescribed by the said fifth section of article 10 of the constitution of Virginia, the provisions of the aforesaid, imposing the same, are unconstitutional and void. But the court is, at the same time, of opinion that the validity of the sixth, eighth, and ninth sections only, of the act in question, are here involved, and the judgment now to be rendered is confined to those sections, and none others. For these reasons, and others to be stated in writing, and filed with the record,<sup>2</sup> it is considered by the court that said sections 6, 8, and 9 of the act aforesaid are repugnant to said section 5 of article 10 of the constitution of Virginia, and therefore void, and that the petitioner is illegally restrained of his liberty. It is therefore ordered that the petitioner, William F. Profit, be discharged from custody.

LEWIS, P., and LACY, J., dissenting.

(91 Va. 88)

**TAYLOR et al. v. NETHERWOOD.<sup>1</sup>**

(Supreme Court of Appeals of Virginia. Jan. 31, 1895.)

**MECHANIC'S LIEN—SUFFICIENCY OF NOTICE—VERIFICATION—DECREE.**

1. Section 2476, Code 1887, in reference to mechanics' liens, requires a brief description of the property upon which the lien is claimed, and section 2478 provides that no inaccuracy shall invalidate the lien if the property can be reasonably identified by the description given. *Held*, that a description: "That certain three-story building No. —, situate and being in the city of Richmond, Va., on G. street, between S. and H. streets, and the lot or piece of ground and curtilage appurtenant to the said building, fronting on the south side of G. street 49 feet, and running back 156 feet, more or less, \* \* \* of which Wirt E. Taylor is the owner or reputed owner,"—was sufficient.

<sup>2</sup> No further opinion was filed in this case.

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

2. Where the account accompanying a mechanic's lien sets forth that the work was contracted for as an entirety, and for a specific sum, all the information on this point is given that is required under section 2478, Code 1887, providing that no inaccuracy in the account filed shall invalidate the lien if the account conform substantially to law.

3. Section 2476, Code 1887, requiring mechanics' liens to be verified by the oath of the claimant, is satisfied where a notary public certifies that the claimant "made oath to the correctness of the account."

4. Where a contractor agrees "not to delay the work any time after the stone is delivered," he cannot be held responsible for a delay caused by the failure to deliver him the stone.

5. Where the court enters a personal decree against the owner and the principal contractor in a suit to enforce a subcontractor's lien, there was no error where the owner held in his hands a sum, owing to the principal contractor, sufficient to discharge the lien.

Appeal from chancery court of Richmond.

Action by James Netherwood against Wirt E. Taylor and John F. Bell. Judgment for complainant, and defendants appeal. Affirmed.

James M. Gregory, for appellants. D. C. Richardson, for appellee.

RIELY, J. This case involves the validity of the lien of a subcontractor filed under the mechanic's lien law. In the month of April, 1890, John F. Bell entered into a contract with Wirt E. Taylor to build for the latter a dwelling house of stone and brick in the city of Richmond. Bell, who was a carpenter, employed James Netherwood to do the stonework and furnish the necessary materials for the fixed sum of \$2,350. Netherwood furnished the materials, and executed the work as required by the plan and specifications, and to the satisfaction of the architect, the general contractor, and the owner. There was no complaint of the manner of its execution. It was only of the delay in doing the work. While the work was being done Netherwood received from Bell the sum of \$1,175, and when he had completed his part of the work he applied to Bell for the balance due to him under his contract, and also the amount due for some extra work, amounting in all to \$1,220.42. Bell refused payment, because of the loss he alleged that he had sustained by the delay of Netherwood in executing his work. Netherwood thereupon, on the 9th day of June, 1891, and within 30 days after the completion of his work, filed in the clerk's office of the chancery court of the said city his mechanic's lien on the said dwelling house for \$1,220.42, with interest thereon from the 22d of May, 1891, and on the same day gave notice thereof to Taylor. On the 7th day of October, 1891, Netherwood instituted suit in the said chancery court against John F. Bell, Wirt E. Taylor, the wife of Taylor, and Charles A. Rose, trustee in a deed of trust made by Taylor and wife on the 11th day of June, 1891, to enforce the said lien. John F. Bell and Wirt E. Taylor separately demurred to

and answered the bill. The court overruled the demurrer; and, the cause coming on to be heard, on the 3d day of July, 1893, on the bill and answers, the exhibits, and the testimony, and it appearing that Taylor owed Bell, when Netherwood gave Taylor notice of having filed his mechanic's lien, the sum of \$1,400,—a sum more than sufficient to pay the claim of Netherwood,—the court held that Netherwood had acquired a valid lien on the said house and lot of land for the sum of \$1,220.42, with interest thereon from the 22d day of May, 1891, and decreed that Wirt E. Taylor and John F. Bell pay to James Netherwood the said sum of money, and the costs of the suit. From this decree, and the decree overruling the demurrer, the appeal in this case was taken.

The demurrer and answers assailed the validity of the mechanic's lien on four several grounds: First, because it did not sufficiently describe the property; second, because the statement of the account was not as full as the law required; third, because the verification of the account was insufficient; and, fourth, because the notice given to the owner was defective. Section 2475 of the Code declares what persons shall have a lien on any building or structure, and so much land therewith as shall be necessary for the convenient use and enjoyment of the premises, for performing labor about or furnishing materials for the construction, repair, or improvement of such building or structure. By section 2476 it is provided that a general contractor, in order to perfect such lien, shall, where the building or structure is within the corporate limits of the city of Richmond, file in the clerk's office of the chancery court of the said city "an account showing the amount and character of the work done or the materials furnished, the prices charged therefor, the payments made, if any, and the balance due, verified by the oath of the claimant or his agent, with a statement attached declaring his intention to claim the benefit of said lien, and giving a brief description of the property on which he claims a lien." And by section 2477, a subcontractor, in order to perfect such lien, shall comply with the provisions of section 2476, which are as above quoted, so far as they are material to this controversy, and, in addition, give notice in writing to the owner of the property or his agent of the amount and character of his claim. It is further provided by section 2478 that "no inaccuracy in the account filed, or in the description of the property to be covered by the lien, shall invalidate the lien, if the property can be reasonably identified by the description given, and the account conform substantially to the requirements of the two preceding sections, and is not willfully false."

1. As to the description given of the property. The object of requiring a description is to inform the owner upon which of his property the lien is claimed, and to give no-

tice thereof to purchasers and creditors, so that they may identify the property, and protect themselves against the lien. "If the property can be reasonably identified by the description given," it is all that the law requires. It is here described as "that certain three-story building No. —, situate and being in the city of Richmond, Va., on Grace street, between Shafer and Harrison streets, and the lot or piece of ground and curtilage appurtenant to the said building, fronting on said south line of Grace street 49 feet, and running back 156 feet, more or less, \* \* \* of which Wirt E. Taylor is the owner or reputed owner." The description ought to be and is sufficient to enable any one to identify the premises intended to be covered by the lien. It is full and accurate, and leaves no doubt as to the property meant. It has been held that a claim filed against "a three-storied brick house, situate on the south side of Walnut street, between Eleventh and Twelfth streets, in the city of Philadelphia, of which Harker and Thorn were the owners, or reputed owners" (Harker v. Conrad, 12 Serg. & R. 301); and against a building "situate on the west side of Thirteenth street, between Vine and James streets, in the county of Philadelphia, belonging to or said to belong to Charles Springer," when in point of fact it was between Callowhill and James, Callowhill street intervening between Vine and James streets (Springer v. Keyser, 6 Whart. 187); and against "the wharf situated on Battery street, between Pacific and Jackson streets in San Francisco" (Hotaling v. Cronise, 2 Cal. 60),—gave a sufficiently accurate description.

2. As to the sufficiency of the account. It is contended that the account filed as the basis of the lien does not conform to the requirements of the law. The account is as follows:

1891.

|         |   |            |
|---------|---|------------|
| May 22. | To stonework done on Mr. Wirt E. Taylor's residence on Grace street, between Shafer and Harrison streets, in the city of Richmond, and materials furnished as per agreement with John F. Bell, general contractor for said work | \$2,350 00 |
| Extras: | 26 ft. 7 in. curbing at 90 cts..  | 23 92      |
|         | 21½ ft. tile at \$1.00 .....  | 21 20      |
|         |   | \$2,395 42 |
|         | Credit by cash.....   | 1,175 00   |
|         | Balance due .....   | \$1,220 42 |

It is insisted that the account should have set forth particularly and separately the quantity of the various materials furnished and used in the execution of the stonework, the number of days of labor required to perform the work, and the respective prices of the materials and labor; in short, that it was necessary, in order to perfect the lien, that there should have been an itemized statement of the materials and labor ente-

ing into this charge in the account. The evidence shows that the stonework was contracted for as an entirety, and for a certain fixed sum. In such case it was not necessary, if possible, to furnish an itemized statement of the materials or labor. The account filed states what the work was, and the contract price. It could not set forth the specific quantity of the different materials, and the prices therefor, or the amount and price of the labor, as is insisted on, when there had been no agreement as to the materials or labor separately, either as to quantity or price. It sets forth the only contract that was made, and in doing so "conforms substantially" to the requirements of the law. The reason for the strictness required in having the account show the amount and character of the work done or materials furnished, and the prices charged therefor, and the payments made, if any, is to prevent fraud and collusion, and to enable the owner to ascertain and verify the correctness of the demand, and to give definite information to purchasers and incumbrancers. Where the work is contracted for as an entirety for a specific amount, and this is so set out in the account filed, all the information is given that is needed or can be reasonably required. It is therefore our conclusion that the account filed in this case is sufficient. And this has been the course of decisions of the courts of last resort of a number of the states having mechanic's lien laws similar to our own. *Gunther v. Bennett*, 72 Md. 384, 19 Atl. 1048; *Young v. Lyman*, 9 Pa. St. 449; *Pool v. Wedemeyer*, 56 Tex. 287; *Heston v. Martin*, 11 Cal. 41; *France v. Woolston*, 4 Houst. 561; *Bank v. Curtis*, 18 Conn. 342; *King v. Smith*, 42 Minn. 286, 44 N. W. 65; *Leeds v. Little*, 42 Minn. 414, 44 N. W. 309; and *School Dist. v. Howell*, 44 Kan. 285, 24 Pac. 365. The statute of Maryland requires that every such claim shall set forth, among other things, "the amount or sum claimed to be due, and the nature or kind of work or the kind and amount of materials furnished, and the time when the materials were furnished or the work done." In *Gunther v. Bennett*, supra, the court said: "The only objection taken to it [the bill of particulars] is that it does not set forth the amount of materials furnished. This court has frequently held that this requirement must be complied with. But where there is a contract, as here, both to do the work and furnish the materials for a certain sum, it is not required to do more than set out the contract price, and for the obvious reason that, under the contract itself, no amount has been fixed either for the work or materials separately." Counsel for the appellants rely upon the case of *Shackleford v. Beck*, 80 Va. 573, as authority for the contention that an itemized account is required by the statute to be filed in every case. An examination of that case shows that it was unlike this in important features,

and that it did not proceed to the extent claimed. There, while the original contract was, it is true, for a sum in gross, there were also charges for extra work. Payments had been made, and the balance due on the account struck. The account filed in that case was merely for this balance. All the items of work, the prices thereof, and the payments made, were omitted from the account, and there was nothing to show how the balance claimed to be due was arrived at. It really gave no information by which its correctness could be verified, but in this case the account filed sets forth what the contract for the stonework was, and the price agreed to be paid, together with each item of extra work, and the price thereof, and, after applying the payments made to the general aggregate, ascertains the balance due. The accounts filed in that case and in this are in striking contrast in essential elements. There is nothing in the opinion of the court in *Shackleford v. Beck*, supra, from which it can be concluded that, under the law as it then was, and under which that case was decided, an account containing the simple statement of the work done or materials furnished under a contract for a sum in gross would not be held sufficient. Said the court in that case: "But if it be true, as insisted, that where a contract is made in gross for the erection of a building, and supplying the material entering into its construction, the law is complied with by filing a statement of the amount due and owing for the work, it is not applicable in this case, because a considerable portion of the work was done, and material furnished, under a verbal contract or contracts, outside of and not included in the written contract with Beck; all of which are embraced in the itemized account rendered by appellant to Beck, but which account was not filed by appellant in the clerk's office to be recorded as the law requires." 80 Va. 577. This decision was rendered on June 25, 1885, when the statute (Code 1873, c. 115, § 4) required that the contractor should file "a true account of the work done or materials furnished." Since then the law has been much modified. The word "true" has been omitted from the requirement of the statute, and a new section incorporated (Code 1887, § 2478), which provides that "no inaccuracy in the account filed . . . shall invalidate the lien if . . . the accounts conform substantially to the requirements" of the statute, "and is not willfully false."

3. As to the verification of the account. The statute requires that the account shall be verified by the oath of the claimant or his agent. It prescribes no particular form of verification. At the foot of the account filed in this case is appended the certificate of the notary that James Netherwood personally appeared before him and "made oath to the correctness of the account." This is a sufficient verification under the statute. The

case of *McDonald v. Rosengarten*, 184 Ill. 126, 25 N. E. 429, relied on by counsel for appellants to show that the affidavit here was defective, differs materially from this. The affidavit to the account there was merely that the claimant "had performed the labor and furnished the materials set forth in the statement of claim for a lien." Under the statute of Illinois no lien can be had unless the work shall be done or materials be furnished within a given time from the commencement of the work, or the delivery of the material. "Time," said the court in the case cited above, "is therefore an indispensable element to be considered in the enforcement of any lien under the statute, and no lien can be enforced disregarding the terms of the statute." The affidavit was, therefore, held to be fatally defective, because of the omission of the element of time, as required by the statute.

4. As to the notice to the owner. It is proved that on the day the lien was perfected an exact copy of the account as filed in the clerk's office of the chancery court, and of the statement for the lien attached to the account, was served on Taylor, the owner. We have already shown that the account filed was a sufficient compliance with the statute, and it therefore follows, as a matter of course, that the notice given to the owner, as above stated, was sufficient. It was insisted that the plaintiff was not entitled to force the lien for his full claim because of the delay in executing his work. When Bell secured the contract for building the house for Taylor he solicited Netherwood to contract for the stonework. The plan and specifications required that the stone to be used in the construction of the building should be obtained from the Alderson Brownstone Company. Netherwood had formerly met with much delay in getting stone from this company, and he hesitated to make an estimate for the work. He was induced to do so by the following letter: "Mr. James Netherwood: I have the contract on Taylor's house. Please make out a list of the stone at once, and hand it to Mr. Wilson or Mr. James D. Crump. Mr. West will bind them to furnish you the stone in a certain time, and you to write me a proposition to do the stonework as per plan and specifications for so much, and agree not to delay the work any time after the stone is delivered to you. I leave the plans in your office. Please return them to me to-night. Yours, truly, John F. Bell, 1009 W. Main St. April 8th, 1890." Messrs. Wilson and Crump were officers of the Alderson Brownstone Company, and Mr. West was the architect of the house to be built for Mr. Taylor, and furnished the plans and specifications. No time was specified within which Netherwood should complete his work. He only agreed not to delay it any time after the stone was delivered to him. It is apparent from the evidence that there was great delay in completing the

house so as to be occupied by Taylor, and considerable delay in doing the stonework. We are satisfied, however, from the evidence that the delay was not the fault of Netherwood, but caused by the delay in delivering to him the stone. He ordered it promptly from the company after receiving from Bell the contract for the work, and did not delay the work after the stone was delivered to him. There was not sufficient ground to abate the amount for which the lien was claimed, and the chancery court rightly so held.

It is also assigned as error that, while the bill was filed to enforce the lien against the house and lot of Taylor, the court entered a personal decree against Wirt E. Taylor and John F. Bell for the amount of the lien. The court, by its decree, established the lien for the amount for which it was perfected under the statute, and entered the decree against Taylor and Bell, as stated. While it would have been more regular and proper to have decreed that their property be subjected, by renting or selling, to the payment of the lien, yet, inasmuch as all the parties were properly before the court, and the court ascertained that Bell, the general contractor, owed James Netherwood the amount claimed under the lien, and that Taylor owed Bell more than enough to satisfy the lien, neither of them is injured by the form of the decree, nor has any good cause for complaint. Taylor, in his answer, admits that he holds the amount of money claimed in his hand to be paid to Bell or otherwise, as the court may direct. It would be a vain and useless act to subject the property to the payment of the lien when the owners already had the money in hand to pay it, and only waited for the court to decide to whom he should pay it. There was no occasion, therefore, for the court to direct that Taylor's property on which the lien was perfected should be rented or sold, but only to decree to whom it should be paid. We are therefore of the opinion that the decrees of the chancery court, from which the appeal was taken, must be affirmed.

#### LEWIS v. COMMONWEALTH.<sup>1</sup>

(Supreme Court of Appeals of Virginia. Dec. 22, 1894.)

Error to circuit court, Accomack county.

One Lewis was convicted of selling liquor contrary to law, and brings error.

Quinby & Quinby and Blackstone & Burdick, for plaintiff in error. R. Taylor Scott, Atty. Gen., for the Commonwealth.

HINTON, J. This case in all material particulars is like the case of *Lewis v. Com.* (just decided) 20 S. E. 777, and, for the reasons given in the opinion in that case, the action of the circuit court in refusing a writ of error to the county court of Accomack is plainly right, and the judgment of the said county court must be affirmed.

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

(31 Va. 775)

**MITCHELL v. COMMONWEALTH.**<sup>1</sup>

(Supreme Court of Appeals of Virginia. Jan. 17, 1895.)

**INDICTMENT FOR SELLING LIQUOR — JOINDER OF OFFENSES—ELECTION—JUDGMENT FOR AGGREGATE OF FINES.**

1. An indictment for selling liquor without license contained three counts, alleging a sale to a different person, at a different time and place, in each count. *Held* that, as each count charged a misdemeanor upon which the same or similar judgments might be given, the indictment was good.

2. Where the offenses charged in different counts are all misdemeanors of the same general character, the attorney for the commonwealth will not be compelled to elect between them.

3. Where a jury find the prisoner guilty on two counts of selling liquor without license, and impose a fine of \$100 in each case, it is not error in the court to enter one judgment for \$200, instead of two for \$100 each.

Error to circuit court, Green county.

W. B. F. Mitchell was convicted of selling liquor without a license, and brings error. Affirmed.

Field & Thomas, for plaintiff in error. R. Taylor Scott, Atty. Gen., for the Commonwealth.

HARRISON, J. W. B. F. Mitchell was indicted at the September term, 1892, of the county court of Green county for selling ardent spirits by retail without license, and at the January term, 1893, of said court, was tried and convicted, and judgment entered accordingly. To the rulings and judgment of the county court, said Mitchell was awarded a writ of error from the circuit court of Green county, which court, at its June term, 1893, affirmed the judgment of the county court; and thereupon a writ of error and supersedeas was obtained from this court.

In his petition for appeal, the defendant assigns five grounds of error, which will now be considered in their order.

1. "That the county court erred in overruling the defendant's demurrer to the indictment, for the reason that there were three distinct offenses charged, to wit, a violation of the revenue laws at three different times, and to three different persons." The indictment contains three counts. In each the defendant is charged with having sold, at a different time, and to a different person, one pint of whisky without license. Each count in this indictment is a good count, and, each being for a misdemeanor, there is no misjoinder. The indictment charges the defendant with three separate offenses of a like character, to wit, selling ardent spirits by retail without license. For each offense the punishment is the same, in the discretion of the jury; and in each case there would have been the same or a similar verdict. In point of law, it is no objec-

tion that several misdemeanors of the same nature, and upon which the same or a similar judgment may be given, are contained in different counts of the same indictment. This has been long the general and well-settled rule of the common law, and cannot be now questioned. 1 Chit. Cr. Law, 249; Dowdy v. Com., 9 Grat. 727; Scott's Case, 14 Grat. 687; 1 Bish. Cr. Proc. § 452.

2. "That the court should have required the attorney for the commonwealth to elect which of the three counts in said indictment he would select to try the defendant upon first." In cases of felony, where several offenses are charged in sundry counts of the same indictment, if the court sees that the charges are so distinct that to try them together would confound the prisoner, or distract the attention of the jury, it will require the commonwealth's attorney to select which count he will try first. In the case, however, of mere misdemeanors, which are only punishable by fine and imprisonment, the prosecutor is permitted to join and try several distinct offenses in the same indictment, and without being required to elect on which charge he will proceed. 1 Chit. Cr. Law, 249; Dowdy v. Com., 9 Grat. 727. It would be both unwise and unnecessary, in a case like the one under consideration, to consume the time of the court, and subject the parties to the cost of several trials, when one would dispose of the whole matter, and without the slightest prejudice to the accused.

3. "It is insisted that there is a variance between the verdict and the judgment, in this: that the jury found the defendant guilty on two counts of the indictment, and fined him \$100 in each case; whereas the court gave one judgment for \$200 and costs,—the aggregate amount of the two fines." The objection is that the jury found the prisoner guilty of two offenses, and the court showed by the form of its judgment that he was only guilty of one. In other words, the defendant complains that the public records minimize his public offenses. The defendant was not injured by the action complained of, but benefited, for he was at least saved the costs attaching to two judgments. Both fines were in one case, both due to the commonwealth, and both due from the defendant. The court pursued the proper practice, in a case like this, to enter one judgment covering the aggregate sum recovered by the commonwealth under the indictment.

4. "That no process had ever been issued against the defendant informing him with what he was charged, and that it was error to proceed to trial until he was so served, which he insists was never done." Without stopping to consider the fact that the defendant was in court, at the trial, with a number of witnesses in his behalf, testifying also himself, and that no objection appears to have been taken at the time to the regularity of the proceeding, it is a sufficient answer

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.



to this objection that it appears from the supplemental record, brought up since the case was in this court, that the defendant was properly served with process to answer the indictment, and that a mere oversight of the clerk occasioned its omission from the original record.

5. "That the court should have set aside the verdict, as contrary to the law and evidence, on the defendant's motion." We have examined the evidence certified in this case, and under the familiar rule applicable where the evidence is certified, that it is to be treated as a demurrer to evidence, we have no difficulty in reaching the conclusion that the jury were justified in their verdict, and therefore the court did not err in refusing to set the same aside.

Although not assigned as error in the petition, it is earnestly contended at bar that the court erred in instructing the jury that the punishment fixed by law for the offenses charged in the indictment was a fine of not less than \$100, nor more than \$500, for each offense. No exception was taken to this instruction at the time, and it is therefore no part of the record, and cannot now be objected to. The instruction, however, correctly propounds the law. See Acts 1889-90, p. 242, c. 244, subc. 2, § 1.

For the foregoing reasons, the court is of opinion that there is no error in any of the rulings of the county court, and therefore the judgment of the said court, and of the circuit court of Green county approving the same, must be affirmed, with costs.

### CASH v. COMMONWEALTH.<sup>1</sup>

(Supreme Court of Appeals of Virginia. Jan. 17, 1895.)

#### PROSECUTION FOR HOMICIDE—REVIEW ON APPEAL—SUFFICIENCY OF EVIDENCE.

1. Where the record shows that the defendant pleaded "Not guilty," the supreme court will disregard an exception that the prisoner was tried without a plea.

2. The evidence showed that the murder for which the defendant was convicted was committed on a farm in the county wherein the accused was tried. *Held*, that the venue was proved.

3. On a trial for murder, where some evidence has been given which tends to prove the fact in issue, or the evidence consists of circumstances and presumptions, a new trial will not be granted merely because the court, if upon the jury, would have given a different verdict. To warrant a new trial in such cases, the evidence should be plainly insufficient to warrant the finding of the jury.

4. Where the evidence is certified, and not the facts proved, under section 3484, Code 1887, the case stands as upon a demurrer to appellee's evidence.

5. The evidence showed that defendant was present at a murder committed during a drunken brawl; that the murdered man was struck with a blunt instrument, and the accused was seen at the time and place of the murder with a

piece of rail; that, on his way home that night, the accused said not to mind about "the murdered man," that he had been bulldozing around there long enough, but "I've fixed him to-night"; and that the accused admitted to his brother that he struck deceased. *Held*, that a verdict of guilty of voluntary manslaughter, and an imprisonment for five years, would not be set aside.

Error to circuit court, King George county.

The plaintiff in error, Edgar Cash, was tried for the murder of one Henry Speaks, and convicted by the jury of voluntary manslaughter, and sentenced for five years to the penitentiary. The facts referred to as being in bill of exceptions No. 2, page 11 of the record, are that after the first list and first venire facias in this cause were issued, on Saturday, the 7th day of April, the prisoner moved to quash the writ of venire facias, which, before trial, was done; and on Monday, the 9th day of April, issued a new writ of venire facias, taking a new list furnished the sheriff on the last-named day, which said list and venire facias, before service, were changed by the court by the erasure of the name of one venire man, and the substitution of another, on both list and writ; and therefore the prisoner moved the court to quash said writ, which was overruled.

W. A. Rose, for plaintiff in error. R. Taylor Scott, Atty. Gen., for the Commonwealth.

CARDWELL, J. Edgar Cash was convicted of voluntary manslaughter in the county court of King George county, at the April term, 1894, upon an indictment charging him, together with Henry Campbell, Henry Hall, Jefferson Cash, and Needham Williams, with the murder of one Henry Speaks, and his punishment fixed by the jury at five years' confinement in the state penitentiary. A motion for a new trial was made, and refused by the county court; and, upon application to the judge of the circuit court of King George county, a writ of error to the county court was refused. To this refusal by the judge of the circuit court, a writ of error was awarded by one of the judges of this court.

The petition of the plaintiff for this writ of error alleges the following errors of the county court, namely: First, that the accused was tried without a plea; second, that no venue was proven; third, that the court erred in refusing to quash the venire facias on Monday, April 9, 1894, on the ground that the court, after said writ was returned executed, erased therefrom the name of a venire man, and inserted therein the name of another, etc.; and that the county court erred in overruling the motion of the accused to set aside the verdict of the jury, and grant him a new trial, on the ground that the said verdict is contrary to the law and the evidence, etc.; and, further, that the county court erred in not granting the accused a new trial on the alleged after-discovered evidence of one Henry Campbell.

Taking the errors assigned in their order,

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

we come, first, to the question whether or not the accused was tried without a plea. The record, in the bill of exceptions No. 1 (page 10 of the printed record), shows that the plea of "Not guilty" was entered, and that the record of the trial court so showed, and that no objection was made to the record by the prisoner; hence this assignment of error is not well grounded.

2. Was the venue proven? The evidence shows conclusively that the murder of Henry Speaks was committed at a cabin on the Chatterdon farm, and that said farm is in King George county, thus disposing of this assignment of error.

3. The facts upon which this third assignment of error is made are not sustained by the record, but the contrary is shown in bill of exceptions No. 2 (page 11 of printed record). Thus, this assignment of error is disposed of, and brings this court to the real question in the case, to wit: Is the evidence plainly insufficient to warrant the finding of the jury, and did the county court err in refusing to set the verdict aside, and grant the accused a new trial, on the ground that the verdict is contrary to the law and the evidence, or did the court err in refusing to grant the accused a new trial on the alleged after-discovered evidence of Henry Campbell?

The case stands upon a demurrer to the commonwealth's evidence, "the evidence" being certified, and not "the facts proved." Code Va. § 3484, amended by Acts 1891-92, p. 962. This court, in *Grayson's Case*, 6 Grat. 712, and in *Blosser v. Harshbarger*, 21 Grat. 214, established the rules which are adopted and reaffirmed in *Pryor's Case*, 27 Grat. 1009, governing the granting of new trials. They are as follows: First. "Where the verdict is against law. This occurs where the issue involves both law and fact, and the verdict is against the law of the case upon the facts proved." Second. "Where the verdict is contrary to the evidence. This occurs where the issue involves matter of fact only, and the fact proved required a different verdict from that found by the jury." Third. "Where the verdict is without evidence to support it. This occurs where there has been no proof whatever of a material fact, or not sufficient evidence of the fact or facts in issue. Where some evidence has been given which tends to prove the fact in issue, or the evidence consists of circumstances and presumptions, a new trial will not be granted merely because the court, if upon the jury, would have given a different verdict. To warrant a new trial in such cases, the evidence should be plainly insufficient to warrant the finding of the jury." The first rule thus laid down has no application to this case, as the issue does not involve both law and fact; and we are therefore to be governed by the second and third in disposing of the case here. We are of opinion that the evidence in this case is not only

not plainly insufficient, but fully warrants the finding of the jury. The evidence shows that the accused, Edgar Cash, was at the cabin on Chatterdon farm (the scene of the murder) on the night of March 10, 1894; that he was engaged in the row or drunken brawl that resulted in the killing of Henry Speaks; that the murdered man was struck with some blunt instrument; that the accused was seen in the yard and in the crowd, when the fatal blow was struck, with a piece of rail answering to the description of the instrument with which the murder was committed, according to the physicians who made the autopsy; that the accused, on his way home that night, after the killing took place, in referring to the victim, Henry Speaks, said to Manuel Williams, a witness examined for the commonwealth, "Never mind about him. The son of a bitch has been bulldozing around here long enough, but I've fixed him to-night. Come along"; and that the accused, at his house the next morning, told his brother Jefferson Cash, another witness examined for the commonwealth, that "he [Cash] struck the deceased." Upon this testimony, we think that the verdict of the jury is fully justified, and are therefore of opinion that there is no error in any of the rulings of the county court, and that the judgment of the said court, and of the circuit court of King George county approving the same, must be affirmed.

#### CAMPBELL v. COMMONWEALTH.<sup>1</sup>

(Supreme Court of Appeals of Virginia. Jan. 17, 1895.)

Error to circuit court, King George county. Henry Campbell was convicted of voluntary manslaughter, and brings error.

W. A. Rose, for plaintiff in error. R. Taylor Scott, Atty. Gen., for the Commonwealth.

CARDWELL, J. Henry Campbell was convicted of voluntary manslaughter, in the county court of King George county, at the April term, 1894, and his term of imprisonment in the state penitentiary fixed by the jury at two years, upon an indictment charging him, together with Edgar Cash, Henry Hall, Jefferson Cash, and Needham Williams, with the murder of Henry Speaks. A motion for a new trial was made, and refused by the county court; and, upon application to the judge of the circuit court of King George county, a writ of error to the judgment of the county court was refused. To this refusal by the judge of the circuit court, a writ of error was awarded by one of the judges of this court.

The indictment in this case is the same as that in the *Case of Cash* (just disposed of by this court) 20 S. E. 893, and the record is the same, except that the crucial and only point raised here is, does "the evidence" certified by the trial court, found on pages 12 to 20 of printed record, support the verdict of the jury? and except, further, that, if the evidence in this case differs at all in effect from that in the *Case of Cash* (both under indictment for the same of-

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

fense), it is stronger against the accused, Henry Campbell. We are therefore of opinion in this case also, and for the reasons stated in writing and filed with the record in the Case of Cash, that there is no error in any of the rulings of the county court of King George county, and that the judgment of the said court, and of the circuit court of King George county approving the same, must be affirmed.

(31 Va. 52)

**HOME BUILDING & CONVEYANCE CO. v.  
CITY OF ROANOKE et al.<sup>1</sup>**

(Supreme Court of Appeals of Virginia. Jan. 31, 1895.)

**POWERS OF CITY—PUBLIC IMPROVEMENTS—CHANGE  
OF STREET GRADE—INJURY TO ABUTTING  
OWNER—DAMNUM ABSQUE INJURIA.**

1. A city may, under its legislative charter, raise or lower the grade of its streets without compensating abutting owners for damage caused thereby.

2. The right of the city to change the grade is independent of the question whether the fee of the street is in the city or in adjoining lot holders.

3. The provision of the charter of Roanoke city giving it power to "build bridges in and culverts under the streets" authorizes it to construct approaches in the streets to bridges built by the city.

4. The city of Roanoke, in making street improvements authorized by its charter, is the agent of the state, and performing a public duty imposed upon it by the legislature, and is not liable for consequential damages, if it act within its jurisdiction, and with care and skill.

5. Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are not a taking of private property within the constitutional prohibition against taking property without compensation, but are *damnum absque injuria*.

6. A city charter provision requiring all contracts for public improvements to be let to the lowest responsible bidder, after notice, etc., does not prohibit the city from constructing approaches to a bridge under direction of its own engineers and officers.

**Appeal from circuit court of city of Roanoke.**

Suit by the Home Building & Conveyance Company against the city of Roanoke and others to restrain the erection of approaches to a certain bridge. From a decree dissolving an injunction granted, complainant appeals. Affirmed.

Scott & Dupuy and A. P. Staples, for appellant. Thos. W. Miller and W. A. Glasgow, Jr., for appellees.

CARDWELL, J. The city of Roanoke, on the 29th day of July, 1890, entered into an agreement in writing, duly executed, with the Norfolk & Western Railroad Company, whereby the said railroad company agreed on its part to build, and furnish the material therefor, at its own expense, an overhead bridge across the railroad at three points in the city of Roanoke, among the number at Randolph street, where it intersected with Railroad avenue, running parallel to said railroad, and in

consideration whereof the city of Roanoke agreed on its part to build the approaches to said bridges. Accordingly, the city of Roanoke proceeded to construct the approach to the bridge to be erected, and which has been erected, by the Norfolk & Western Railroad Company across its roadbed at the point named in Randolph street, and the city prosecuted the work till enjoined, as will be hereinafter stated. On August 4, 1891, the Home Building & Conveyance Company, a corporation duly chartered under the laws of Virginia, as owner of a certain lot of land in the city of Roanoke, situated on the east side of Randolph street at and near the intersection of said street with Railroad avenue, and as a taxpayer of said city, presented its bill of complaint, together with certain exhibits and affidavits therewith, to the Honorable Henry E. Blair, judge of the circuit court of the city of Roanoke, praying that the city and one T. S. Boswell, their agents, etc., be enjoined and restrained from further prosecuting the work, and that all obstructions placed by them in and upon Randolph street be removed, unless complainant was compensated for injuries sustained, etc. And the defendants to the bill, having been notified of the application for the injunction, appeared by counsel, and filed their demurrers and answers to the bill, to which answers the complainant replied generally, but the judge, for reasons stated in the order entered by him August 6, 1891, refused to grant the same; whereupon the complainant, after first agreeing with the defendants as to the time and place thereof, on the 20th day of August, 1891, at Marion, Va., renewed its motion for injunction before one of the judges of this court, who likewise refused it. After notice to the defendants, complainant on the 14th day of September, 1891, presented before another of the judges of this court, at Staunton, the original papers theretofore presented to the judge of the circuit court of the city of Roanoke, and again renewed its motion for an injunction according to the prayer of the bill, which was granted; and the cause, together with all papers therewith, was remanded to the circuit court of the city of Roanoke for further proceedings therein, etc. On the 9th day of November, 1891, the circuit court of the city of Roanoke dissolved the injunction, and dismissed complainant's bill, and it is from this decree that an appeal was allowed to this court by one of its judges, and to operate as a supersedeas.

The material facts in the case are fully set out in the pleadings, and not controverted, and, in addition, there is an agreement of facts between the parties, reduced to writing, and made a part of the record. That we may fully understand the locus in quo, it will be necessary to refer here particularly to the following among the facts agreed on, namely: "That the approach at Randolph street starts at a grade at the northern side of Campbell street, and rises to a height of 13 feet at the

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

northern side of Salem avenue, which is of dirt, and is in Randolph street. That in Randolph street is a stone structure, commencing at the northern side of Salem avenue, at the height of 13 feet, of 35 feet in width, and extending to within 60 or 65 feet of the northeast corner of Railroad avenue and Randolph street, and rising to a height of 16 feet. That this approach and structure do not extend to either side of the street, but leave on each side of the structure about  $7\frac{1}{2}$  feet on Randolph street unoccupied, available for the use of the complainant and the public in approaching to the complainant's lot on Randolph street. That from the northern end of the stone structure to the line of Railroad avenue the superstructure rises from 18 to 18 feet at the south line of Railroad avenue, and that a few feet south of the south line of Railroad avenue, on Randolph street, are two columns supporting the superstructure. That on the south side of Railroad avenue, and on the north line of the curb of that street, rises the stairway or foot approach to the bridge, extending from the east line of lot No. 18 to bridge." Upon the agreed facts and those proven in the record the case stands thus: The Norfolk & Western Railroad Company, in operation now nearly a half century, doing an immense business in passenger and freight traffic, traverses the entire length of the city of Roanoke from east to west,—a city that has developed from a way station, with a few residences around, to a city of some 20,000 inhabitants, almost within a decade, with a portion of the inhabitants of the city on the south side and the remainder on the north side of the tracks. That for a great distance, including the point where Randolph street intersects Railroad avenue, a surface crossing from one side of the railroad to the other, was almost, if not entirely, impracticable, in view of the number of tracks along the streets of the city at this point, over which there is a constant stream of passenger and freight trains, as well as yard engines; whereby, to say nothing of the constant danger to which the traveling public was subjected, free intercourse between the citizens of the city residing on different sides of the railroad was constantly interfered with. This situation being recognized by the city of Roanoke, it, as early as January 7, 1890, passed an ordinance submitting to the freehold voters the question of issuing bonds to the amount of \$30,000 for the purpose of constructing the approaches to the bridges to be built across the Norfolk & Western Railroad track at three points, including the one at Randolph street; and, upon a vote being taken thereupon on the 18th day of February, 1890, the freeholders almost unanimously approved of the issuing of the bonds. The bonds were issued and negotiated, and the proceeds thereof in cash lay in the treasury of the city, less the amount expended in the prosecution of this work up to the time of the service of the injunction in this suit. This is nowhere controverted in the record,

and the work of building the approach to the bridge at Randolph street was begun in November, 1890, and prosecuted till the injunction was actually served upon the city after September 14, 1891, while the deed to appellant for its property on Randolph street is dated June 18, 1890.

The appellant, in its petition for appeal to this court, makes a general assignment of error that the circuit court of Roanoke erred in dissolving the injunction granted in this cause by Hon. B. W. Lacy, one of the judges of this court, and in dismissing petitioner's bill. This brings up the questions raised by the original bill filed in the lower court, all of which hinge upon whether the construction by the city of Roanoke of the approach to the overhead bridge in Randolph street without compensation to the appellant as an abutting lot owner is the taking of the property of appellant without compensation, within the meaning of section 14 of article 5 of the constitution of Virginia; in other words, has the city of Roanoke transcended the authority conferred upon it by its legislative charter in placing the approach to the bridge in Randolph street in the manner in which it is constructed? The fifth subdivision of section 18 of the charter of the city of Roanoke (Acts 1883-84, p. 91) gives to the city of Roanoke the power "to close or extend, widen or narrow, lay out, graduate, curb and pave, and otherwise improve streets, sidewalks, and public alleys in said city and have them kept in good order and properly lighted; and over any street, or alley which has been or may be ceded or conveyed to the city by proper deed, they shall have like power and authority as over other streets and alleys; they may build bridges in and culverts under said streets, and may prevent or remove any structure, obstruction, or encroachment over or under any street, sidewalk, or alley in said city." Now, it would seem clear—in fact, it does not appear to be denied in this record—that this clause in the charter conferred upon the city full power and authority to erect the bridge across the railroad track at Randolph street, and therefore the question first to be determined is, did that authority extend to the building of the structure termed the "approach to the bridge" in Randolph street? And just here it may be noted that it is nowhere claimed in this record that the work in constructing said approach to the bridge in Randolph street was being done in a negligent and unskillful manner, whereby the appellant's property has been injured. We are therefore to deal with the naked question whether the city of Roanoke had the right to build this approach in the manner in which the same is shown to have been done. The right of the city under its legislative charter to raise or to lower the grade of its streets is too well established in Virginia to admit of discussion here. *Smith v. City Council of Alexandria*, 33 Grat. 208, and *Kehrer v. Richmond City*, 81 Va. 745. Therefore, had the

city of Roanoke raised the grade of the entire surface of Randolph street in the construction of the approach to the bridge, the right to do so could not have been questioned; but the contention of the appellant here is that the structure called the "approach to the bridge" constitutes an additional servitude on the land, whereby the private property of appellant, as an abutting lot owner, is taken without just compensation; and in support of this contention the able counsel who argued its case before this court cited numerous authorities, which will be noticed later on. And further, to sustain this contention, appellant asserts that the fee in the land to the middle of Randolph street belongs to it, but we do not see that it makes any material difference in the determination of this case whether the appellant owns the fee in Randolph street or whether the city of Roanoke holds it in trust for the use of the public. *Cooley, Const. Lim.* 552-555; *Barney v. Keokuk*, 94 U. S. 324; *Northern Transp. Co. of Ohio v. Chicago*, 99 U. S. 641. The last case named was an action of trespass on the case by the Northern Transportation Company of Ohio against Chicago to recover damages by reason of the construction by that city of a tunnel under the Chicago river along the line of La Salle street. Judge Strong, in delivering the opinion of the court in the case, says: "It is immaterial whether the fee of the street was in the state or in the city or in the adjoining lot holders. If in the latter, the state had an easement to repair and improve the street over its entire length and breadth, to adapt it to easy and safe passage. It is undeniable that in making the improvement of which the plaintiffs complain the city was the agent of the state, and performing a public duty imposed upon it by the legislature." Judge Dayton, in delivering the opinion of the court in the case of *Freeholders of Sussex v. Strader*, 85 Am. Dec. 532, defines "bridge" thus: "The term 'bridge' conveys to my mind the idea of a passageway by which travelers and others are enabled to pass safely over streams or other obstructions. A structure of stone, which spans the width of a stream, but is wholly inaccessible at either end (whatever may be its architecture), does not meet my ideas of what is meant in law and common parlance by a bridge. Sound policy, moreover, requires that we so construe the law as to compel those persons who erect the structure itself to make it accessible at its ends. It is then that an available passageway will be obtained for the public, when the body of the bridge itself is completed." It is true that in that case the right of the county of Sussex to build the bridge was not in question, the only question being who, if any one, was liable to Strader for the value of his horse that fell from a defective abutment and was killed. Yet, as we are to determine whether the city of Roanoke, under its charter, had the right to build the bridge across the railroad at Randolph street, we should understand what is meant by a bridge, which the

charter of the city authorizes to be built in any of its streets. Hence this authority is pertinent, since it defines just what constitutes a bridge. The wisdom of the city authorities of Roanoke in providing these overhead bridges for the convenience and safety of its citizens is not questioned in this record. Then, in the light of the authority just cited, if the city of Roanoke had the right, under its charter (which seems to us to be clear), to build the bridges in question, it not only had the right, but it was incumbent on it, to build the approach thereto.

Among the authorities cited on behalf of appellant to sustain the contention that the structure placed in Randolph street by the city is an additional burden to the servitude of the street, for which the appellant should be compensated, are the cases of *Story v. Railroad Co.*, 90 N. Y. 122; *Pumpelly v. Green Bay Co.*, 13 Wall. 106; *Hodges v. Railroad Co.*, 88 Va. 653, 14 S. E. 380; *W. U. Tel. Co. v. Williams*, 86 Va. 696, 11 S. E. 106. In each of those cases the act complained of was committed by a private corporation for private gain, and not for the public good only. There is, to our mind, a marked difference between a private corporation, or any third party, though claiming, under the authority of the legislature, the right to place additional burdens upon the servitude of a public highway for private gain, and a public corporation clothed with authority from the legislative power to improve its public highways so as to make them more convenient and safe to the traveling public. (2 Dill. Mun. Corp. [4th Ed.] §§ 715, 716); and on this point see opinion of this court in *Hodges v. Railroad Co.*, 88 Va. 655, 14 S. E. 380, where Hinton, J., says: "The easement of the public is the right to use and improve the street for the purposes of a highway only. A railroad on the street, being foreign to such purposes, is an interference with the adjoining owner's property rights in the soil, and an acquisition or taking of an estate or interest in his land, for which he is entitled to compensation as in other cases." It is undeniable that the city of Roanoke, in making the improvement in Randolph street of which appellant complains, was the agent of the state, and performing a public duty imposed upon it by the legislature; and that persons appointed or authorized by law to make or improve a highway are not answerable for consequential damages, if they act within their jurisdiction, and with care and skill, is a doctrine almost universally accepted alike in England and in this country. See opinion of Mr. Justice Strong in *Northern Transp. Co. of Ohio v. Chicago*, 99 U. S. 641, and cases there cited. This case, as we have seen, grew out of the construction of a tunnel under the Chicago river along the line of La Salle street, under authority conferred upon the city by its legislative charter; and Mr. Justice Strong further says: "The doctrine, however it may at times appear to be at variance with natural

justice, rests upon the soundest legal reason. The state holds its highways in trust for the public. Improvements made by its direction or by its authority are its acts, and the ultimate responsibility, of course, should rest upon it. But it is the prerogative of the state to be exempt from coercion by suit, except by its own consent. This prerogative would amount to nothing if it does not protect the agents for improving highways which the state is compelled to employ. The remedy, therefore, for a consequential injury resulting from the state's action through its agents, if there be any, must be that, and that only, which the legislature shall give. It does not exist at common law. The decisions to which we have referred were made in view of *Magna Charta* and the restriction to be found in the constitution of every state that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the state or its agent, or give him any right of action. This is supported by an immense weight of authority." *Cooley*, *Const. Lim.* p. 542, and notes, and cases there cited. Proceeding further, this eminent jurist says that: "The extremest qualification of the doctrine is to be found, perhaps, in *Pumpelly v. Green Bay Co.*, 13 Wall. 163, and in *Eaton v. Railroad Co.*, 51 N. H. 504. In those cases it was held that permanent flooding of private property may be regarded as a 'taking.' In those cases there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession. But in the present case there was no such invasion." So in the case here under consideration.

A case almost exactly similar to the one we now have under consideration has recently been decided by the supreme court of Minnesota, and reported in the *Northwestern Reporter* (volume 60, p. 814), styled *Willis v. City of Winona*. The syllabus of that case is as follows: "(1) The city of Winona, under express legislative authority, constructed a public wagon bridge across the Mississippi river, the Minnesota end of which reaches the river bank near the foot of Main street, and at considerable height above the natural level of the land. For the purpose of connecting the bridge, for the purposes of travel and traffic, with Main street and other public streets, the city constructed an approach in and along the center of Main street in front of plaintiff's abutting lot. This approach, which consists partly of solid abutments and partly of a plankway supported by iron columns, gradually ascends from the natural level of the street at one end to the level of the bridge at the other. (2) Held, that the construction and maintenance of

this approach does not impose any additional servitude on the street, and does not render the city liable for damages to plaintiff's lot, in the absence of any negligence on the part of the city, and of any statute imposing such liability." Judge Mitchell, who delivered the opinion of the court in that case, in summarizing the facts alleged adds to what is stated in the syllabus: "This approach commences in the center of Main street, a short distance south of plaintiff's lot, and gradually rises until it reaches the height of about 25 feet opposite the north end of the lot. This approach is 24 feet wide, leaving a portion of the street on each side at the former grade. It is covered with plank, and is supported by abutments and columns of iron and stone. The construction and maintenance of this approach have materially reduced the value of the plaintiff's lot, but there is no allegation that it touches the body of the plaintiff's lot, or that it was negligently constructed, or in any manner not expressly authorized by the act of the legislature." And upon his statement of what the act of the legislature—that is, the charter of the city—provides with reference to private property taken, etc., it fully appears that it is in effect the same as section 23 of the charter of the city of Roanoke, relied on by appellant. The basis of the claim asserted by Willis against the city of Winona for damages was, as in the case here, based on two grounds: (1) That the act of 1891 (the charter of Winona), authorizing the building of this bridge, imposes upon the city a positive duty to pay such damages; and (2) that the construction of this bridge approach has imposed an additional servitude upon the street upon which plaintiff's lot abuts. But the court held, in its strong opinion, supported by numerous authorities cited, that, taking all of the provisions of the act (that is, the charter of Winona) together, it was not intended to impose upon the city a liability to pay damages where none already existed, but merely to provide a method of ascertaining and paying damages for such taking of private property as, under existing law, entitled the owner to compensation; and that the construction and maintenance of the bridge approach are not an additional servitude on the street for which the plaintiff could recover damages, saying that "the doctrine of the courts everywhere, both in England and this country (unless Ohio and Kentucky are exceptions), is that, so long as there is no application of the street to purposes other than those of a highway, any establishment or change of grade made lawfully, and not negligently performed, does not impose an additional servitude upon the street, and hence is not within the constitutional inhibition against taking private property without compensation, and is not the basis for an action of damages, unless there be an express statute to that effect."

Stress is laid by appellant's counsel here up-

on section 23 of the charter of the city of Roanoke, as imposing the duty upon the city to compensate appellant for the taking of its property by the construction of the approach to Randolph street bridge, and in like cases; but we think that that section of the charter refers to the acquisition of property for the opening of new streets, the extension of those already opened or dedicated, and to the building or establishment of work-houses, houses of correction, and other buildings or improvements contemplated in the charter; and, if section 23 has any application to appellant's case, it is, after all, but the embodiment of the established law of the state, and only provides a method of ascertaining and paying damages for the taking of private property under existing law where the owner is entitled to compensation. So, after as careful examination of the authorities reported in other states and the federal reports as we could give, we conclude that, since we find from the authorities cited *supra* that the building of an approach to a bridge authorized by law to be built is but the grading of the street to adapt it to the uses and needs of the public, the determination of the case under consideration must be governed by the rulings of this court in the case of *Smith v. City Council of Alexandria* and *Kehrer v. Richmond City*, *supra*. The doctrine laid down in those cases is stated clearly by Judge Burks in the first-named case as follows: "The validity of the legislative act, similar to the charters of most of our cities and towns in respect to streets, has not been, and cannot be, questioned; and, the city council having full discretionary power thereunder to improve the streets of the city by grading them, the due exercise of the power cannot, in the nature of things, be wrongful in a legal point of view; and hence, although it may be attended or followed by damage, as a necessary incident, to the owners of adjacent lots, such damage is what is known in the law as 'damnum absque injuria,' and imposes no legal liability." 33 Grat. 211; Dill. Mun. Corp. §§ 782, 783. The opinion of the court by Lewis, P., in *Kehrer v. City of Richmond*, 81 Va. 745, but emphasizes the doctrine,—a doctrine that, we admit, appears harsh, and may be really so, when applied to some cases; but it should be remembered that it is not the province of this court to make the law, but rather to enforce it.

It is, however, contended by appellant that because section 50 of the charter of Roanoke requires all contracts for the erection of public improvements or buildings within the jurisdiction of the city council to be let to the lowest responsible bidder, after notice, etc., all the acts and doings of the city in connection with the building or construction of the bridge approach in Randolph street are manifestly contrary to law and illegal,—*ultra vires*.

We see nothing in that clause of the charter

which inhibited the city from constructing public buildings or improvements under direction of its own engineers and officers. It simply provides that when such buildings or improvements are let to contract, it shall be to the lowest bidder, and after advertisement, as provided. Any other construction of that provision would prove dangerous, if not injurious, to any city, since we see from this record that, if that construction had been followed, the approaches to the overhead bridges in the city of Roanoke would have cost the city \$8,000 or \$10,000 more than they will under the mode of construction adopted by the city.

Upon a review of the whole case, and for reasons stated, we are of opinion that the judgment of the circuit court of Roanoke city dissolving the injunction awarded in the case, and dismissing appellant's bill, is clearly right in all respects, and must be affirmed.

#### HEERMANS et al. v. MONTAGUE et al.<sup>1</sup>

(Supreme Court of Appeals of Virginia.

March 13, 1890.)<sup>2</sup>

DEED OF TRUST—SALE ON DEFAULT—EQUITY PRACTICE—BILL OF REVIEW—PETITION FOR REHEARING—UNRECORDED DEED—EFFECT AS AGAINST CREDITORS.

1. A trustee in a deed of trust was authorized, upon default to pay a sum secured by the deed, to advertise the property for 30 days by posting notices in three public places, and sell the same; but, instead of advertising, the trustee made a deed of bargain and sale to the beneficiary, upon consideration of \$100 credited on the debt. *Held*, that the deed passed no title.

2. Though a bill of review lies only to a final decree, and is not a part of the cause in which the former decree was rendered, while a petition for rehearing lies only to an interlocutory decree, and is a part of the suit, a bill of review filed to an interlocutory decree will be treated as a petition for rehearing; and a petition for rehearing to a final decree will be treated as a bill of review, provided it conform to the requirements of such a bill.

3. A petition for a rehearing must state by whom it is presented, the interest of the petitioner, the material facts upon which the decree to be reviewed was founded, and the relief sought, and it must be filed by leave of court.

4. While leave will always be given any party to answer or deny the allegations of a petition for review, it is not usual to require service of process, for matters requiring such service should be presented by the regular pleadings; and where the parties have been served with process, or are before the court, there is no reason for a further process, and the practice in this respect is the same that prevails as to supplemental bills.

5. A bill of review lies only for error apparent on the face of the decree, or for after-discovered new matter, and all the parties to the original suit must be brought in by regular process.

6. A bill of review can only be filed by a person who was a party or privy to the suit wherein was rendered the decree to be reviewed, and who was aggrieved by the errors as-

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

<sup>2</sup> This case has not been published before because the opinion was not filed until December 21, 1894.

signed, and is to be benefited by a reversal of the same; and, though a like rule applies to petitions for rehearing, a person not a party to the former suit, whose interest may be affected, may come in by petition to be made a party, and then ask a rehearing of a former decree.

7. Bills of review, and petitions for rehearing that may be treated as bills of review, must be filed by leave of court.

8. A bill to review a decree confirming a sale made by previous order of court, which does not seek to bring in the purchaser at said sale, who was not a formal party to the suit, is defective for want of proper parties.

9. A bill of review filed by persons who were not parties or privies to the suit wherein the decree to be reviewed was rendered is irregular and unauthorized.

10. By section 5, c. 114, Code 1873, a deed, until recorded, is absolutely void as to creditors with or without notice thereof.

Appeal from circuit court, Montgomery county.

Ronald & Heermans and Hoge & Hoge, for appellants. George G. Junkin, for appellees.

RICHARDSON, J. This is an appeal from a decree of the circuit court of Montgomery, rendered on the 1st day of December, 1888, sustaining the demurrer to the petition of C. H. Heermans, trustee, and E. Roundthaler, seeking to review, reverse, and annul a decree theretofore rendered in the chancery cause of Montague, for, etc., v. J. Glenn Latimer and others, subjecting a certain tract of 245 acres of land, in the county of Montgomery, to the satisfaction of certain lien creditors of J. Glenn Latimer. The suit of Montague, for, etc., v. Latimer et al., in which the decree sought to be reviewed was rendered, was a creditors' suit brought by J. K. Montague, for the benefit of George G. Junkin and others, creditors of J. Glenn Latimer, against said Latimer and Onora, his wife, Robert G. Latimer and Nannie, his wife, and Warren D. Latimer, their infant child, Charles H. Miller and Margaret J., his wife, and Burrill Howard and America, his wife. The object of the suit was to enforce the lien of the judgment set forth in the plaintiff's bill against certain real estate sold and conveyed by the judgment debtor, said Latimer. The lands thus sought to be subjected were—First, certain lots or parcels of land conveyed by J. Glenn Latimer to his father, Robert G. Latimer, by deed dated 29th November, 1882; second, a lot of one-half acre conveyed by said Latimer to America Howard, wife of Burrill Howard, by deed dated 8th September, 1878, but not recorded until July 7, 1881, which was after the rendition of the plaintiff's judgment; and, third, a tract of 245 acres, inherited by J. Glenn Latimer from his maternal grandfather, Jesse Hall, which tract of land was conveyed by said Latimer to C. H. Miller, by deed of bargain and sale dated 20th of July, 1875, and on the same day was acknowledged before the clerk of Montgomery county court, in his office, by said J. Glenn Latimer, and was left in said office, but not for recordation, and was not admitted to

record as to him until after the commencement of this suit, to wit, on the 28th day of June, 1884, and long after the rendition of plaintiff's judgment, which was recorded on the 29th of November, 1878, and was duly docketed. The bill charged that a certain conveyance from J. Glenn Latimer to Robert G. Latimer, of 29th November, 1882, was not only without consideration, and therefore fraudulent and void, but was made to hinder, delay, and defraud creditors, and that the lands thereby conveyed were liable to the plaintiff's judgment; that as to the one-half acre Howard lot and the 245-acre tract, while they were sold and conveyed prior to the recovery of plaintiff's judgment, the deeds, respectively, were not recorded until long after the rendition and docketing of same; and that, the lien of the judgment having in the meantime attached, the said lands are liable thereto.

It seems that J. Glenn Latimer, Robert G. Latimer, Burrill Howard and wife, and Charles H. Miller, each answered the bill; but the answer of Charles H. Miller only appears in the record here. In his answer he says that the deed from J. Glenn Latimer to him, of 20th July, 1875, conveying the 245-acre tract of land, was properly acknowledged and prepared for recording as to said Latimer, and on the said 20th of July, 1875, "was lodged in the clerk's office of the county court of Montgomery county for record." But this averment is wholly unsustained by proof. So far, indeed, from the deed having been lodged in the clerk's office for recordation, the proof is clear that it was not left for recordation, and was not recorded, for one or both of two sufficient reasons: (1) The tax for recordation was not paid. (2) J. Glenn Latimer was an infant, under 21 years of age, when he inherited from his grandfather the 245 acres of land, and his father, Robert G. Latimer, was his guardian; and the heirs of Jesse Hall, other than said J. Glenn Latimer, instead of conveying the land to him, conveyed it to his said father, as his guardian; and, the said father and guardian not having conveyed it to his said son and ward on his attaining his majority, it seems to have been thought necessary that the father and former guardian should join in the conveyance to C. H. Miller. Hence the deed was so prepared, and on its face purports to be, not the deed of J. Glenn Latimer alone, but the deed of Robert G. Latimer, former guardian of J. Glenn Latimer, and J. Glenn Latimer. It was never executed or acknowledged by Robert G. Latimer; and although acknowledged by J. Glenn Latimer, and left in the office, it was not so left for recordation, but as a deed not ready for recordation, and, for one or both of these reasons, was deposited and kept by the clerk in the receptacle for deeds not ready to be recorded, and continued to be so kept until after this suit was brought, when, on the 28th of June, 1884, it was admitted to record



as to J. Glenn Latimer, as appears by the indorsement on the deed.

The cause having been matured, such proceedings were had therein that on the 14th day of May, 1886, when the cause "came on to be heard upon the papers formally read, decrees entered, the answers of the defendants J. Glenn Latimer, Robert G. Latimer, Burrill Howard and wife, and C. H. Miller," a decree was then entered holding that the lots of land mentioned in the bill as claimed by Robert G. Latimer and America Howard are not subject to the lien of the plaintiff's judgment, and dismissing the bill as to the defendants Robert G. Latimer and wife, Warren D. Latimer, and Burrill Howard and wife. But by the same decree the plaintiff's judgment was declared to be a lien upon the 245-acre tract of land conveyed by the judgment debtor, J. Glenn Latimer, as aforesaid, to Charles H. Miller; and by the same decree an account of liens and their priorities was ordered, and an inquiry was specially directed as to whether the rents and profits of said 245 acres would in five years discharge the liens thereon. The account of liens and their priorities was taken and reported, it being ascertained and reported also that the rents and profits of said land would not in five years pay off the liens thereon; and on the 30th of November, 1886, a decree was entered in the cause confirming said report, to which there were no exceptions, and directing a sale of the land, unless the said judgment debtor, J. Glenn Latimer, or Charles H. Miller and wife, or some one for them, should pay off said liens within 30 days. Such payment not having been made, John R. Johnson, the commissioner appointed for the purpose, sold the land on the 21st day of March, 1887; George G. Junkin, the beneficial plaintiff, becoming the purchaser, at the price of \$125. This sale was reported by the commissioner, the commissioner stating in his report that the land sold at an apparently low figure, because, among other things, C. H. Miller had cut most of the saw timber from the land during his ownership, a steam sawmill having been located upon the land. This report of sale was confirmed by a decree entered in the cause on the 16th of May, 1887; and by the same decree the commissioner, John R. Johnson, was directed to disburse the proceeds on hand, and to collect and disburse the purchase money to become due according to the priorities previously ascertained; and said commissioner was authorized to receive the purchase money at any time, and make a deed to the purchaser or his assignee. At a later day, during the same term, to wit, on the 19th of May, 1887, Charles H. Miller made an upset bid; whereupon the court set aside said decree of confirmation, and ordered a resale of the land, directing the commissioner to start the bidding at \$150, the amount of said Miller's upset bid. The land was accordingly resold, and George G. Junkin, the beneficial

plaintiff, and the firm of I. H. Adams & Bro., creditors of the judgment debtor, who had proved their respective debts in the cause, became the purchasers, at the price of \$230; and, the purchasers so desiring, the commissioner collected the purchase money, and disbursed the same in accordance with the terms of the original decree of sale; and, the purchasers so agreeing, the commissioner, John R. Johnson, reported that George G. Junkin, on the one part, and I. H. Adams & Bro., on the other part, are entitled to a deed for one moiety of said land,—all of which was reported by the commissioner; and on the 15th day of September, 1887, upon the motion of the plaintiff, after more than 10 days' notice in writing to C. H. Miller and wife, duly served and returned, a vacation decree was entered in the cause, confirming said report of sale, there being no exceptions thereto.

After all these proceedings had in the suit of Montague, for, etc., v. Latimer; after the liens and their priorities had been ascertained, reported, and confirmed; after the land had been decreed to be sold, the sale made, reported, and confirmed, and the decree of confirmation set aside upon an upset bid by the defendant, Charles H. Miller, and a resale ordered, made, reported, and confirmed; after the purchase money had been collected and disbursed, report thereof made, and confirmed by a decree of the court; and after the commissioner had been directed to convey the land to the purchaser; and after the cause was practically ended,—C. A. Heermans, trustee, and one Edward Roundthaler (neither of whom was a party to the suit, nor was either a necessary or proper party) present their petition to be made parties, and to have reviewed, reversed, annulled, and set aside the decree of sale of the 245 acres of land, and to confirm and validate a certain deed made by said Heermans, trustee, conveying said tract of land to said Roundthaler, which deed seems to have been made without any authority whatever, and is foreign to the issue in this cause.

The claim to review, reverse, and annul said decree of sale rests upon the following state of facts: On the 31st of October, 1876, Charles H. Miller, his wife, Margaret J., joining him, executed a deed of trust to George G. Junkin and H. D. Wade, trustees, conveying certain parcels of real estate in the county of Montgomery and state of Virginia, and in the county of Raleigh, W. Va., in trust to secure certain creditors mentioned in said deed; and among the debts so secured was a judgment in favor of J. H. Franklin & Co. for \$598.07, with interest from September 1, 1875, \$2.58, protest fee, and costs, \$9.56. Among the properties so conveyed in trust were the 245 acres sold and conveyed by J. Glenn Latimer to said Miller, as aforesaid, but the deed to which was not at the date of said trust deed, nor thereafter, until the 28th of June, 1884, recorded. J. H. Franklin & Co. afterwards brought a chan-

very suit to enforce said trust, but it does not appear by the record when this suit was brought, nor what the proceedings therein were. In the bill of Montague, for, etc., in the original suit, the fact is briefly and imperfectly referred to that there was such a suit, and that, under a decree therein, the 245-acre tract of land was sold, and that Mrs. Margaret J. Miller, wife of C. H. Miller, became the purchaser. But in appellant's petition for appeal it is stated that a suit was brought in April, 1877; that Mrs. Miller became the purchaser of said land, under a decree therein, and that the sale was confirmed to her; that on the 19th of May, 1880, commissioners were appointed to make sale of the land; and that at the March term, 1888, said commissioners reported "the sale of the said 245 acres of land to Margaret J. Miller, which report was confirmed by the court." On the 30th day of August, 1884, Charles H. Miller and wife executed a deed of trust to C. A. Heermans, trustee, by which he conveyed said 245 acres of land to said trustee, in trust to secure certain debts due, not by his wife, but by him, to Edward Roundthaler, the beneficiary in said trust deed. This deed, in the most explicit terms, provides that, in the event that Charles H. Miller should fail or neglect to pay the debts thereby secured as they become due and payable, then on the application of the said Edward Roundthaler, or such other person as might be entitled to recover the moneys so due, it should be lawful for and the duty of said C. A. Heermans to advertise said land in three or more public places, by public posters, in the county of Montgomery, for 30 days, therein appointing a day and place of sale, and at such time and place to expose said land to the highest bidder, for cash, as to so much as might be required to pay said debt and interest and the cost and expenses of sale, etc. Notwithstanding these express provisions, said Heermans, trustee, on the 10th day of May, 1886, by deed of bargain and sale, conveyed said 245 acres of land to said Roundthaler; the deed on its face reciting that it was made in consideration of \$100, to be credited on the account due from Charles H. Miller to said Roundthaler. The deed does not profess to have been made after advertisement and sale, as provided in the trust deed, or to have been made in pursuance of the authority thereby conferred on said trustee, but, on the contrary, seems to have been a private transaction, and without any authority whatever. And it was upon this state of facts that the circuit court was asked, not only to review, reverse, and annul the said decree of sale, but to validate said deed from Heermans, trustee, to Roundthaler, which, so far as shown by the record, seems to have been made without any authority whatever. On the 1st day of December, 1888, the cause came on again, and was heard on the papers formally read, the petition of C. A. Heermans, trustee, and E.

Roundthaler, and upon the demurrer of the plaintiffs to said petition, and was argued by counsel; whereupon a decree was rendered sustaining said demurrer, and from this decree said petitioners obtained an appeal and supersedeas.

The sole question to be decided is, did the court below err in sustaining the demurrer to said petition? In order to a proper solution of this inquiry, it is necessary to consider briefly the things essential to such a proceeding. It may be said in general that what is essential to a good bill of review is also essential to a petition for rehearing; keeping in view, however, that a bill of review only lies to a final decree, and is not regarded as part of the cause in which the decree sought to be reviewed was rendered, but as a new suit, having for its object the correction of the decree in the former suit; while a petition for rehearing lies only to an interlocutory decree, and is treated as part of the suit in which the decree is rendered. But the settled practice, nevertheless, is to treat a bill of review which is filed to an interlocutory decree as if it was in name a petition for rehearing; and a petition for rehearing, which is filed to a final decree, as if it was a bill of review, provided it conforms to the ordinary requirements of such a bill. 1 Bart. Law Prac. 332, and numerous decisions of this court there referred to.

A petition must always state by whom it is presented, the interest of the petitioner, the material facts upon which it is founded, the relief sought, and must be filed by leave of the court. Id. 342, 343. And the same author says: "In Virginia, while leave will always be given any party to answer or deny the allegations of a petition, it is not usual to require service of process, for matters requiring such service should be presented by the regular pleadings; and where all the parties have already been served with process, or are before the court, there is no good reason for further process, and the practice in this respect is the same that prevails as to supplemental bills." This last remark of the author, as to the circumstances under which the service of process may be dispensed with, for obvious reasons, applies only to petitions proper to rehear interlocutory decrees, and not to bills of review, or to petitions to final decrees, which may be treated as bills of review; for as the object of a bill of review is to reopen and correct the final decree in the former suit, and is a continuation of the former suit, and must often be presented after the former suit is ended, and even stricken from the docket, and as such a bill lies only on one or both of the grounds of error apparent on the face of the decree, or after-discovered new matter, and as all the parties to the original suit must in general be made parties to the bill of review, it is clear that process should be regularly issued and served. Hence it is

said: "A bill of review can only be filed by a person who was a party or privy to the former suit; and even persons having an interest in the cause, if not aggrieved by the particular errors assigned in the decree, cannot maintain a bill of review, however injuriously the decree may affect the rights of third persons. Nor can it be filed by persons who cannot be benefited by the reversal or modification of the former decree. But the general rule is that all the parties to the original bill shall be made parties to the bill of review. \* \* \* The same rules govern petitions for rehearing; but it is, nevertheless, competent for a person not a party to the former suit, but whose interest may in some way have been affected by the proceedings had therein, to come in by petition to be made a party, and then to ask a rehearing of a former decree." *Id.* pp. 204, 205, citing *Thompson v. Railroad Co.*, 95 U. S. 391; 2 *Daniell*, Ch. Prac. 1579; *Webb v. Pell*, 3 *Paige*, 368; *Story*, Eq. Pl. § 401; *Thomas v. Harvie's Heirs*, 10 *Wheat*. 146; *Whiting v. Bank*, 13 *Pet.* 6.

While it is unquestionably true that a bill of review for after-discovered matter can only be filed with leave of the court, it has been repeatedly laid down, but without any sufficient reason, that a bill of review for error apparent on the face of the decree may be filed without leave of the court. There can, in the nature of things, be no good reason for this distinction. We have seen that it is competent even for a person not a party to the former suit, but whose interest may have been affected by the proceedings had therein, first to petition to be made a party, and then to ask a rehearing of the former decree complained of; and it may be said to be the established practice that every such petition, and every petition which has for its object the rehearing and disturbing of even a former interlocutory decree, must be filed with the leave of court. This being so, how much more important it is that every bill of review, whether for error apparent or for new matter, should only be filed with leave of the court; for whether founded on alleged error apparent, or on after-discovered matter, or both, the object of the bill is to overturn a final decree; and certainly such a decree is entitled to more, rather than less, sanctity than an interlocutory decree, a petition to rehear which must be filed with the leave of court. Hence the only safe rule, and the rule that applies alike to every bill of review, to any petition that may be treated as a bill of review, and to every petition to rehear an interlocutory decree, is that it must be filed with leave of court. In no other way can the trial courts protect the records from becoming overburdened with irrelevant and vexatious matter, which in too many cases, in the form of bills of review or petitions for rehearing, only serves the purposes of confusion and delay. If a party may, after a final decree adverse to him has been entered in a cause, at

his own election, and without the leave of court, file a bill of review for alleged error apparent on the face of the decree, and may thus reopen and continue the litigation in the former suit, all experience teaches us that such errors, though oftener imaginary than real, will be made the foundation for such a proceeding, and much inconvenience, expense, and delay will result; whereas, if such a bill must be filed only with the leave of court, the judge can inspect the bill, and see that it conforms to the ordinary requirements of such a bill, and presents a proper case for review. And especially should the leave of court be obtained as an appeal lies to the refusal of the court to allow a bill of review in a proper case.

Viewed in the light of the principles above stated, the petition in the present case, treated as a bill of review,—and it must be so treated, and was doubtless so considered by the court below,—is radically defective in several particulars. But, before pointing out these defects, it will be well to state briefly why the petition, which is very inartificially drawn, must be considered and treated as a bill of review. It begins with this language: "Your petitioners, C. A. Heermans, trustee, for the benefit of E. Roundthaler, and E. Roundthaler, respectively pray a bill of review in the case," etc., naming it; and then, after setting forth the alleged grounds for review and reversal, in conclusion prays that the petitioners be made parties to the suit; and that the court will reverse, annul, and set aside the decree of sale of the 245 acres of land rendered in the said case, and thereby confirm the deed from C. A. Heermans, trustee, conveying the said 245 acres of land to E. Roundthaler; that J. K. Montague and George G. Junkin be required to answer the petition; and for general relief.

Whatever may be the law elsewhere, in Virginia a decree of sale is not considered and treated as a final decree, for the reason that the sale is not considered as fully consummated until confirmed by the subsequent decree of the court. Moreover, this was a creditors' suit, in which the land was purchased by the beneficial plaintiff and the firm of I. H. Adams & Bro., who were creditors of the judgment debtor, Latimer, whose debts were proved in the cause, and who are considered and must be treated as parties to the suit; and being thus parties and purchasers, and not strangers, it is clear that, if the prayer of the petitioners could prevail, the result would be not only to reverse and annul the decree of sale proper, but also the decree of confirmation. In other words, the real object of the petition was to overturn and annul the final decree in the cause, and it must therefore be treated as a bill of review. So treated, it is on its face radically defective, in that it does not conform to the ordinary requirement of a bill of review: First. It is defective for want of proper parties. Again, by the decree of May 14, 1886, the original bill was dismissed

with costs, as to the defendants Robert G. Latimer and others. The only remaining defendants were Charles H. Miller and Margaret J., his wife, neither of whom were made parties to the bill of review, when both were necessary parties. The persons comprising the firm of I. H. Adams & Bro. should, together with the beneficial plaintiff, Junkin, who became the purchasers of the land in question, have been made parties; for, while purchasers at judicial sales are universally regarded as parties to the suit under a decree in which they purchased, yet, unless they are already otherwise parties, the mere fact of their being purchasers does not bring them sufficiently before the court to make it proper to render a decree affecting their interests without any further notice to them. *Parker v. McCoy*, 10 Grat. 594; *Hughes v. Johnston*, 12 Grat. 479; *Pierce's Adm'r v. Trigg's Heirs*, 10 Leigh, 406; *Londons v. Echols*, 17 Grat. 19. Second. The bill of review was filed by outside parties, strangers, and not by persons who were parties or privy to the former suit, which was irregular and unauthorized. Third. The bill of review shows no error apparent, and there is no pretense of after-discovered matter. In fact, the contention is—and such is the first assignment of error here—that the circuit court erred in decreeing a sale of the land because it is said the legal and equitable title to said land was in the petitioners before any decree was entered in the cause, and it was error to enter any decree without making them parties. In answer to this, it is only necessary to make a brief statement: J. Glenn Latimer conveyed the land in question to Charles H. Miller in July, 1875, but the deed was not recorded until the 28th of June, 1884. In the meantime, in November, 1878, the plaintiff's judgment was recovered and duly docketed. The object of the suit was to subject the land, as the property of Latimer, to the lien of the plaintiff's judgment, which attached before the deed of Latimer to Miller was admitted to record. That deed, except from the time that it was duly recorded, was absolutely void as to creditors, with or without notice thereof. See section 5, c. 114, Code 1873. See, also, *Guerrant v. Anderson*, 4 Rand. 208.

The plaintiff's judgment lien having thus attached before Latimer's deed to Miller was admitted to record, the conveyance in trust of the latter—the conveyance of Miller and wife, dated 31st of October, 1875, to secure his creditors—could not operate so as to make Latimer's then unrecorded deed to him valid as against creditors, or to put Miller's creditors in any other or better situation than that occupied by Miller himself; he at that time holding a title void as to Latimer's creditors, because not recorded. And though it is alleged, but not satisfactorily proved, that under the suit of J. H. Franklin & Co. against C. H. Miller and others the land in question was sold for the debts of said Miller, and that it was purchased by his

wife, Mrs. Margaret J. Miller, the court in that case could only sell, and Mrs. Miller only acquired, what her husband had conveyed in trust for the benefit of his creditors, and that was a title void by reason of nonrecording as to the creditors of Latimer; and it appears from the petition for appeal in the present case that Mrs. Miller purchased long after the lien of the plaintiff's judgment had attached.

For like reasons, the deed from C. H. Miller and wife, dated 30th August, 1884, long after the plaintiff's lien had attached, and after the commencement of the present suit, and by which they conveyed this land to C. A. Heermans, trustee, to secure E. Roundthaler certain debts, due him from C. H. Miller, could put the beneficiary, Roundthaler, in no better attitude than that occupied by Miller and wife, or by Mrs. Miller, if in fact she was ever a bona fide purchaser under a decree in said suit of Franklin & Co. against her husband and others, his creditors, etc. And as to the prayer in the bill of review, that the court will validate the deed from Heermans, trustee, to E. Roundthaler, it is altogether foreign to anything in the present suit, and cannot be entertained for a moment; for if the sale and conveyance by Heermans, trustee, to Roundthaler, the beneficiary in the trust deed, was made in pursuance of the terms of the trust, then the powers of said trustee were spent, and he had no concern with the present suit; and if the trustee's deed vested in Roundthaler, as claimed by the trustee, the title paramount, then he could assert that title in some appropriate original proceeding, and could not intrude his claim into this suit. Thus, it is plain, not only that the petition, here treated as a bill of review, was filed by persons having no authority to file same, but that no case was presented entitling them to be entertained in any event.

The trouble in this case evidently arose from a misapprehension of the relations of the parties to the subject of controversy. The situation is illustrated by numerous decisions of this court, one only of which need be referred to. In *March v. Chambers*, 30 Grat. 299, it appeared that in January, 1866, Chambers, by an agreement in writing, sold to Ramey a lot in Danville, Va., and in the same month conveyed it to him. The agreement was never recorded, and the deed was not recorded until September 18, 1873. Ramey paid all his purchase money, and on the 15th of August, 1866, conveyed the lot to John G. Ramey, to secure a debt of \$4,000. On the 1st of July, 1872, March, Price & Co. obtained a judgment against Chambers, which was duly docketed March 11, 1873. Ramey was declared a bankrupt in April, 1868; and in the following month the register in bankruptcy conveyed the lot to his assignee. In September, 1868, on the joint application of the assignee and of John G. Ramey, as a lien creditor of the bankrupt,

the court in bankruptcy ordered a sale of the lot; and John G. Ramey bought it, and received the deed in due form from the assignee; and, upon a proceeding by March, Price & Co. to subject the lot to the lien of their judgment, it was held that it was so liable, notwithstanding all the conveyances and proceedings in relation to it. No further illustration could be required. It follows that the court below did not err in sustaining the demurrer of the plaintiffs to the petition, and therefore the decree of the court below must be affirmed.

(43 S. C. 21)

SIMS et al. v. JONES et al.

(Supreme Court of South Carolina. Jan. 31, 1895.)

**COMPETENCY OF JUROR—EXPRESSION OF OPINION—RELATIONSHIP TO PARTY—ADMISSION OF EVIDENCE—OFFER OF COMPROMISE—HARMLESS ERROR.**

1. Where a juror, after stating that he has formed or expressed an opinion, states that it is not so fixed as not to be changed by testimony, and that he is not sensible of any bias, it is proper to accept him.

2. Where a juror states that he has formed an opinion, and that, while he does not think it would prevent him from rendering an impartial verdict, yet he would prefer not to act as a juror, it is not error to reject him.

3. It is not error to reject a juror when he and plaintiff are fourth cousins, and their wives first cousins.

4. Parol evidence is admissible to prove the existence of a written instrument, no attempt being made to prove the contents thereof.

5. Error in refusing to permit defendant, on cross-examination, during the introduction of plaintiff's evidence in chief, to introduce documentary evidence, on the ground that it was then inadmissible, is not ground for reversal, where such evidence is afterwards admitted, and it does not appear from the record that it was material. *McIver, C. J., dissenting.*

6. Error in permitting plaintiff to testify that he refused to compromise his claim against defendant, who claimed on the trial that the note in suit was a forgery, is harmless, when the compromise was suggested by a person who stated at the time that he was without authority from defendant. *McIver, C. J., dissenting.*

7. Error in admitting such evidence is also cured by striking it out. *McIver, C. J., dissenting.*

8. The admission of evidence in reply is within the sound discretion of the trial court.

9. An exception to the admission of evidence should state the ground thereof.

Appeal from common pleas circuit court of Union county; Ernest Gary, Judge.

Action by George T. Sims and E. L. Sims, partners, against W. T. Jones and Ida Jones, administrators. From a judgment for plaintiffs, defendants appeal. Affirmed.

In impaneling the jury, the defendants exhausted their right of peremptory challenge. J. G. Rice, P. P. Hamilton, and J. K. Young, jurors, were sworn upon their *voir dire*, and examined as follows: "J. G. Rice (by request of Mr. Munro): Q. Are you related to any of the parties to this suit? A. I don't know of any kinship. Q. Have you formed or expressed any opinion in regard to it? A. Yes; I have. Q. Is it such an opinion as is fixed,

and will not be changed by testimony? A. No, sir; I don't think so. Q. Are you sensible of any bias now, one way or the other? A. None at all. Q. You have formed an opinion? A. Yes, sir. By the Court: I rule the juror competent. Mr. Munro: I would like to ask the juror if he was present at either of the other trials in the case? (Objection by Mr. Schumpert.) By the Court: No, sir; he need not answer that. I rule the juror competent. P. P. Hamilton (by request of Mr. Schumpert): Examination by Mr. Schumpert: Q. Are you related to any of the parties to this action? A. Well, sir, we claim some kin, me and Mr. Sims. I don't know exactly what kin it is. Q. You always claim kin? A. We do. Q. Your grandmother was a Sims? A. Yes, my grandmother was a Sims. Q. Have you formed or expressed an opinion? A. I have formed an opinion; I don't know as I have ever expressed it. Q. Would that prevent you from rendering a verdict according to the testimony and the law in the case? A. No, sir. Q. You know what kin you are? A. No, sir; I do not know. Q. You have always claimed kin? A. Yes; we are about fourth or fifth cousins,—somewhere along there; I don't know what. I couldn't count it; in fact, I never count kinship when it gets off to a third cousin. Mr. Sims there calls me 'Cousin,' and I call him 'Cousin,' and a man that calls me 'Cousin,' I claim kin with him. Q. Were you connected by marriage with the plaintiff? A. Yes; his mother and my wife are, I think, first cousins; I had forgotten that. Mr. Munro: That is not within the prohibited degrees. By the Court: Yes; I rule that it is. You are excused as a juror. (Exception by Mr. Munro.) J. K. Young (by request of Mr. Schumpert): Examination by Mr. Schumpert: Q. Are you related or connected with any of the parties to this action? A. No, sir. Q. You know all the parties, do you not? A. Very well; yes. Q. Have you formed or expressed an opinion as to this case? A. Well, sir, during the trial of the case heretofore,—the same case,—it was thoroughly discussed in my store, before my fire, and I did form and express an opinion then, when the case was being tried before. Q. Would that prevent you from rendering a verdict? A. Well, I don't think it would; at the same time, I would not like to sit on the jury. Q. You have not only formed, but you have expressed, an opinion? A. Yes; I have expressed an opinion in my store. By the Court (to Mr. Munro): Have you anything to say as to his competency? Mr. Munro: I think he has made himself competent. He says he has an opinion, which would not influence him in the decision of the case. Naturally no juror would want to sit on the case. By the Court: I rule him incompetent, from the fact that he did not answer the question directly. He said he did not think it would. The question was, 'Would that prevent you from rendering a verdict?' If it would or would not, he ought to have answered the

question. I rule the juror incompetent. (Exception by Mr. Munro.)"

The juror J. G. Rice was admitted, and sat as a juror upon the trial of the case, and P. P. Hamilton and J. K. Young were ruled incompetent and were excluded.

Munn & Munn, for appellants. J. G. McKissick, S. W. Melton, O. L. Schumpert, O. O. Culp, and T. B. Butler, for respondents.

GARY, J. This action is upon an alleged promissory note of the defendants' testator, Tyrrel J. Jones, deceased. The defense is forgery and consequent want of consideration. The jury found for the plaintiffs upon the trial on circuit. The defendants appeal to this court on numerous exceptions.

The first three exceptions will be discussed together, and are as follows: "And now come the defendants, and except to the rulings of his honor, over the objections of defendants, alleging error in the following particulars: (1) In holding that the juror J. G. Rice was a competent juror. (2) In holding that the juror P. P. Hamilton was not a competent juror. (3) In holding that the juror J. K. Young was not a competent juror." These jurors were sworn upon their voir dire. Their examination will be set forth in the report of this case. Section 2403, Rev. St. 1893, provides: "The court shall, on motion of either party in suit examine on oath any person who is called as a juror therein, to know whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein, and the party objecting to the juror may introduce any other competent evidence in support of the objection. If it appears to the court that the juror is not indifferent in the cause he shall be placed aside as to the trial of that cause and another shall be called." In the case of *State v. Dodson*, 16 S. C. 453, the court uses this language: "The question is whether the circuit judge erred in allowing certain jurors to be presented to the prisoners, who, when examined on their voir dire, stated that they had formed an opinion in reference to the case from what they had heard or seen in the newspapers, which, however, would not in the least influence their minds as jurors; that they were not sensible of any bias or prejudice whatever, either for or against the prisoners, and would be governed by the evidence adduced in the case. The statute, after providing that the court shall, upon the motion of either party to the cause, examine any person called as a juror upon his voir dire, declares that: 'If it appears to the court that the juror is not indifferent in the cause, he shall be placed aside as to the trial of that cause, and another shall be called.' Gen. St. p. 523, c. 111, § 25. This would seem to vest the power of determining the question of fact, as to whether the juror was indifferent, in the hands of the court called upon to try the

case, and we do not see how this court could undertake to review such determination. But even were this not so, we see no error in the course pursued by the circuit judge. Any other course would have the effect of excluding from the jury box, in any case of such magnitude or public interest as would be likely to attract attention, the very class of persons who would be best qualified to occupy that position, for in cases of that character it would be difficult to find persons of ordinary intelligence who had not received some impressions in regard to a case from what they had heard or read in the newspapers." *S. P. State v. Williams*, 31 S. C. 257, 9 S. E. 853; *State v. Merriman*, 34 S. C. 17, 12 S. E. 619; *State v. Summers*, 36 S. C. 479, 15 S. E. 369; *State v. Haines*, 36 S. C. 504, 15 S. E. 555; *State v. McIntosh*, 39 S. C. 97, 17 S. E. 446. In the case of *State v. Merriman*, 34 S. C., on page 34, 12 S. E. 619, the court says: "The objection that the judge erred in rejecting the juror Fletcher, because of his relationship to the accused within the degrees stated in the record, cannot be sustained. We are not aware of any statute fixing the degrees either of consanguinity or affinity within which a juror is disqualified; and it must therefore be left to the circuit judge to determine whether the fact the juror's father and the grandfather of the accused were brothers was such a relationship as would be likely to render the juror not indifferent in this case." These exceptions are overruled.

The fourth exception complains of error on the part of the presiding judge as follows: "In admitting the testimony of the witness Charles P. Sims that liens were given by witness' mother to T. J. Jones during the years 1872 to 1879, inclusive." The testimony of the witness was introduced for the purpose simply of showing that liens were given as therein stated, but no attempt was made to prove the contents of the liens. This comes within the principle laid down by the court in the case of *Lowry v. Pinson*, 2 Bailey, 328, as follows: "But where the writing relates to a collateral circumstance, and an inference favorable to the party arises out of the fact of its execution and existence, and not out of its particular contents, parol evidence is admissible. Of this the case of *Splers v. Willison*, 4 Cranch, 398, is an instance. There parol evidence of the existence of a deed of gift was admitted, to show the nature of the possession that accompanied the deed. The allegation of the plaintiff here is that Isaac J. Pinson conveyed the land in dispute to the defendant, for the purpose of defrauding her; and the object of the evidence that he about the same time made a voluntary bill of sale to the defendant and David Madden of all his negroes—the bulk of his remaining property—was to show the fraudulent intention by way of deduction, not from the particular provisions of the bill of sale, but from the fact of its execution without consideration. The evidence was

therefore properly admitted." This exception is overruled.

The fifth, sixth, seventh, and eighth exceptions complain of error on the part of the trial judge as follows: "(5) In ruling that the defendants could not introduce documentary evidence until after plaintiffs had closed their case in chief, and in excluding deed of settlement after proof of same by plaintiffs' witness Charles P. Sims on cross-examination. (6) In ruling that the defendants could not introduce documentary evidence until after the plaintiffs had closed their testimony in chief, and in excluding the mortgage deed of S. W. Sims to T. J. Jones after proof of same, by plaintiffs' witness Charles P. Sims, on cross-examination. (7) In refusing to allow the defendants to introduce documentary evidence after proof of same by plaintiffs' witness because plaintiffs had not closed their testimony in chief. (8) In refusing to permit the defendants to introduce in evidence four letters written by the witness Charles P. Sims after proof of same because plaintiffs had not closed their testimony in chief." The testimony mentioned in these exceptions was offered by the defendants when they came to their defense, and all admitted except the mortgage of S. W. Sims to T. J. Jones, mentioned in the sixth exception, which was refused on account of irrelevancy, and to which, it seems, no exception has been taken. The said mortgage is set out at length in the case, but the letters are not. The rule for the introduction of testimony is thus stated in the case of *Willoughby v. Railroad Co.*, 32 S. C. 427, 428, 11 S. E. 339, to wit: "The first exception imputes error to the circuit judge in refusing to allow the written agreement, which the plaintiff in her cross-examination admitted to be the contract under which she leased the rails, to be then read in evidence. It seems that, while the plaintiff was under cross-examination, the written agreement was shown to her, and she admitted 'her signature to the contract set up in the answer, and that it was the contract under which she leased the rails.' Now, if this contract had been verbal instead of written, we do not see how defendant's counsel could have been prevented from asking the plaintiff what were the terms of such contract; and it seems to us that asking the privilege of reading the terms which had been put down in writing was in effect the same thing as asking what were the terms of a parol contract which lay at the foundation of the whole controversy. But as we think this question was conclusively determined by the recent case of *Owens v. Gentry*, 30 S. C. 490, 9 S. E. 525, we need not discuss it further. There the sheriff was sued for certain property, which he had seized under a warrant to enforce an agricultural lien, and he justified his seizure, and asserted his right to the property under such warrant; and it was there held that the defendant had the right, in the cross-examination of one of plaintiffs'

witnesses, to prove the warrant, and put the same in evidence at that time, because, however it may be in the United States courts and in the courts of some of the other states, the rule here is that the defendant may, if he can, make out his whole defense in the cross-examination of plaintiff's witnesses. In the present case the defendant was sued for a trespass, and undertook to justify, or to rather deny, any trespass, because of a license contained in the very agreement under which plaintiff obtained the property about which the controversy arose. It is urged, however, that, the agreement being signed by other parties as well as by plaintiff, it could not properly be offered in evidence until the signature of such other parties had been proved; but it will be observed that the plaintiff not only admitted her signature to the paper, but also admitted that it contained the contract under which she asserted her right to the possession of the iron rails, and this dispensed with proof of the signatures of the other parties. Again, it is insisted that no substantial injury was done to the defendant by the refusal to allow the paper read at first, because afterwards, when the defendant came to offer its testimony, the paper was duly proved and offered in evidence. If the defendant had the legal right to have the paper read in the first instance, then it was error to deny such right, and we are bound so to declare it. But it might admit of grave doubt whether the defendant sustained no substantial injury by the refusal to allow the paper to be read in the first instance. It is very clear that the terms of the contract lay at the foundation of the whole controversy. Without it the plaintiff confessedly had no shadow of right to the possession of the rails; and it was specially set up in the answer as a justification for the alleged wrongful acts with which defendant was charged. Upon its construction, which was a matter for the court alone, might depend the question whether plaintiff had any cause of action; and it is not difficult to conceive how it may have been a very material matter to the defendant to have this written agreement before the court while the plaintiff was undertaking to make out her cause of action." It will be observed that the instruments of writing offered in evidence in the cases of *Willoughby v. Railroad Co.* and *Owens v. Gentry*, during the introduction of plaintiffs' testimony in chief were unquestionably material,—in fact, were the foundation upon which the defenses set up in the answer rested. The decisions in this state settle the law beyond controversy that harmless error committed by the presiding judge during the progress of the trial on circuit is not ground for reversal by this court. Where the rulings of the circuit judge are brought in review before this court, two things must appear: (1) That the ruling to which exception was taken is erroneous; (2) that the appellant has suffered prejudice by such erroneous ruling.

Under the cases of *Owens v. Gentry* and *Willoughby v. Railroad Co.*, supra, the presiding judge failed to follow the proper rule for the introduction of testimony on the cross-examination of plaintiffs' witness, and in so doing we hold that he committed error. We do not, however, see where the defendants have been prejudiced by such error. It was incumbent on the appellants to make this appear, but they have failed to do so. These exceptions are overruled.

The ninth, tenth, and eleventh exceptions complain of error on the part of the presiding judge as follows: "(9) In permitting the plaintiffs to introduce evidence that a compromise of the claim sued on was offered. (10) In permitting the plaintiffs to introduce evidence that a compromise of the claim was refused. (11) In permitting the witness Charles P. Sims to testify, before plaintiffs closed their case in chief, to a conversation between him and P. M. Cohen in relation to a compromise of this action." These exceptions cannot be sustained, for two reasons: (1) Because Mr. Cohen, with whom the witness had the conversation in regard to the alleged compromise, did not claim that he was authorized by Mr. Jones, the defendant, to act in the premises; on the contrary, stated that "what he did he did himself, as friend to both parties." Such being the case, nothing said by him in regard to the compromise could have been construed as an admission on the part of the defendant Jones, and was wholly immaterial. (2) Because the presiding judge ruled out what Mr. Cohen told and wrote the witness.

The twelfth, thirteenth, and fourteenth exceptions complain of error on the part of the presiding judge as follows: "(12) In admitting in evidence, in reply, the testimony of the witness W. D. Humphries of declarations of T. J. Jones to him. (13) In admitting in evidence, in reply, the testimony of the witness Jesse Nix of declarations of T. J. Jones to him. (14) In admitting in evidence, in reply, the receipt of J. C. P. Jeter to Ed. Cromer, dated December 22, 1887." In the case of *Talbott v. Padgett*, 30 S. C. 167, 8 S. E. 845, the rule as to what the exception should contain is stated as follows: "The object of exceptions is a very important one. It is to bring to the attention of the court the precise question of law or fact involved and desired to be reviewed. To do this effectually and definitely, something more must be stated than merely an occurrence or order or decree below, objected to as erroneous. The grounds of the alleged error must be presented in a direct and positive form, and especially, if it be a legal error complained of, the principle of law alleged to be violated must be stated." These exceptions fail to comply with this requirement. But, even if it be conceded that the object of the exceptions is to raise the question that the testimony mentioned was

not properly in reply, we do not think they can be sustained, as such testimony is largely in the discretion of the trial judge, and there is nothing showing an abuse of discretion in this case. In the case of *Brice v. Miller*, 35 S. C. 537, 15 S. E. 272, the court says: "The appellant objects also that some of the testimony was irrelevant, and not in reply. \* \* \* As to the objections based on irrelevancy, and not being in reply, it is sufficient to say that these are matters which must necessarily be largely left to the discretion of the judge before whom the case is tried." These exceptions are overruled.

It is the judgment of this court that the judgment of the court below be affirmed.

POPE, J. Having concurred generally, I shall content myself with one observation: If the defendant in the court below, having excepted to the ruling of the circuit judge whereby his right to have the contents of the written papers brought out while the plaintiffs' witnesses were being cross-examined by him, had stopped there as to such testimony, a new trial would have been inevitable. However, the defendant did not elect to stop there. On the contrary, he offered such contents in testimony afterwards. He thus made manifest what was before unknown, viz. that the contents of the papers were immaterial. It seems to me that Mr. Justice GARY has successfully differentiated the case at bar from the two previous cases, — *Owens v. Gentry*, 30 S. C. 490, 9 S. E. 525, and *Willoughby v. Railroad Co.*, 32 S. C. 410, 11 S. E. 389; and I agree with him that this was harmless error, under the circumstances of this case, and should not be allowed to cause a new trial. There should be an end of litigation the moment the ends of justice have been attained.

McIVER, O. J. (dissenting). While I concur with Mr. Justice GARY in the conclusions which he has reached on all the points except those specially mentioned herein, I am unable to agree with him as to such points, and will proceed to state briefly the grounds of my dissent.

The fifth, sixth, seventh, and eighth exceptions raised the question whether the circuit judge erred in refusing to permit defendants to offer in evidence, during the cross-examination of one of the plaintiffs' witnesses, certain documents, the execution of which had been proved by such witness, not upon the ground that such papers were either incompetent or irrelevant testimony, but solely on the ground that the defendants could not be permitted to offer such evidence at that stage of the trial, but must wait until the plaintiffs had closed their testimony in chief; for it appears in the case that the circuit judge was asked by one of the counsel for the plaintiffs whether he sustained the objection to certain of such testimony only on the ground that it was irrelevant, and that



he responded in these words: "I sustain it on the ground that the defendants cannot, at this stage, offer documentary evidence." And, again, the circuit judge used this language: "I rule that the defendant cannot offer documentary evidence until his time has come; that is, after the plaintiff has closed his case." It seems to me, therefore, that the circuit judge has expressed his ruling in no uncertain terms, and the clear-cut legal question presented for the consideration of this court is whether such ruling is erroneous. The case of *Willoughby v. Railroad Co.*, 32 S. C. 410, 11 S. E. 339, which does not seem to have been brought to the attention of the circuit judge, and in fact was not cited by counsel in the argument here, in my opinion, conclusively shows that such ruling was erroneous. So much of that case as relates to the question here under consideration is so fully set out in the opinion of Mr. Justice GARY as to supersede the necessity of repeating it here. The fact that the paper there offered in evidence during the cross-examination of one of plaintiffs' witnesses, and erroneously rejected, was very material to the defense set up by defendants, and in fact lay at the foundation of such defense, cannot, in my judgment, affect the principle upon which the ruling there made rested. If the documentary evidence rejected in the present case, only on the ground that it was offered at an improper time, was competent and relevant, then defendants had a legal right to have it received, and the denial of such legal right constitutes reversible error. As was said in *Willoughby's Case*: "If the defendant had the legal right to have the paper read in the first instance, then it was error to deny such right, and we are bound so to declare it." The fact that the rejected evidence, or, to speak more accurately, the most of it, was both competent and relevant, is shown by the fact that all of it, except the mortgage referred to in the sixth exception, was afterwards, when defendants came to offer their evidence, received. Neither do I think that this court is justified in saying that the error was harmless, for I do not find that the contents of all the documents rejected in the first instance are set out in the case. At all events, it seems to me unsafe to say that the exclusion of competent and relevant evidence at the time it was first offered could result in no harm to the party offering it if it should be afterwards received; for, as was said in the *Case of Willoughby*, above cited: "It is not difficult to conceive how it may have been a very material matter to the defendant" to have the documentary evidence in question before the court "while the plaintiff was undertaking to make out her cause of action." It seems to me, therefore, that the point made by the exceptions above referred to should be sustained.

Again, I think there was error in receiving any evidence in relation to an offer of com-

promise, for two reasons: (1) Because there was no evidence tending to show that Cohen, the person through whom the offer of compromise or rather from whom the inquiry came as to whether a compromise could be made, had the slightest authority from the defendants, or from any person authorized to speak for them, to make any such offer or any such inquiry, and, on the contrary, the testimony tended to show that he had no such authority. (2) Because, even if Cohen had such authority, it would be clearly incompetent to show that any offer or attempt was made by defendants to obtain a compromise. While it is true that the circuit judge did rule that it was not competent for the plaintiff to prove what passed between himself and Cohen in relation to the terms of the offer of compromise, yet at the same time the witness was permitted to testify that a compromise was proposed and rejected. Now, it seems to me that the injury to the defendants consisted in allowing proof that a compromise was proposed and rejected, and that the terms of such proposed compromise was a wholly immaterial matter. It is very easy to see that in a case of this kind, where the defense was that the note was a forgery, there was nothing better calculated to prejudice the case of the defendants in the minds of the jury than to show that defendants had made an unsuccessful attempt to compromise. I think, therefore, that it was error to receive any evidence in relation to any proposition of compromise, and hence exceptions 9, 10, and 11 should be sustained.

(115 N. C. 667)

BLACK v. ABERDEEN & W. E. R. CO.

(Supreme Court of North Carolina. Dec. 4, 1894.)

For majority opinion, see 20 S. E. 713.

AVERY, J. Concurring fully with the majority of the court in the judgment announced, I deem it best to state a little more explicitly the grounds upon which I rest my opinion. The right of way of railroads is by judgment of condemnation made subject to occupation whenever the corporation finds it necessary to use it in furtherance of the ends for which the company was created. In assessing the damages, it must be assumed that the estimate is not based upon the idea of the exclusive occupation and preception of the profits of the whole of the condemned land by the corporation, but upon the more reasonable view that only so much of the territory will be subjected to occupation and exclusive dominion as is necessary for tracks, ditches, and houses to be used for stations and section hands, while outside of this the owner of the servient tenement will be unmolested, except where entry is made for the purpose of removing something that endan-

gers the safety of passengers traveling on the railroad, or that may subject the company to liability for injury to adjacent lands or property. This is the principle to which this court has given its sanction in *Ward v. Railroad Co.*, 113 N. C. 566, 18 S. E. 211, in the same case, 109 N. C. 358, 13 S. E. 926, and in *Hinkle v. Railroad Co.*, 109 N. C. 472, 13 S. E. 884.

(40 W. Va. 129)

**CANN v. CANN et al.**

(Supreme Court of Appeals of West Virginia.  
Dec. 19, 1894.)

**ADMINISTRATOR — PROOF OF PERSONAL CLAIM —  
ACTION ON DUEBILL—LIMITATIONS—  
SERVICES OF SON.**

1. An administrator who presents a personal demand against his decedent's estate must show that such demand is just and valid, and not barred by the statute of limitations. The statute of limitations does not begin to run until the right of action accrues.

2. An action or suit cannot be maintained on an undelivered writing or duebill found among the supposed debtor's papers after his death.

3. Such writing, so found, is not a sufficient acknowledgment to prevent the bar of the statute of limitations, but may, if genuine, be admissible as evidence to establish a quantum meruit.

4. Where a son, who is also the administrator of his father's estate, sues such estate for wages claimed for services rendered before his father's death, he cannot recover unless he proves an express contract, or the facts and circumstances sustained by a preponderance of testimony clearly establish an expectation or intention on the part of his father to compensate him for such services.

(Syllabus by the Court.)

Appeal from circuit court, Berkeley county:

Bill by Harrison Cann against Susan Cann and others. From a decree sustaining an exception by defendants to a report by a commissioner in favor of plaintiff, and giving plaintiff leave to amend, plaintiff appeals. Reversed.

Faulkner & Walker, W. H. Travers, and C. H. Syme, for appellant. D. B. Lucas, for appellees.

DENT, J. At March rules, 1883, in the clerk's office of Morgan county, Harrison Cann filed his bill in chancery against the heirs of his father's estate to enforce payment of his claim for services rendered as evidenced by a certain duebill bearing date the 28th day of April, 1880, calling for \$3,000 for services rendered by the plaintiff "since he became twenty-one years of age." The plaintiff made himself a party defendant to this bill as administrator of decedent. The only appearance for the defendants is the answer of the infants Silas Largent and Elizabeth Largent, by their guardian ad litem, T. N. B. Davis; an answer filed by George W. Ziller, husband of one of the heirs, and an exception indorsed on the commissioners' report by the defendants Catherine Ziller, Susan E. Ambrose, and Sarah Cann. The bill is not taken for con-

fessed as to any of the defendants, but on service of summons an order of reference is entered to ascertain the debts and their priorities against the estate of Jacob Cann, deceased, and the estate liable to the payment of the same. From the commissioner's report it appears that the personal estate was amply sufficient to pay all the debts against the decedent, with the exception of plaintiff's claim, and that that is the only matter of controversy in the suit, without which no suit would have been necessary.

According to the law and the decision of this court in the case of *Rader v. Neal*, 13 W. Va. 373, in this suit concerning his wife's separate estate, George W. Ziller was not a necessary party thereto, and therefore the answer filed by him cannot be regarded, as he is too remotely interested in the subject-matter to contest plaintiff's claim in his own right.

The adult defendants who are proper parties to the suit did not think it worth while to contest the allegations of the bill, but contented themselves with indorsing the following exceptions on the commissioner's report: "The within report is excepted to by Catherine Ziller, Susan E. Ambrose, and Sarah Cann so far as it allows Harrison Cann a claim against the estate, amounting, principal and interest, to \$4,924.50, all of which should be rejected as improperly allowed." The report being in accord with the allegations of the bill, to which these defendants made no appearance, but allowed it to go uncontested so far as they were concerned, this exception should have been disregarded by the court, or promptly overruled, as by their silence in not pleading they have admitted the justice of the claim. As to them, neither the report of the commissioner nor any proofs are necessary to support a decree justified by their confession. It is not so with the infant defendants, who are under the protection of the court, and whose interests must be regarded and preserved by it. The plaintiff has placed himself in an anomalous, though not inequitable position by making himself, not only as the administrator of Jacob Cann, deceased, but also as the administrator of Elizabeth Largent, deceased, defendant to his own bill. If the claim on which he sues is just beyond controversy, there could be nothing wrong in so doing, as equity readily recognizes and distinguishes between personal and representative rights, and can shape its decrees accordingly. But where the obligation of defense rests upon him in his representative capacity, equity will not permit him to make himself, in such capacity, a defendant to his own personal bill, and then treat such bill as taken for confessed as to his decedent's estate, but will require him to establish the debt claimed by him against such estate as fully and completely as though all defense that could possibly be made to such debt were properly interposed to its allowance. If this were not true, and he, by this means, secured the allowance of

an illegal debt against the estate of his decedent, he would become personally liable for its payment, and so he has gained nothing by his suit. In section 5, c. 87, of the Code it is provided that, "if any personal representative, guardian, curator or committee shall pay any debt, the recovery of which could be prevented by reason of illegality of consideration or lapse of time, or by any other fact within his knowledge, no credit shall be given him therefor." This law applies equally as well where an individual claim of the fiduciaries is presented for allowance as where a debt has been paid by him, and the duty devolves upon the court and commissioner before whom his accounts are presented to prevent the auditing against the estate of any illegal claim; wherefore it becomes incumbent on the court in this case to say whether the claim presented by the plaintiff in his personal character has been shown to be a proper charge against the estate of the decedent. The bill charges that the decedent, in pursuance of a contract made with the plaintiff to pay him a reasonable compensation for his services as a common laborer on his father's lands (decedent) since he became 21 years of age, executed to the plaintiff his note or duebill on the 28th day of April, 1880, for \$3,000. The evidence of plaintiff shows that some time after his father's death he found this duebill written in his father's account book. It is also shown that it was in the father's handwriting. If this duebill had been delivered by the deceased to plaintiff, his right to recover would have been beyond question. It not only was not delivered, but plaintiff had no notice of its existence until it came to his hands as the administrator of decedent's estate. Not being delivered, it had no binding force. *Curtis v. Gorman*, 19 Ill. 141; *Thomas v. Watkins*, 16 Wis. 549; *Prather v. Zulauf*, 38 Ind. 155. To allow it to be used as an admission or acknowledgment of an indebtedness would, in effect, make it a valid legal instrument, and hence the law requiring delivery would be thwarted. Nor can it be treated as such an acknowledgment in writing as will avoid the statute of limitations. In 13 Am. & Eng. Enc. Law, p. 760, the law is stated as follows, to wit: "To make the acknowledgment complete, it must, however, be communicated to some one; and consequently a paper which was never delivered, but was found among the debtor's papers after his death, cannot operate as an acknowledgment." Also: "A mere writing acknowledging a debt, which is retained by the person making it, and which is never delivered, either to the creditor or any one else, cannot have the effect of preventing the operation of the statute." *Pershing v. Canfield*, 70 Mo. 140; *Merriam v. Leonard*, 6 Cush. 151. For the purposes of this suit under the law as we find it the duebill relied on is worthless unless it can be treated as an admission of indebtedness on the part of the decedent. In *Chamberlayne's Best*, Ev. 486, it is said that a written admission, void as an ob-

ligation, is admissible as evidence, although the maker is deceased, and such admission be in the form of a book entry. This appears to be consonant with reason and justice if the admission as alleged is shown to be genuine and indisputable; but where its genuineness is attacked, and it is not sustained by a clear preponderance of legal testimony, its weight as evidence is destroyed, and it should be received with the greatest caution, if at all. The commissioner to whom the matter was referred finds in favor of the genuineness of the paper, but the court, on an examination of the evidence, overrules and disaffirms the report. Hence it devolves upon this court to determine for itself from the facts and circumstances disclosed by the record whether it will sustain the conclusion of the commissioner or that of the circuit court. *Roots v. Kilbreth*, 32 W. Va. 585, 9 S. E. 927.

Examining the evidence, we find that the following nine witnesses introduced by the plaintiff, to wit, Lewis Allen, George Blakeley, J. H. Buzzard, William P. Smith, H. Clay Spohr, Edmund Pendleton, Franklin Farris, Albeto Mendenhall and J. S. Duckwall (an attorney for plaintiff), testify more or less strongly that they are acquainted with the handwriting of Jacob Cann, deceased, and that they believe the signature to the controverted paper to be his. Another witness for the plaintiff,—John W. Bechtol,—who was well acquainted with decedent's signature when written with a pen, testifies that he is unable to say that the signature in controversy written with a pencil is his genuine signature. On the other hand, the following seven witnesses, to wit, William J. Fleece, Andrew J. Davis, John J. Hertz, Jefferson Vanersdoll, John Frederick, William Z. Catlett, and Joshua Ziler, testify just as strongly, and some of them even more emphatically, that the controverted signature is not the genuine signature of the decedent, and some of them give good reasons for the belief that is in them. The latter are sustained by many of the circumstances surrounding the transaction. The plaintiff himself states that, although he was looking carefully through his father's papers and books for something of the kind, he did not discover this duebill until he had looked through this little account book three times, and not until some time after his father's death; and he never made the discovery known to his mother or sisters until after he had failed to get the latter to deed him the home farm, even though he promised them to will it to their children; and they testify that they did not know it until after this suit was brought, nearly two years after the death of their father, and then their first information did not come from their brother, although he had ample opportunity to inform them. On the contrary, he did inform one of his sisters, about six months after the death of his father, that he had examined his books and papers carefully, and could find nothing in

his own favor except a credit for one hog. His concealment of this matter from his sisters, and making no claim for compensation to them for his services, until after this suit was instituted, is certainly a very strong circumstance against plaintiff's claim. In addition, Isalah J. Smith, a witness for plaintiff, states that in the December before Jacob Cann's death, which happened in August, decedent told him "he always intended Harrison should have the home place." This was almost eight months after the date of the controverted paper. Silas J. Largent testifies that some four or five months before his death Jacob Cann told him he expected to leave Harrison Cann the home place and what was on it,—almost one year after the date of the paper. John Turner testifies that Jacob Cann told him the same thing, but his date is indefinite. All these witnesses approached Jacob Cann at the instance of Harrison, and the latter tried to get him to sign a paper to the effect that he would give Harrison the home farm, but he declined to do so, saying, "I will give him something to show for his work after a while." H. Clay Spohr's evidence is to the same effect. These witnesses certainly prove that there was a persistent effort on the part of Harrison Cann to get his father to deed him the home farm, even up until his death, which the decedent just as persistently declined to do. But there was no intimation at any time to any of these witnesses that said paper writing was in existence. The consideration for any such paper is left by the evidence in very great doubt, especially when the incompetent testimony is expunged from the record. In the case of *Riley v. Riley*, 38 W. Va. 290, 18 S. E. 569, Judge Holt, quoting from 17 Am. & Eng. Enc. Law, 336, states the law governing cases of this character as follows, to wit: "But where it is shown that the person rendering the service is a member of the family of the person served and receiving support therein either as parent, child, or other near relative, a presumption of law arises that such services were gratuitous. \* \* \* Therefore, before the person rendering the service can recover, the express promise of the party served must be shown, or such facts and circumstances as will authorize the jury to find the services were rendered in the expectation by one of receiving and by the other of making compensation." There is no express contract proven in this case. And the facts and circumstances show that Harrison Cann lived along with his father, by his own admissions, working and farming for himself, receiving his board and clothes, and doing very much as he pleased; that he never pretended to make any charge or keep any account of his services, but that he was continuously importuning his father to give him the home place, which his father at times stated it was his intention to do. John W. Nolan, a witness for the defendants, states

"that about a year before the death of Jacob Cann he had a conversation with Harrison Cann, in which he asked him how he was getting along with his work, and he said, 'Not very well; he was doing for the old man; that the old man was not doing much for him.' I made mention to Harrison that I would talk to the old man for him. He said he didn't think it would do any good, but I could do as I pleased about that." Afterwards, he says, he fell in with Jacob Cann, and says: "I asked him if he oughtn't to do something for Tip, and he told me he had done more for Tip than any of the balance of the children. Well, he said Tip had stock on the place. He said he knewed what Tip wanted. If he would deed him the home place, he would be satisfied; and that he never would do while his head was above the top of the ground. He said Tip wanted all from the other heirs; poor John, he said, especially." Tip was Harrison's nickname. William J. Fleece testifies that about the month of March, 1880, the plaintiff stated to him that he was getting up in years, and that he had worked a long time, and had no guaranty for it, and requested him to see his father, and ascertain whether he would leave him the farm before he left the world, or make some arrangement to compensate or pay him for his work. Harrison Cann made this request twice, and then the witness says: "I went there, and found Mr. Cann there alone entirely. After talking over other things, I told him what I came there for; that Harrison Cann, his son, requested me to come to see him, to know from him what he would leave or give Harrison, his son, if he would go to work on the farm, attend to his father's things, and have whatever he agreed to give him put in writing. He (Jacob Cann) said he would not agree to give him anything, and have it put down in writing, but he might come there, and go to work on the farm, as he had done. He would board him. He might have all he made on the farm except one field. That Harrison Cann had never done as much for him as his daughter Kate had. That he had paid money for Harrison, bought him clothes, and that Harrison had been working the most of the time for himself. Other things were said by him. His exact words I do not remember, but he left me under the impression that his son John was a better boy to him than his son Harrison." The witness further testified that he reported to Harrison his father's reply. This is the testimony of two uncontradicted witnesses, acting in the capacity of agents for the plaintiff. And they certainly show that Jacob Cann had no expectation of making compensation to Harrison for his services, and this fact was communicated to him; and if he had any right of suit at that time he should then have brought it in his father's lifetime. James D. McCool testifies that in the month of February before his death he met with Jacob Cann, when "he

commenced talking about his family and children. He said that he never intended to make a will, for, said he, 'Tip, my son, is so damned contrary. He will work for a while,' he said, 'then lounge about, and I have to keep him and his stock, and I consider him a bill of expense to me; while my girls are at home, working for the family, all the time, and I just think the laws of my state can make a better will than I can.' This statement is not properly admissible testimony, except as a mere circumstance, in a case of this kind, involving so many grave doubts.

Taking the evidence as a whole, it is certainly a matter of impossibility to pronounce the controverted writing to be a genuine paper; but, the court being of the opinion that neither the circuit court nor the commissioner has yet passed upon the plaintiff's claim for compensation independent of such writing, and that there is evidence tending to show his right to maintain his suit on a quantum meruit for such compensation, and that the allegations of the bill are sufficient therefore, the decree in this case is reversed, and the same is remanded to the circuit court, with directions to recommit the same to a commissioner thereof, for the purpose of ascertaining, if any, what amount is legally due the said plaintiff from his father's estate for services rendered from the time he became of age until the death of his father, and that said case be further heard and determined according to the rules of law and equity.

HOLT, J. (concurring). The following state of facts is disclosed by this record as alleged in the pleadings proved by the testimony and found by the commissioner: The plaintiff, Harrison Cann, was born on the 15th day of October, 1840, and became 21 on the 15th day of October, 1861. From that period up to the death of his father, on the 5th day of August, 1881,—a period of 20 years,—he lived with and worked for his father at his home, and unmarried, on the promise and assurance made to him by his father, who was the owner of 24 different tracts of land, that he would leave him by will the home place of about 321 8-4 acres, and worth three or four thousand dollars. In 1879-80 plaintiff became dissatisfied about the uncertainty of getting the farm or any other compensation for his labor, and got several of his friends to talk to his father on the subject. The father told these intermediaries that plaintiff would be standing in his own light if he left home; that, if he remained at home, and took care of them, he always intended he should have the home place; that he intended to compensate him. Thus induced, the plaintiff remained with his father and mother down to their death. At the death of the father was found his book of accounts, containing 87 pages of items of debit and credit entered for and against some 25 or 30 different persons, and among them were

two items of charge against plaintiff, Harrison Cann, of three hogs, at two separate times, and the following entry in the handwriting of Jacob Cann: "1880, April 28. Due Harrison Cann, three thousand dollars, for services since twenty-one years of age. [Signed] Jacob Cann,"—all in pencil. Jacob Cann died intestate on the 5th day of August, 1881, leaving his widow, Susan Cann, and five children: (1) Plaintiff, Harrison Cann; (2) John, who died intestate and unmarried since his father; (3) Catherine Ziller, wife of George W. Ziller; (4) Elizabeth Largent, wife of Silas J. Largent; (5) Emma Ambrose, wife of Jesse H. Ambrose. He left some personal property—about enough to pay all just claims except that of plaintiff—and 2,857 3-4 acres of land in 24 separate tracts. Plaintiff qualified as administrator on the 31st day of August, 1881, and found in the drawer of decedent the above account book. He tried to get his sisters to convey him the home place, but they failed and refused to go on with it after three of them had signed the deed. On the first Monday in March, 1883, he brought a creditor's bill against the heirs and administrator. In the bill is contained a specification of his claim against the estate as follows: "The plaintiff further says that from the time he became 21 years of age, which was on the 15th day of October, 1861, up to and until his father's death, a period of twenty years, in pursuance of a contract between his father and himself, he remained with his father, and worked for him as a common laborer on his father's lands, his father promising to pay him a reasonable compensation therefor. And accordingly, in pursuance of the contract and understanding aforesaid between his father and himself, his father, on the 28th day of April, 1880, executed to the plaintiff his note or duebill for three thousand dollars, 'for services rendered him by the plaintiff since he became twenty-one years of age.'" The four heirs, sisters of plaintiff, seem to have recognized to some extent the justice of plaintiff's claim, and in performance of what the father was supposed to have promised to do went so far as to sign a deed conveying the home place to plaintiff, their brother, but for some reason refused to go on and complete it. No one answered the bill except George W. Ziller, the son-in-law, who had no interest, and he pleads the statute of limitations; but Mrs. S. Largent died during the suit, and her children—both infants—answered in 1890 (April 7th), by their guardian ad litem. On the 4th day of April, 1883, an order of reference was entered, referring the cause to Commissioner J. R. Smith to report the claims, hear proof, etc. The commissioner took and returned the testimony of 31 witnesses, filing his report on the 8th day of December, 1890. He finds and reports the duebill of \$3,000 to be a valid claim against the estate of the said Jacob Cann, deceased, and that plaintiff is entitled to receive the same, with in-

terest from the 28th day of April, 1880. But he further reports that "Jacob Cann was satisfied with the consideration for said duebill when he executed the same, by naming the consideration therein, which consideration is strongly supported and established as valuable by the evidence herewith returned;" and the testimony of 8 or 10 witnesses, who knew his services rendered, put the value thereof at at least \$150 per year for the 20 years. The report is excepted to by the two daughters and the widow. On the 27th day of November, 1891, the cause came on to be heard, and the court, being of opinion that the claim reported in favor of plaintiff was not sustained by the evidence, sustained the exception, disallowed the claim, confirmed the report in other respects, and gave plaintiff leave to file an amended bill. What amendment the court deemed necessary does not appear, but I infer it related to the duebill. This appeal was allowed plaintiff. I propose to consider the case first on the theory that the entry found in decedent's book of accounts is not only ineffectual as a testamentary paper, but is wholly nugatory for any purpose.

(1) As to the pleading. Plaintiff's claim for a quantum meruit against the estate is presented and set forth in his bill explicitly, specifically, and with all the definiteness of detail of individual characteristics that the claim is capable of.

(2) Plaintiff has presented it in a court of equity, the proper forum, for he asks to have real assets descended, administered, and applied in satisfaction of his claim. See Code (Ed. 1891) c. 86, p. 686, §§ 3, 4.

(3) What is the nature and binding force of his claim, if made out by the proof? That there was an express agreement between his father (the decedent) and himself, that the father would devise him the "home place," or otherwise make him a reasonable compensation for his services, if plaintiff would work for decedent on his lands, and take care of him for life; that he performed his part of the contract, but his father left his part unperformed, unless the duebill found entered on his book of accounts shall be held to be an execution of the contract on the part of the father; if not, he claims compensation for what his services shall be shown to be reasonably worth.

(4) What is the evidence of his claim? By the testimony of at least 10 witnesses his claim is proved and established, and that in performing his part of the argument he spent 20 years of the best part of his life,—that is to say, from 21 to 41,—and that the deceased accepted these services knowing that plaintiff was relying upon his promise to compensate him in some testamentary way.

(5) On this mass of testimony he had in his favor in the circuit court a quasi verdict in the finding and report of a patient, careful, intelligent commissioner, who knew and saw the witnesses face to face, and calls them

"intelligent and unbiased." This, in my view, for the practical administration of justice, establishes the agreement and the performing of it on plaintiff's part, for such finding of fact by the commissioner of what he was directed to ascertain and report has in general great weight. Here it bears the marks of deserving what the law accords, and the claim itself bears internal marks of being deserving, and of legal obligation. I do not think that the action of the circuit court has, for the purposes of this court, done away with the findings of the commissioner, and set the matter wholly at large. That would be unreasonable. It still stands upon its own merits, whatever they may be, as the ascertainment of a fact depending on conflicting evidence, without anything to prevent this court going into the evidence to ascertain for itself the facts and drawing its own conclusions; but there is no presumption against his report merely by reason of the action of the court below. See *Roots v. Kilbreth*, 32 W. Va. 585, 9 S. E. 927. Cannot the action of the circuit court in disregarding or overruling such ascertainment of a fact by the commissioner be appealed from and reviewed in that court, where the rule is constantly laid down? See *Oteri v. Scalzo*, 145 U. S. 578, 12 Sup. Ct. 885; *Kimberly v. Arma*, 129 U. S. 512, 9 Sup. Ct. 355; *Crawford v. Neal*, 144 U. S. 585, 12 Sup. Ct. 759; *Medsker v. Bonebrake*, 108 U. S. 66, 2 Sup. Ct. 351; *Tilghman v. Proctor*, 125 U. S. 133, 8 Sup. Ct. 894; *Callaghan v. Myers*, 128 U. S. 617, 9 Sup. Ct. 177; *Camden v. Stuart*, 144 U. S. 104, 12 Sup. Ct. 585; *Cook v. Railroad Co.* (N. Y. App.) 39 N. E. 2.

First. Silas J. Largent, a brother-in-law, and one of the defendants, says: That four or five months before his death Jacob Cann told him that if his son Harrison continued to live with him, and to do as he had done, he intended to leave him the home place, and what was on it. This was said while plaintiff was dissatisfied because his father did not give him something to show for his promise. That plaintiff did continue to live with his father thereafter until the latter's death.

Second. John Turner. He knew the family of decedent during the 14 or 15 years before his death. Plaintiff did most of the work; managed the farm. His services were worth \$200 per year. Some four years before he testified, decedent, while on the home place, told him that Tip (a nickname of plaintiff) was a good fellow, and when he was gone he intended to leave him the home place, and all that was on it; that all the others had left him. Afterwards there was some misunderstanding about it, and at the instance of plaintiff he saw decedent about it, to fix it up. He told decedent that plaintiff wanted him to give him something to show for the place or his work. He replied, "I will give Tip something to show for his work after a while." This was communicated by witness to plaintiff.

Third. George Dunn. Plaintiff worked on the farm steadily, fixed up the dwelling house, stables, blacksmith shop, granary, wagon shed, the fences, and put the farm in good order generally. He was a good hand, worked steady, etc. Was worth, managing, working, etc., \$200 per year. This, witness, who worked on the place, knew during a period of 10 or 12 years.

Fourth. H. Clay Spohr. Had known the parties all his life. Forty-three years of age. Been there very frequently. Decedent married his half-sister. Had conversation about the matter; the last time in 1880-81. Decedent told witness Harrison (the plaintiff) was the only one that was of any service to him, and he intended to reward him for it. He intended to give him the home place, and farming implements. He said (the last time witness talked to him about it) that some one was trying to persuade plaintiff away from him, "but if he stays I will reward him well for it." At another time he said he would give him the home farm if he stayed.

Fifth. Jesse Ambrose is a defendant and brother-in-law. Had known plaintiff as living with decedent for more than 16 years, farming for his father; blacksmithing, wagon making, any kind of work about the farm; putting in crops, gathering, threshing, and saving it. He worked at carpentering,—put up buildings on the farm. Farm contains about 300 acres.

Sixth. Isalah J. Smith. Had been there frequently from a day to a week at a time. Had known decedent 44 years, plaintiff 25 years. Plaintiff was of good habits, sober and industrious. Did all kinds of work. Was worth \$300 per year. In December before decedent's death (August 5, 1881) plaintiff complained to him that he had worked a number of years without ever having received any compensation, and that he would leave home if he did not get some satisfaction for the services he had rendered; and at plaintiff's instance he spoke to decedent on the subject. Decedent answered that plaintiff stood in his own light if he left home; that if he remained at home, and cared for them, he always intended he should have the home place; and plaintiff was persuaded, and remained till his father's death. He always found plaintiff at the head of the labor force and management of the farm. He was engaged in all kinds of farm labor, and did blacksmithing, etc., besides.

Seventh. Adam Spring. Plaintiff, during the latter part of Jacob Cann's life, took charge of his affairs, putting out and gathering crops, and attending generally to the labor on the farm. Was worth about \$150 per year.

Eighth. Susan Cann, the mother. Plaintiff was born in 1840. Has never married, but has resided at home, doing all kinds of work; putting in and gathering the crops; a good deal of work of all kinds; made fence, built stable, corn house, granary, made

plows, harrows, wagons. He was an industrious, sober boy. He has spent all his best years on the place,—twenty-odd years since he has been his own man.

Plaintiff's own testimony and a part of his mother's are not given because incompetent. It was disregarded by the commissioner. This has been enough to convince me that the father, a man of property, owning 24 tracts of land, held out to the only child remaining with him to the last the inducement of testamentary compensation. On it the son acted, and steadily, soberly, efficiently gave to his father's service the first 20 years of his manhood, reaching from 21 well on up into middle life. The father's promise miscarried. That he is entitled to a quantum meruit compensation. I put in evidence this long list of cases. Many of them show not only the general doctrine of legal obligation, but, what is most to my purpose, illustrate the mode, the means, and the force of what has been regarded as safe, satisfying proof in such cases: *Grant v. Grant* (1893) 63 Conn. 530, 38 Am. St. Rep. 379, note 393; *Wainright v. Talcott*, 60 Conn. 43, 22 Atl. 484; *Reynolds v. Robinson* (1876) 64 N. Y. 589; *Eaton v. Benton*, 2 Hill. 576; *Williams v. Hutchinson* (1850) 3 N. Y. 312, 53 Am. Dec. 301, 306, note; *Parsell v. Stryker*, 41 N. Y. 480; *Newell v. Keith*, 11 Vt. 214; *Johnson v. Hubbell* (1855) 10 N. J. Eq. 332, 66 Am. Dec. 773, 784, note; *Hawkins v. Ball* (1857) 18 B. Mon. 816, 68 Am. Dec. 755, 758, note; *Carmichael v. Carmichael* (1888) 72 Mich. 76, 40 N. W. 173, and 16 Am. St. Rep. 528, 534, note; *Snyder v. Castor*, 4 Yeates, 353, 858; *Gary v. James*, 4 Desaus. Eq. 185; *Walker's Estate*, 3 Rawle, 243; *Miller v. Lash*, 85 N. C. 51; *Shakespeare v. Markham*, 10 Hun, 322, 72 N. Y. 406; *Raynor v. Robinson* (1862) 36 Barb. 128, 131, 28 N. Y. 494; *Quackenbush v. Ehle*, 6 Barb. 472; *Campbell v. Campbell*, 65 Barb. 644; *Martin v. Wright* (1835) 13 Wend. 460, 28 Am. Dec. 468, 471, note; *Wright v. Tinsley* (1860) 30 Mo. 389; *Gupton v. Gupton* (1870) 47 Mo. 37; *Sutton v. Hayden* (1876) 62 Mo. 101; *Teats v. Flanders* (1893) 118 Mo. 660, 24 S. W. 126; *Newton v. Newton* (1891) 46 Minn. 33, 48 N. W. 450; *Schutt v. Society* (1886) 41 N. J. Eq. 115, 3 Atl. 898; *Stone v. Todd* (1887) 49 N. J. Law, 275, 8 Atl. 300; *Whetstone v. Wilson* (1889) 104 N. C. 385, 10 S. E. 471; *Huguley v. Lanier*, 86 Ga. 636, 12 S. E. 922, and 22 Am. St. Rep. 487, note; *Hudson v. Hudson*, 87 Ga. 678, 13 S. E. 583; *Wallace v. Long*, 105 Ind. 522, 5 N. E. 666; *Day v. Wilson*, 83 Ind. 463; *Ham v. Goodrich*, 37 N. H. 185; *Emery v. Smith*, 46 N. H. 151; *Leslie v. Smith*, 32 Mich. 64; *Sutton v. Rowley*, 44 Mich. 112, 6 N. W. 216; *Welch v. Lawson*, 32 Miss. 170; *Bender v. Bender*, 37 Pa. St. 419; *Clark v. Davidson*, 53 Wis. 317, 10 N. W. 384; *Howard v. Brower*, 37 Ohio St. 402; *Ellis v. Cary*, 74 Wis. 176, 42 N. W. 352; *Manning v. Pippen*, 86 Ala. 357, 5 South. 572, and 11

Am. St. Rep. 46, note; *Wellington v. Apthorp*, 145 Mass. 69, 72, 13 N. E. 10; *Taylor v. Wood*, 4 Lea, 504; *Frost v. Tarr*, 53 Ind. 390. By these authorities I show that, where there is an express agreement between a father and a son that the father will devise the home place to the son, or in some testamentary way compensate him for his services, if the son will attend to and take care of him for life, and the son performs his part of the agreement, he is entitled to recover upon a quantum meruit for his services if the father's part of the contract is unperformed. See *Grant v. Grant* (Conn.) 29 Atl. 15, 38 Am. St. Rep. 393, note; *Hudson v. Hudson*, 87 Ga. 678, 13 S. E. 583,—that it is a valid contract, though not in writing, not forbidden by the statute of frauds, and not barred by the statute of limitations, until the prescribed period has run since the death of the promisor before the bringing of the suit. *Raynor v. Robinson* was a case much like this in its facts; was discussed and decided in the surrogate's court, in the supreme court (1862; 36 Barb. 128), and finally in the court of appeals (28 N. Y. 494), the latter holding that where services are rendered by one person to another in pursuance of a mutual understanding and agreement between the parties that compensation shall be made for them by will, and the party receiving the services dies without making the expected compensation, the party rendering the services is entitled to compensation out of the estate of the deceased as a creditor for the value of the services. *Robinson v. Raynor* (1864) 24 N. Y. 494; *Bish. Cont. § 224*; 2 Chit. Cont. (11th Am. Ed.) p. 798, note g; 2 Whart. Cont. § 719; *Lawson, Cont. § 38*; *Stewart v. Small* (Ind. App.; 1894) 38 N. E. 826.

(6) But there may be danger of abuse. In many cases there is peculiar danger of abuse, requiring, therefore, peculiar guards against it; requiring the court to be on its guard not to let things done under the impulse of affection in discharge of a moral duty usurp the place of a legal duty discharged, and thereby create a legal right. See *Houck v. Houck* (1882) 99 Pa. St. 552, and many cases of like kind. See 2 Pars. Cont. (8th Ed.) pp. 50, 51, notes, and cases cited. It may in some cases have been held to create a quasi obligation to compensate, raised by law out of the special circumstances of particular cases, but by the great weight of authority has not reached that point. The law requires, under such circumstances, the sanction of an agreement to compensate, express or by inference fairly and clearly arising out of what is said and done by both parties, that if the one shall work and care for his aged parent so long as he shall live, he, the father, will compensate the son in some testamentary way, and in pursuance thereof the son performs his part of the agreement, which the father adopts and enjoys as long as he lives, but neglects to do

his part, or his testamentary paper attempted in execution thereof miscarries, or from any cause proves ineffectual, then the son's right to action against the estate accrues, and the only question is, what does he deserve to have as the value of the services thus rendered? On what possible ground can the superadded moral element on his part, or the abortive testamentary paper on the father's part, destroy or impair his legal right to a quantum meruit compensation?

(7) But is it not obnoxious to clause 7 of section 1 of chapter 98 of the Code, which forbids the bringing of an action on an oral agreement that is not to be performed within a year? The answer is, "No, because complete performance on the part of plaintiff within the year, as by the death of his father, is not impossible within the terms of the agreement." And this answer was given in *Peter v. Compton* (1694) and has been adhered to ever since. See *Peter v. Compton*, 1 Smith, Lead. Cas. (9th Am. from 9th Eng. Ed.) 586, 591; *Bish. Cont. § 1284*; *Kent v. Kent* (1875) 62 N. Y. 560; *Wellington v. Apthorp* (1887) 145 Mass. 69, 72, 13 N. E. 10; *Larimer v. Kelley*, 10 Kan. 298; *Jilson v. Gilbert*, 26 Wis. 637.

(8) It is not barred by the statute of limitations, for the statute does not commence to run until the right of action accrues, and such right did not accrue until after the promisor's death, for that was the time fixed; and plaintiff continued the performance of his part of the agreement up to the happening of that event. He then brought suit within two years,—five years being the bar. *Kent v. Kent*, cited above; *Reynolds v. Robinson* (1876) 64 N. Y. 589; *Patterson v. Patterson*, 13 Johns. 879; *Price v. Price* (1840) 1 Cheves, Eq. 167; *Stone v. Todd* (1887) 49 N. J. Law, 275, 8 Atl. 300. Where the promisee serves until the death of the promisor, this question presents no difficulty. It only arises where the promisor breaks or repudiates his contract before death and dismisses the promisee. See *Johnson v. Hubbell*, 10 N. J. Eq. 332, 26 Am. Dec. 773, 785, note. See case of *Jincey v. Winfield*, 9 Grat. 708, 718. In this case the bar of the statute was applied to part of his claim, because he stopped rendering his services and sued the testatrix in her lifetime, on the ground that she had disabled herself from making the will promised. It is an authority on the main point. On a promise to pay for a thing by bequest it begins to run from the death of the person promising. *Bish. Cont. § 1354*; *Egan v. Kergill*, 1 Dem. Sur. 464; *Schouler, Wills* (2d Ed.) § 453; *Schouler, Dom. Rel.* (3d Ed.) § 274. See 2 Pars. Cont. (8th Ed.) pp. 50, 51, notes, and cases cited. The statute does not begin to run until the cause of action accrues, and this is the provision in all our statutes. The creditor must first have a perfect right to prosecute his demand according to the civil law. *Evans' Poth. 404*; 1 Wood, Lim. (2d Ed.) p. 324, § 119, notes. See *Tuckey v.*



Hawkins, 4 C. B. 655; Sanders v. Coward, 15 Mees. & W. 56. So, where a contract for services provides that payment shall be made by provision in the employer's will, a right of action does not accrue until after the employer's death, because up to that period there has been no breach. Nimmo v. Walker, 14 La. Ann. 581. So I have found it laid down in all the cases and books which I have been able to consult that touch upon the subject, and see no reason why this should be an exception to the general rule.

Again, is this duebill a testamentary paper? It is proven to be wholly in the handwriting of the deceased, Jacob Cann; the body of the instrument as well as the signature. And, taken in connection with what he declared he intended to do by way of compensating plaintiff for his services, and the fact that it was never delivered, it would seem that he intended it to take effect after his death. The law is well settled that the form is immaterial, or the fact that it is also an obligation made on valuable consideration, if it was intended to take effect after death; it may be regarded as testamentary for purposes of probate. *Ex parte Day* (1851) 1 Bradf. Sur. 476, 482; *Pollock v. Glasell* (1846) 2 Grat. 439, 455. No matter what the form given or intended, provided it be the intention of the deceased that it should operate after his death. *Roberts v. Coleman*, 37 W. Va. 143, 151, 16 S. E. 482. Whether the maker would have called this a testamentary paper or not is one question. Whether it shall operate as such is a distinct question, that is to be determined by the provisions of the instrument. It depends upon its contents, not upon any declaration of the maker. *Habergham v. Vincent*, 2 Ves. Jr. 231; *Patterson v. English*, 71 Pa. St. 454; *Schouler, Wills*, § 272. To determine this, the instrument must be read by the light of all the surrounding circumstances, and, where the instrument itself is silent or equivocal, collateral evidence is admitted in order to show whether or not a testamentary disposition was actually intended. *Id.* § 273. In this case there is nothing in the scope or bearing of the contents of the instrument that indicates that it is to operate after death, but, in the view I take of it, this is wholly unimportant, for, if genuine, it is certainly competent as an admission on the part of the decedent that he owed plaintiff \$3,000 for services since 21 years of age, because it is an original entry, shown to be wholly in the handwriting of deceased, against his interest at the time made by him in his book of accounts produced and proved. This is upon the ground that, being against his own pecuniary interest, he could have no notice to make a false entry. *Burton v. Scott*, 3 Rand. (Va.) 399; *Gale v. Norris* (1841) 2 McLean, 469, Fed. Cas. No. 5,190. See *Higham v. Ridgway*, 10 East, 109, 3 Smith, Lead. Cas. (9th Am. from 9th Eng. Ed.) 1607, 1617. That

this is a good reason for admitting an entry, made by a person deceased, to be evidence, numerous decisions have established beyond all controversy, made since the case of *Higham v. Ridgway*, especially against those claiming under and in privity with the deceased. See *Mahaska Co. v. Ingalls* (1864) 16 Iowa, 81; *Rand v. Dodge*, 17 N. H. 343; *Harriman v. Brown*, 8 Leigh, 697; 1 Greenl. Ev. §§ 171, 212; *Chamberlayne's Best*, Ev. § 518; 2 Am. & Eng. Enc. Law, 467m. That original entries on plaintiff's books may, in certain cases, be evidence for himself, see *Downer v. Morrison* (1845) 2 Grat. 250. See, also, *Griffin v. Macaulay* (1851) 7 Grat. 476. Nor is it material that because the document has never been delivered or communicated, so as to influence conduct, so as to be ineffectual as an express promise or as an acknowledgment from which a promise may be implied, or for any reason creating no obligation; it is nevertheless competent and admissible as evidence. *Hickey v. Hinsdale*, 12 Mich. 99; *Ayres v. Bane*, 39 Iowa, 518; *Atkins v. Plympton*, 44 Vt. 21; *Reis v. Hellman*, 25 Ohio St. 130; *Huffman v. Cartwright*, 44 Tex. 296. It is certainly competent evidence to prove the contract set up by plaintiff in his bill. It is an admission against the pecuniary interest at that time of the party who made the original entry in his book of accounts, proved by producing and proving the original book and the entry to be in his handwriting, and the signature in a suit wherein his heirs at law and privies in estate are defendants. "The universal experience of mankind testifies that as men consult their own interest, and seek their own advantage, whatever they say or admit against their interest or advantage may, with tolerable safety, be taken to be true against them, at least until the contrary appear." *Best*, Ev. § 519. I concur in reversing the decree complained of, and in directing the ascertainment of a quantum meruit compensation, although my own opinion is that that was sufficiently ascertained by the commissioner.

(40 W. Va. 124)

#### WILLIAMSON v. CLINE et ux.

(Supreme Court of Appeals of West Virginia.  
Feb. 2, 1895.)

WIFE'S SEPARATE PROPERTY—LIABILITY ON BOND  
—SECURITY FOR HUSBAND—SEALED OBLIGATION—WANT OF CONSIDERATION—MERGER.

1. By reason of chapter 3, Acts 1893, a court of law has jurisdiction to entertain an action and render personal judgment against a married woman upon a contract made during coverture, binding her separate estate.

2. A bond executed by a married woman as surety for a debt of her husband is valid to bind her separate estate.

3. A contract of a married woman, made since the enactment of chapter 3, Acts 1893, such as binds her separate estate, may be enforced against her separate estate, whether owned by her at the time of the contract or af-

erwards acquired, the same as if she were a feme sole.

4. A judgment on such a contract under said act binds as a lien the corpus or entire body of her estate in realty owned by a married woman.

5. Forbearance to sue being valuable consideration, if a creditor take from his debtor and a surety a note giving further time for payment, that is a valid consideration to bind the surety.

6. The words, "for value received," in a note, prima facie establishes a valuable consideration, where it becomes necessary to prove such consideration.

7. An obligation under seal imports valuable consideration, requiring no proof of the consideration, and neither at common law nor under section 5, c. 126, of the Code can want of consideration be shown in defense of an action on it. But, as to failure of consideration, that may, under that section, be shown, though not at common law. There is a difference between want and failure of consideration in such case.

8. A married woman may, in an action at law or in equity, plead want of consideration against a sealed obligation given by her during coverture.

9. Taking an obligation under seal for a simple contract debt merges it in the obligation, and thus extinguishes it, as the taking of a security of higher dignity extinguishes inferior securities for the same debt.

(Syllabus by the Court.)

Error to circuit court, Jackson county.

Action by Eunice Williamson against Samuel Cline and Margaret Cline. From a judgment for plaintiff against defendant Samuel Cline and absolving defendant Margaret Cline, plaintiff brings error. Reversed, and judgment rendered against both defendants.

N. C. Prickett and R. F. Fleming, for plaintiff in error. J. A. Wooddell, for defendants in error.

BRANNON, J. Eunice Williamson brought an action of debt in the circuit court of Jackson against Samuel Cline and Margaret Cline, based on a single bill, made September 16, 1893. Margaret Cline came in with a plea to the effect that when the single bill was executed she was the wife of Samuel Cline, living and cohabiting with him, and still so remained; and that she never received any consideration for which the single bill was executed, and she did not, at the execution of it, owe the plaintiff; and that the debt was one of her husband's, contracted for his sole use and benefit, prior to the date of single bill; and that she was only surety for him in said single bill. Objection was made to this plea, but it was overruled, and the plea received, but no replication was made to it, and judgment rendered against the husband for the debt, but in favor of Margaret Cline absolving her from the debt. Eunice Williamson brought this writ of error.

The sole question is whether the married woman was liable under this single bill. If she was, the plea of coverture filed by her was no bar to the action, and the court erred in overruling the plaintiff's objection to it, and in rendering judgment upon it in her

favor; and, if she was not liable, the plea was properly received, and judgment rendered upon it. *Duval v. Malone*, 14 Grat. 24, 27. What is commonly called the "Married Woman's Act" has undergone material legislative amendment since its first enactment in chapter 66 of the Code of 1868. Up to the enactment of chapter 3, Acts 1893, a court of law had no jurisdiction to render judgment upon the contract of a married woman, and the plea of coverture filed in this action would have at once ousted the law court of the case. Only a court of equity had jurisdiction to enforce against her separate estate such contracts as bound it. *White v. Manufacturing Co.*, 29 W. Va. 385, 1 S. E. 572. And, in absence of a specific lien by deed of trust or purchase money, not the corpus of her real estate, but only its issues during coverture, could be subjected in equity, and there could be no personal decree against her even in equity. *Hughes v. Hamilton*, 19 W. Va. 366, points 10, 12; *Turk v. Skiles*, 38 W. Va. 404, point 4, 18 S. E. 561. While her personal property could be sold outright for debts under contracts that bound it, yet it could not be done by judgment at law and execution, as in the case of persons generally, but only in equity. You could not subject the smallest item of her chattels without resort to an expensive chancery suit. This was a serious inconvenience to her creditors, even a prejudice to herself. So far as concerns the jurisdiction of courts of law to enforce her contracts against her separate estate, section 15 of chapter 66 of the Code, as found in chapter 3, Acts 1893, makes a radical revolution. By it a "married woman may sue and be sued in any court of law or chancery in this state, which may have jurisdiction of the subject-matter, the same in all cases as if she were a feme sole; and any judgment rendered against her in any such suit shall be a lien against the corpus of her separate real estate, and an execution may issue thereon and be collected against the separate personal property of a married woman as though she were a feme sole." Under this section her status or condition of coverture has no influence upon jurisdiction. It depends on the subject-matter. If that be such as is cognizable at law, she may be sued in a court of law like any one else; if cognizable in equity, she may be sued in equity. Hence, as to jurisdiction of the court to entertain this suit, as the court of law had jurisdiction of debt upon a single bill for a specific sum of money, the plea presented no bar.

But does the single bill, executed by the wife, not for any consideration benefiting her or her separate estate, but only for a debt of her husband as his surety, bind her? It is urgently insisted that it does not. What contracts bound a married woman's separate estate under the law as found in chapter 66 in the first edition (1868) of our present Code, before its amendment and re-enactment in chapter 3, Acts 1893, our present law on the

subject? What contracts, I repeat, bound a wife's separate estate under the Code of 1868? I need not and ought not enter into a wearisome discussion of this subject, for our function in these days upon this subject, as upon many other subjects, is to apply the doctrine of *stare decisis*,—stand to decisions, rather than enter into prolix disquisitions, admissible when the questions were new, as if we were hewing out the way through an untouched forest. Courts have widely differed as to what kind of contracts bound separate estate, and elaborate discussion has been given the subject elsewhere and in this state. It was settled, under the separate estate chapter in the Code of 1868, by the cases of *Patton v. Bank*, 12 W. Va. 587; *Radford v. Carwile*, 13 W. Va. 572; *Hughes v. Hamilton*, 19 W. Va. 366; *Camden v. Hiteshew*, 23 W. Va. 236; and *Dages v. Lee*, 20 W. Va. 584,—that a married woman, as to separate estate, is regarded as a single woman, with right to dispose absolutely of her personalty, and of the rents and profits of her realty during coverture, as if single; that this right of disposal (*jus disponendi*) is an incident to the very ownership of separate estate; and that the liability of such estate to all her debts incurred during coverture is also an incident to such ownership, making her personalty and the rents and profits during coverture, but not the corpus of her realty, liable for such debts. Under the law as so settled in this state, all debts contracted by a married woman so bound her separate estate, no matter out of what transaction arising, just the same as if she were single, except a bond or covenant based on no consideration. It was not necessary, to bind her estate for her debts, that the consideration inure to her own individual benefit, or of her separate estate, as if it inure to the benefit of her husband, or any third party, or to the prejudice of the person contracting with her, it was sufficient as a consideration; but to bind her estate for the debt of another she must do so by writing, signed by her. Thus she could bind her estate as surety for her husband. Then, according to the law as it was under the original chapter 66 of the Code, the single bill in this case would have bound the separate estate of Margaret Cline. Has subsequent legislation changed it? The act of March 14, 1891 (Acts 1891, c. 109) amending and re-enacting chapter 66 of the Code, did make section 12 of that chapter work radical change in the law, as above stated, touching the obligation of a married woman's contract upon her estate, limiting their validity and obligation to certain cases therein specified, and thereby narrowing very much her power to bind her separate estate by contract; but I need say nothing more relative to that act, because the single bill involved in this case was not executed while it was in force, and it was repealed by the amendment of Code, c. 66, by Acts 1893, c. 3. What, then, is the effect of the last-named act upon the power of a mar-

ried woman to subject her separate estate by contract to debts? Did it narrow her power to do so? Its purpose not to narrow, but to widen, the liability of her estate is spoken by both letter and spirit of the act. Her capacity to contract and bind her estate has been for years, under legislation and decision here and elsewhere, save the act of 1891, widening, and this last act breathes the spirit of the intention of the legislature to make her, in this regard, a single woman, as it subjects her personalty to the jurisdiction of courts of law and equity, and to their judgments and decrees, and makes them bind the absolute estate or corpus of her realty, and subject her personalty to execution, just as if she were single; thus making change in expansion, not restriction, of her liability under the law as it was aforetime. This act of 1893 does not say in words just what contracts bind her estate. Neither did chapter 66, as first enacted, and as it was when construed by the cases of *Patton v. Bank* and others cited above, fixing her capacity to charge her estate under that chapter. This act of 1893 omitted, and thus repealed, the restrictions upon her capacity to bind her estate created by the act of 1891; thus manifesting the legislature's dissatisfaction with those restrictions. And the act of 1893 continued the capacity of the wife to take and hold separate estate and her *jus disponendi* or power of disposal as fully as they existed from the first enactment of chapter 66, and as the power to charge her separate estate with debt is an incident or consequence of her power to hold and dispose of separate estate, it follows that she may still charge her separate estate as pointed out in the cases above cited. Nay, more, the act made her debts bind the corpus of her real estate, whereas only its rents and profits could be subjected before that act; and it wiped out the limitations or restrictions imposed by the act of 1891 upon her power to charge her separate estate with debt, signifying an intent to increase, rather than lessen, her power. It is the capacity to own and dispose of her property that gives birth to her ability to charge it with debt. Neither of those capacities gives her ability to contract at law, as law, without statutory mandate to do so, knows not her separate estate nor power to contract. Though her title to her estate is, under our statute, a legal estate, she did not have power to contract at law, her contracts binding her estate and being enforceable against it only in equity. *Pickens' Ex'rs v. Kniseley*, 36 W. Va. 794, 798, 15 S. E. 997, and cases cited; opinion in *Carey v. Burruss*, 20 W. Va. 576. But that furnishes no argument now against the validity and full legal operation in a court of law of her note or bond or other contract, because the act of 1893 commands a court of law to render judgment upon it binding her estate, and that necessarily clothes her with power to contract in the eyes of a court of law by contracts that would have been en-

forceable against her separate estate in equity.

It is contended by counsel that this new section 15 of its own force gives married women as full power to contract as if single. There are some views that occur to me imparting force to this theory. No other section defines or limits her power to contract. The section says she may be sued in any court in all cases as if single, and any judgment against her shall be a lien on the corpus of her real estate; it thus seeming that the legislature intends to make her a single woman as to liability to civil suit, and for the same causes as if single. Saying she may be sued in all cases as if single appears to mean that any cause of action on contract which would bind an unmarried woman will bind a married one; and, being compared as to liability to suit with the single woman, why is she not correlatively measured by the single woman also as to her capacity by contract to subject herself to that liability? But further reflection induces me to the conclusion that the mission of this section is not to enlarge the woman's ability to contract, but only the remedies upon contracts binding her estate. Before the enactment of this section, justices' courts and all courts of law were powerless to enforce her contracts against her separate estate, and even equity could not subject the corpus of her estate to her debts; and the design and motive of this section were to remedy these evils by giving law courts, as well as chancery, jurisdiction over her estate, and to bind the corpus of her real estate by contracts which before bound only its rents and profits; and it was not the purpose to erect a new test of the validity of her contracts by making binding contracts not before binding. See *Fitzgerald v. Quann*, 109 N. Y. 441, 17 N. E. 354. But it is of no practical importance to the decision of this case that section 15 does not enlarge the married woman's capacity to contract, since it is clear that the single bill in this case is binding on Mrs. Cline's separate estate, as the statute was before the passage of section 15, as expounded by this court in cases above cited, and as it still remains; and, being valid, she can be sued at law upon it. And, in general, it is not important, as, so far as I now can anticipate, there are very few contracts which need the helping hand of such a construction of section 15 to give authority to contract, seeing that decisions years ago declare that debts for which her separate estate may be held liable are such as arise out of any transaction out of which a debt would arise if she were single, except bonds without consideration. *Camden v. Hiteshew*, 23 W. Va. 236. But by said section 15 other change is made in our law. Before it, no personal judgment or decree could be rendered upon the contract of a married woman; but in this respect, by that section, change is meant unmistakably by the very letter of the section—saying she may be sued "the

same in all cases as if she were a feme sole, and any judgment rendered against her in any such suit shall be a lien against the corpus of her separate estate," and execution may issue against her separate personality as if single. "Judgment against her" is the language. My present opinion is that a personal judgment against a married woman would bind all her estate owned by her at the date of the judgment or afterwards acquired, without regard to the date of the contract; whereas, until this section, it bound only property owned by her at the date of the contract. *Pickens' Ex'rs v. Kniseley*, 86 W. Va. 801, 15 S. E. 997; 2 Pom. Eq. Jur. § 1123; *Ankeney v. Hannon*, 147 U. S. 128, 13 Sup. Ct. 206; *Crockett v. Doriot*, 85 Va. 240, 3 S. E. 128; *Lee v. Cohick*, 39 Mo. App. 672; *Pike v. Fitzgibbon*, 17 Ch. Div. 454; *Wells, Mar. Wom.* § 619; *Van Metre v. Wolf*, 27 Iowa, 346. The legislature intended to make her pay her honest debts out of any property which she now owns or may come to own. Authorities I have met with on an examination of this point indicate that personal judgments are rendered, and bind after-acquired property, just like judgments against persons in general, where statutes subject married women to judgments in courts of law. *Fabrique Co. v. Stanage*, 50 Ohio St. 417, 34 N. E. 410; *Whittaker v. Kershaw*, 45 Ch. Div. 320; *Bank v. Garlinghouse*, 53 Barb. 619; *Insurance Co. v. Babcock*, 42 N. Y. 613; *Van Metre v. Wolf*, 27 Iowa, 341; *Smith v. Dunning*, 61 N. Y. 251; *Miner v. Pearson*, 16 Kan. 28; *Kelly, Cont. Mar. Wom.* 283; *Wells, Mar. Wom.* § 619. As said in the Iowa case just cited, it seems to me that there is nothing in the statute to indicate that judgments against married women are different from personal judgments against others, or have less force and effect as to her property, and therefore they may be enforced against after-acquired property; and the equity principle heretofore prevailing, that the decree can go only against the property before the court, and cannot be personal, has ceased with this act of 1893. As chancery has been proceeding, there could be a decree only against the married woman's separate property before the court, and no personal decree (*Howe v. Stortz*, 27 W. Va. 555), but, of course, this doctrine cannot apply now to actions at law under section 15, as an action at law, unless on attachment, will not proceed against specific property, personal or real; and there can thus be only the ordinary personal judgment as if the action were against a single woman. In *Peck v. Marling's Adm'r*, 22 W. Va. 708, as section 13, c. 68, Code, allowed a married woman living separate from her husband to carry on business, her power to contract was thence implied, and she was subjected by mere implication to common-law action on such contract, whether she had separate estate or not when she made the contract. Of course, a judgment on the contract of such a woman would be personal, and, I take it, would bind

after-acquired estate. Though I have indicated an opinion as to the effect of a judgment upon after-acquired property, it is by no means necessary to decide it, since we are dealing only with the question of whether the plea of coverture in this case answers or bars the action, not with the question of what property would be bound by judgment therein.

It is said in brief of counsel that the circuit court was of opinion that the language found in the statute that a married woman holds her separate estate free of her husband's control, and it is in no way liable for his debts, exonerates it from his debt, though she bind herself as surety for it, and that she cannot go his security, as there is no consideration beneficial to her or her estate. I need only say, as to this, that our statute has from the first declared that a wife may hold certain estate to her sole use, free from her husband's control and debts; but that language was only used to remove the common-law rule by which the husband, by marital right, acquired ownership of all her personalty, and the use and rents and profits of her realty during coverture, and was not used to say that she could not, by her own act, subject it to her husband's debt. The statute read in the same way in years gone by, when this court held in *Radford v. Carwile*, 13 W. Va. 572, and *Dages v. Lee*, 20 W. Va. 584, and other cases, that a married woman, as surety for her husband or any one else, could bind her separate estate by a writing, without any consideration moving to her or her estate, the benefit to the principal being sufficient. Should we sustain the theory mentioned, we would overrule numerous cases. But it is relied upon in the plea that the debt for which the single bill was given was an antecedent debt, due from the husband for money lent; not a new consideration. The answer to this is that the instrument extended the time one day for payment. It is well settled that though, to bind a surety, there must be some consideration, yet forbearance, postponement of payment is sufficient consideration. 1 *Brandt*, Sur. § 16; 3 *Am. Eng. Enc. Law*, 836; *Metc. Cont.* 199; 1 *Whart. Cont.* § 532; *Bish. Cont.* § 1266. It is true, indulgence of one day is short, but even that is in many cases salvation to the business character and success of a business man. If a pressing creditor agrees to forbear suit for even a day, it may enable the debtor to dispose of property, or get the help of a friend, or in some way save himself from ruin. And though the consideration be small, or even nominal, if it be appreciably valuable, it will be sufficient, and the court will not enter into the work of nicely weighing how small or valuable it may in fact have been. Parties have weighed these things themselves. *Lawrence v. McCalmont*, 2 *How.* 426, 452; *Davis v. Wells*, 104 U. S. 159; *Brandt*, Sur. § 13; 3 *Am. & Eng. Enc. Law*, 431. This single bill gave indulgence for a fixed time, and

thus tied the hands of the creditors from suit until its expiration, as even a mere promissory note, given for a pre-existing one, will. *Bank v. Good*, 21 W. Va. 455, point 3; *Hopkins v. Detwiler*, 25 W. Va. 734. But, as it is not a parol contract, but a specialty, it ended and merged the prior debt, so that suit could never be brought on that prior debt, but only on the single bill. *Per Roane, J.*, in *M'Guire v. Gadsby*, 3 *Call*, 237; 5 *Rob. Prac.* p. 808, c. 76; *McNaughten v. Partridge*, 33 *Am. Dec.* 731; *Van Vleet v. Jones*, 43 *Am. Dec.* 633; *Ladd v. Wiggin*, 69 *Am. Dec.* 551; *McDonald v. Ingraham*, 64 *Am. Dec.* 106; *Baker v. Baker*, 75 *Am. Dec.* 243.

It is contended by counsel that, as the single bill in this case recites that its promise is "for value received," that is *prima facie* evidence of valuable consideration, and repels the allegation of want of consideration in the plea. So the words are *prima facie* evidence of valuable consideration. *Per Lee, J.*, in *Averett v. Booker*, 15 *Grat.* 164; *Daniel*, *Neg. Inst.* § 161. But the trouble in front of that argument is that the plea is taken for true for want of replication, and, though the single bill would be evidence on that point, if there were issue on it, it is not under these circumstances. So it is argued that the seal imports consideration, and is evidence to deny the plea. So it would be, were there a replication. It is argued by counsel that section 15 enables a married woman to contract as a single woman, and therefore that exception from her capacity to contract, stated in point 1 of *Hughes v. Hamilton*, 19 W. Va. 366, that her bond being void at law, she can show want of consideration, would cease, and she would come under the rule that a sealed instrument imports consideration, and its want cannot be shown at law. 5 *Rob. Prac.* 606, 608; *Taylor v. King*, 6 *Mumf.* 357; *Wyche v. Macklin*, 2 *Rand. (Va.)* 426; *Harris v. Harris*, 23 *Grat.* 737; *Metc. Cont.* 3. Illegality of consideration in a sealed document may be shown at law, but not want of consideration, or failure of consideration, according to common-law principles. The statute (section 5, c. 126, Code), changes the rule by allowing failure of consideration to be pleaded at law, but, not mentioning want of consideration, leaves that as at common law; so that neither at common law nor under section 5, c. 126, Code, can want of consideration be pleaded or shown at law. *Harris v. Harris*, 23 *Grat.* 737. As just stated, failure of consideration may be shown under that statute as defense to a sealed instrument. *Fisher v. Burdett*, 21 W. Va. 626. We must, under that section 5, draw the line of distinction between want of consideration and failure of consideration, as they are different. The words, "failure in the consideration," used in that section, refer to contracts where originally there was consideration subsequently failing, not to contracts wholly wanting consideration at their execution. *Crouch v. Davis*, 23 *Grat.* 75; *Cunningham*

v. Smith, 10 Grat. 255; Watkins v. Hopkins, 13 Grat. 743. But, as we hold that said section 15 of chapter 66, found in chapter 3, Acts 1893, does not enable a married woman to make a contract to bind her separate estate which she could not have made before it, and as our decisions stated above hold that a bond without consideration does not bind a married woman's estate, and she could show that want in a chancery suit to enforce it against her estate, and as we do not think that by giving action at law on such bond the legislature could have meant to deprive her of that defense, we conclude she may make defense of want of consideration at law, unlike other persons. So the plea presented no defense, and it was error to receive it, and render judgment in favor of the party filing it. We therefore reverse the finding and judgment, and, rendering such judgment as the circuit court ought to have rendered, we disregard the plea as immaterial, and render judgment for plaintiff against both defendants. *Mason v. Bridge Co.*, 28 W. Va. 639.

(40 W. Va. 188)

**STEWART v. OHIO RIVER R. CO.**

(Supreme Court of Appeals of West Virginia.  
Feb. 2, 1895.)

**INJURY TO RAILROAD EMPLOYE — ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE.**

1. When a servant enters into the employment of a master, he assumes all the ordinary hazards incident to the employment, whether the employment be dangerous or otherwise.

2. The test of liability is the negligence of the master, not the danger of the employment, though the danger of the employment may determine the ordinary care required in the case.

3. The mere fact of injury received raises no presumption of negligence on the part of the master.

4. When a servant willfully encounters dangers which are known to him, the master is not responsible for an injury occasioned thereby.

5. A servant having knowledge of danger about him must use diligence and care in protecting himself from harm.

6. An employer does not impliedly guaranty the absolute safety of his employes. In accepting an employment, the latter is assumed to have notice of all patent risks incidental thereto, or of which he is informed, or of which it is his duty to inform himself, and he is further assumed to undertake to run such risks.

(Syllabus by the Court.)

Error to circuit court, Wayne county.

Action by T. H. Stewart against the Ohio River Railroad Company. There was an order overruling a demurrer by defendant to the evidence, and one denying a motion to set aside a verdict for plaintiff, and, from the judgment thereupon rendered for plaintiff, defendant brings error. Reversed.

Vinson & Thompson, for plaintiff in error.  
W. W. Marcum and Marcum, Peyton & Marcum, for defendant in error.

**ENGLISH, J.** This was an action of trespass on the case brought on the 17th day of June, 1893, in the circuit court of Wayne

county, by T. H. Stewart against the Ohio River Railroad Company, to recover \$10,000 damages, to which the plaintiff claimed to be entitled by reason of injuries received by him in consequence of being thrown from a hand car on which he was riding and helping to operate, which accident he claims was caused by the negligence of the section foreman, who was riding on the same hand car, in suddenly applying the brakes, thereby causing said hand car to suddenly stop, which resulted in throwing the plaintiff off in front of the hand car, and to be run over thereby. The defendant pleaded not guilty, and issue was thereon joined, and the cause was submitted to a jury, and after all the evidence was heard the defendant demurred thereto, and the plaintiff joined therein, and the jury, in pursuance of the direction of the court, ascertained the plaintiff's damages to be \$5,000, subject to the opinion of the court upon the questions of law arising upon the defendant's demurrer to the evidence, and the defendant also moved the court to set aside said verdict and finding of the jury, because the damages assessed were excessive and not warranted by the evidence; and upon consideration the court overruled said demurrer, and the defendant moved the court to set aside the verdict of the jury, because the same was excessive and contrary to the law and the evidence, which motion the court overruled, and the defendant excepted, and judgment was rendered upon said verdict, and the defendant obtained this writ of error.

It appears from the testimony in the case that the plaintiff had been in the employ of the defendant company a month, or a little over, as a section hand, and that he and other hands were in the habit of traveling to and from their work on the track with Mr. Ellis, the section foreman. On the occasion when this injury was sustained, the section hands had finished their day's work, and seven of them, including the foreman, Ellis, got upon the hand car to return to the tool house. It was their custom to start from this tool house in the morning and return to it in the evening, and the plaintiff was in the habit of assisting at the levers in propelling the car. According to the plaintiff's own statement as to his position on the hand car when it started for the tool house on that evening, he was in the center of the hand car. His heels were kind of over the edge, for he lost his balance, and didn't have any chance to support himself, and fell in front of the hand car. He was riding backwards, and, at the time he fell off, was helping to run the car, and had hold of the lever, and when asked, "Did you see Mr. Ellis at the time he put the brake on?" answered, "I may have seen him, but don't remember it." The plaintiff further states that he was riding in front in the center, the brake was on the right-hand side, and the foreman, Ellis, was in an arm's reach of him. The brake was applied by pressing the foot upon the

lever, and in answer to the question, "Where was the car, with reference to the tool house, when Mr. Ellis applied the brake?" the plaintiff stated that the car had got past the tool house when he put the brake on. He knew it was the intention to stop the hand car at the tool house when they started home from their work; he was standing in such a position that he could see the movements of the foreman, Ellis, and had hold of the lever. For eight or ten days he had been going out with this gang of section hands from the tool house in the morning and returning to it in the evening, and, knowing that the car was to be stopped at the tool house, what was the necessity for the foreman, under these circumstances, to announce the fact that he was going to apply the brakes, having arrived at the tool house, and all hands being aware that it was the custom and intention on that occasion to stop there? It must be presumed the men stopped working their levers, and, in fact, J. W. Henderson, a witness for the plaintiff, when asked who stopped the car, answered, "Mr. Ellis stopped all he could, and I pulled up on the lever. Every time she would go to go down, I would hold it up." And in reply to the question, "Did he [meaning Ellis] give any warning to the crew that he was going to stop her?" stated, "No, sir; I did not hear it. They all knew they wanted to stop there at the tool house." He also stated that it was not usual, when they went to stop there, to say, "I am going to put on the brake." Everybody knew that the brake was going to be put on at the tool house; that no one had any particular place to work at the levers; that every fellow got his place, catch as catch can. This witness also states that he saw the plaintiff falling; he had let loose of the lever; and he thinks his foot slipped right off, and then his other foot caught the car, and it just doubled him right up and ran up over him. If, then, the law should regard this foreman or section boss as the vice principal or alter ego of the defendant company on this occasion, what did he say or do that would render the defendant liable? The plaintiff took his position on the hand car without any direction from the foreman. When he did so he was fully aware of the destination of the car, he knew where the brakes would be applied, and the foreman, who stood at the brake, was in his immediate presence, so that nothing but his negligence prevented him from having notice of his every movement; he was himself assisting in giving speed to the car, and must have known the swiftness with which it was moving by the action of the levers, and yet he stood, according to his own statement, with his heels projecting from the platform, at the very moment the tool house was reached and the brakes applied, and when he knew they would be applied. What negligent act could be attributed to the fore-

man on this occasion is difficult to discover from the evidence. The plaintiff's witness Henderson says: "We always went pretty fast," and when asked, "Was there any difference between the rate of speed on that and on any other evening?" replied, "I think we went a little faster on account of the engine following us." But no witness states that the speed on that evening was increased by the direction of the foreman, and the speed was controlled by the action of the plaintiff and his fellow servants, who were working the levers. The same witness was asked, "When you were coming into the tool house, was that the usual way of stopping the car?" and replied, "Yes, sir"; and when asked, "Stop suddenly?" replied, "Stopped as quick as we could." There was nothing, then, that the foreman did, except to use the brake in stopping the car, and the plaintiff's own witness tells the jury that the hand car was stopped in the usual way on this occasion, and the plaintiff appears to have ridden to the tool house often enough on this hand car to be acquainted with the manner of stopping it.

In the case of *Knight v. Cooper*, 36 W. Va. 232, 14 S. E. 909, this court held that "when a servant enters into the employment of a master, he assumes all of the ordinary hazards incident to the employment, whether the employment be dangerous or otherwise"; that "the test of liability is the negligence of the master, not the danger of the employment, though the danger of the employment may help to determine the ordinary care required in the case"; that "the mere fact of injury received raises no presumption of negligence on the part of the master"; that "when a servant willfully encounters dangers which are known to him, the master is not responsible for an injury occasioned thereby"; that "a servant having knowledge of danger about him must use diligence and care in protecting himself from harm." In the case of *Engine Works v. Randall*, 100 Ind. 293, the supreme court of that state holds that "where both master and servant have equal knowledge of the danger of the service required, and the means of avoiding it, and the servant, while engaged in the performance of the work he is set to do, is injured by reason of his own inattention and negligence, the master is not liable." Bailey, in his work on *Master's Liability for Injuries to Servant* (page 219), in speaking of the duties of the master, states the law thus: "He must not only give the servant warning of danger, but he must also give him such instruction as will enable him to avoid injury, unless both the danger and means of avoiding it while he is performing the service required are apparent. But he is not bound to anticipate extraordinary, unusual, or improbable occurrences which involve inattention on the part of the servant." This court held in the case

of *Johnson v. Railway Co.*, 38 W. Va., page 207, 18 S. E. 573, that "an employé having knowledge of the danger about him must use prudence and care to protect himself from harm, and if he willfully and imprudently encounters such danger the employer is generally not responsible for the injury caused thereby." Patterson, in his work on *Railway Accident Law* (section 816), states the law as follows: "There is no implied obligation upon the part of the master to indemnify the servant against the ordinary risks of the service, and the servant, when injured, can only recover upon proof that the master knew of a danger which was unknown to the servant, and which the master did not make known to him." So in the case of *Sykes v. Packer*, 99 Pa. St. 465, it was held that "an employer does not impliedly guaranty the absolute safety of his employes. In accepting an employment, the latter is assumed to have notice of all patent risks incidental thereto, or of which he is informed, or of which it is his duty to inform himself, and is further assumed to undertake to run such risks"; and also in the case of *Naylor v. Railway Co.*, 53 Wis. 661, 11 N. W. 24, it was held that "if a servant, knowing the hazards of his employment as the business is conducted, is injured while engaged therein, he cannot maintain an action against the master for such injury merely on the ground that there was a safer mode for conducting the business, the adoption of which would have prevented the injury." It is true that the hand car might have been run slower, and if such had been the case the injury might not have resulted, but the defendant in error cannot be heard to complain of the speed of the car for two reasons: First, because he, without any directions from the foreman, so far as appears from the evidence, was assisting in working the levers which gave the car its velocity; and, secondly, because he had been working as a section hand on the road for a month and, for eight or ten days had been traveling upon this hand car to and from his work, and knew the speed with which it traveled, and, possessing this knowledge, he voluntarily took a dangerous position upon the car, standing on the front edge of the platform, facing to the rear, and with his heels projecting over the edge of the platform. Occupying this position, and being acquainted with the facts in regard to the speed of the car, and its sudden manner of stopping when it reached the tool house on each successive day, he must be regarded as assuming the risk attendant thereon, and, the evidence disclosing no negligent act on the part of the foreman, my conclusion is that the circuit court erred in overruling the defendant's demurrer to the evidence and in rendering judgment upon the verdict. The judgment complained of is therefore reversed, and, this court proceeding to render such judgment as the court below should

have rendered, the demurrer to the plaintiff's evidence is sustained, and judgment is rendered for the defendant, with costs, etc.

(40 W. Va. 55)

# PHILLIPS v. MINEAR.

(Supreme Court of Appeals of West Virginia.  
Dec. 8, 1894.)

## TAX SALE—PURCHASE BY OFFICER MAKING SALE—EVIDENCE—PRESUMPTION FROM ABSENCE OF AFFIDAVIT—CURATIVE ACT—EFFECT.

1. Section 9 of chapter 81 of the Code reads as follows: "No sheriff, deputy sheriff, collector or other officer who shall return any real estate as delinquent for the nonpayment of the taxes thereon, or who shall receive a list thereof under the provisions of the fourth section of this chapter or who shall sell by himself, his deputy or agent or who shall be the deputy of any officer making such sale, shall directly or indirectly purchase any real estate so sold, or be in any way directly or indirectly interested with any other person in such purchase. Every person violating this section shall forfeit one hundred dollars for each offense, and the sale shall be absolutely void, and the title to the real estate sold shall remain in the person in whose name the same is sold." *Held*, such fact making void such sale may be shown by any natural, common-sense implication fairly arising on the record according to the principles of evidence and ordinary means and methods of proof.

2. Where a sheriff, who sells land for nonpayment of taxes under chapter 31 of the Code, appends to the list of sales not the affidavit required by law according to the form prescribed by section 13 of chapter 31, but, instead of saying in such affidavit, "I am not now, nor have I at any time been, directly or indirectly interested in the purchase of any of said real estate," substitutes therefor the phrase, "I am not directly or indirectly interested in the purchase of any of said land," and there being no other evidence of any kind on the point, *add*, such case is properly held to be void under section 9 of chapter 31.

3. It is not the object or effect of the curative section 25 of chapter 31 to impair or in any way or to any degree affect section 9 of chapter 31, or to prescribe that its violation may not be shown by implication.

(Syllabus by the Court.)

Appeal from circuit court, Tucker county.

Bill by James Phillips against David S. Minear. From a decree for plaintiff, defendant appeals. Affirmed.

A. B. Parsons, for appellant. Lipscomb & Lipscomb, for appellee.

HOLT, J. The plaintiff, James Phillips, brought this suit in equity in the circuit court of Tucker county on the 23d day of January, 1891, against D. S. Minear, to set aside a tax deed made to said Minear on the 27th day of December, 1890, by C. W. Minear, clerk of the county court of Tucker county, conveying a tract of 114 acres and one of 30 acres, recited as sold by A. H. Bonfield, as sheriff of said county, in the month of —, 1889, as charged with taxes in the name of James B. Phillips, and returned delinquent for the years 1887 and 1888, and bought by said defendant, David S. Minear. The circuit court, by decree entered on the 13th day of March, 1892, set aside the tax deed, from which this appeal was taken.



The first question presented by this record is, does it appear by any natural and fair implication therefrom, that the sheriff who made the sale was at any time directly or indirectly interested in such purchase? If so, the law declares that the sale shall be absolutely void, and the title to the real estate sold shall remain in the person in whose name the same was sold. See section 9, c. 31, under which this sale took place. The evidence which goes to establish such interest is as follows: The thirteenth section (chapter 81) prescribed that there should be appended to such list an affidavit as follows:

"I, A. B., sheriff (or collector or deputy for C. D., sheriff or collector) of the county of —, do swear that the above list contains a true account of all the real estate within my county which has been sold by me, as well as a list of all the real estate redeemed, and the names of the persons who redeemed the same during the present year, for the nonpayment of taxes thereon for the year —, and that I am not now, nor have I at any time been, directly or indirectly interested in the purchase of any of said real estate, so help me God."

Instead of that, the sheriff appended the following oath, taken on the 22d day of November, 1889:

"I, A. H. Bonnifield, sheriff of the county of Tucker, do swear that the above list contains a true account of all the real estate within my county, which has been sold by me to individuals during the present year for the nonpayment of taxes thereon for the years 1887 and 1888, and that I am not directly or indirectly interested in the purchase of any of said real estate. So help me God. A. H. Bonnifield, Sheriff.

"Sworn and subscribed to before me this 22nd day of November, 1889. Abe Bonnifield, Clerk County Court."

The legislature, with commendable wisdom, and for obvious reasons, enacted that the sheriff who made the sale should not be at any time, neither at the time when the affidavit is made nor at any prior time, in any way directly interested in the purchase of said real estate; and it intended to secure the evidence of such want of interest on the part of the officer making the sale by requiring him to take and sign a written oath to that effect as lasting evidence, to be appended to the list of sales. The former law had not required the affidavit to state the want of interest with such separate distinctness as to the time of interest, but the legislature, moved perhaps by some actual or supposed or apprehended evasion of the law in that regard, by chapter 5, p. 8, of the Acts of 1887, amended and re-enacted section 13, c. 31, of the Code, so as to make it read as we now find it in section 13, c. 31, of the Code (Ed. 1887, and Ed. 1891), "that I am not now, nor have I at any time been, directly or indirectly interested in the purchase of any of said real estate," and made

no other change in the section than the one here involved; so that it can hardly be said that the deliberate and only amendment made in a form of so important an oath was made for no purpose, and has no meaning, and that the old oath is, in effect, just as good. But it may be said—and no doubt could be truly said—that the high character of the officer in this instance repels such inference of interest; but the change in the law was made not for particular instances, but for a general rule of conduct framed alike for all. It will hardly be said that the officer did not, as matter of fact, know the law, or that it is hard to find, or to read and understand when found, or to put in form when read and understood; for by turning to section 13 of chapter 31 of the Code of 1887—the law under which the sale was made—the form is given, and all such excuses thereby barred. It is a mistake to suppose that section 9 and section 13 are merely intended to make a purchase invalid which would, without such statutory inhibition, be lawful and valid. On general principles of public policy such a sale would be held void without any statute against it. Cooley, Tax'n, 492. Public policy does not permit official integrity to be subjected to such conflict between duty and interest (see Black, Tax Titles, 2d Ed., § 297); and, if he cannot buy directly, for a still stronger reason he should not be permitted to be indirectly interested in the purchase by or in the name of another; and this part of the affidavit is intended to bring home to the officer, impress it upon his conscience, and put him under the stress of an oath, sworn to and subscribed and filed as a part of the permanent record of his proceedings, that he cannot purge himself of such a fault by transferring his interest to another, before he comes to make the affidavit; is intended to remind the officer that this law does not tolerate any such shift or device, and to give such express sanction to the honesty of the sale, and furnish at least prima facie evidence that no such shifting of interest between-times has been resorted to. And these provisions are in this state, and very generally, held to be mandatory, and indispensable to the validity of the sale. See Simpson v. Edmiston, 23 W. Va. 676; Black, Tax Titles, §§ 303, 306. Such was the main, if not the sole, purpose of the amendment of section 13, c. 31, made by the act of February 5, 1887 (see Acts 1887, p. 8).

The circuit court, in holding this tax deed invalid, was, in my opinion, clearly right, and was simply following and making effectual the behest of the lawmaker (see section 9, c. 31), which declares with emphasis such a sale to be absolutely void; and taking as sufficient prima facie evidence of such interest and a common-sense implication contained in and spread upon defendant's own record of title, in this case un rebutted, contradicted, in fact the only evidence in the case on that point; and upon a matter so

vital as to be a necessary condition to the validity of the sale, with a plain mandatory form spread out before the officer on pages 212, 213, of the law (the law he was going by—chapter 31, Code 1887), the only authority he had to sell at all, to bisect the oath required, putting in that on the 22d day of November, 1889, when the oath was taken, he was not directly or indirectly interested in the purchase of any of said real estate, but leaving out the most important part,—that he was not indirectly interested in such purchase on the 12th day of November, 1889, when the sale was made,—gives rise to a natural, material implication under such circumstances, which cannot be overlooked or passed by wherever the common-law principles of evidence come into play. And the curative section 25 of the same chapter neither takes away nor attempts to take away such implication, but leaves section 9 in full force, rendering such interest on the day of sale enough of itself to make the sale absolutely void, with such fact to be made out *prima facie* or otherwise by the ordinary principles of evidence and common-law means and methods of proof as are used and applied by courts of equity. See *Hays v. Heatherly*, 36 W. Va. 613, 15 S. E. 223; *Jackson v. Kittle*, 34 W. Va. 207, 12 S. E. 484; *Baxter v. Wade*, 39 W. Va. —, 19 S. E. 404. There is evidence in the case tending to show that within the time given by law for the owner to redeem—that is to say, within one year from the sale (section 15, c. 31)—there was an attempted tender of the purchase money, as shown as to amount by the purchaser's official receipt (see section 10, c. 31). The agent of plaintiff who lived on the land, who was to keep the taxes paid, went to the purchaser, told him he lived on the lands of plaintiff, James Phillips, and was authorized to pay all taxes in Tucker county for him, and asked defendant if he had bought for taxes any of the plaintiff's lands in that county. Defendant said he had bought none of James Phillips' lands for taxes; that he had no claims against any lands of James Phillips for taxes. Witness put his hand in his pocket to pay all taxes that there were on two tracts owned by Phillips, one of 114 acres and one of 80 acres (the lands in controversy). Defendant, Minear, said he had not bought said lands for taxes, and had no claim against it. "We talked a little along about it, and I remarked that I was to look carefully after Phillips' taxes, and, if Minear had bought said land, that I was ready to redeem it for James Phillips, and that I had the money there to do it; but Minear said that he had not bought the James Phillips land for taxes." The record shows that these two tracts were charged on the land books and sold in the name of James B. Phillips. He is corroborated in the main by his brother, who swears he was present, and by a third witness, who saw them together, talking about something, at the time and

place mentioned. Defendant, David S. Minear, examined as a witness on his own behalf, flatly denies this; says that neither such conversation, nor any one like it, ever took place. There is an attempt to impeach the general character for truth of these two witnesses for plaintiff, which certainly fails as to one. As to the first witness for plaintiff, five witnesses are introduced who testify that they are acquainted with his general character for truth, and that it is not good. On the other hand, defendant introduces 10 witnesses who testify that they are acquainted with his general character for truth, and that it is good. Without going into details, it is enough to say that from the facts not contradicted, and from all the circumstances of the case and their inherent probabilities, I am inclined to the opinion that no legal tender was made or dispensed with. Several other defects are relied on. First. The land was charged on the land books and sold in the name of James B. Phillips. Second. The caption to the list of sales prescribed by the statute is not followed, but it reads, "List of real estate within the county of Tucker sold within the month of Tucker, 1889, for the nonpayment of taxes thereon for the years 1887 and 1888, and purchased by individuals." Third. It will be noticed that, besides the mistake of repeating the name of the county where the name of the month of the sale ought to have been inserted, omitting the month from the caption altogether, it does not comply with the form prescribed by law in other respects. See Code 1887, c. 31, § 12. Fourth. So, also, it will be seen that the affidavit of the officer to be appended as required by the form given in section 13, c. 31, reads: "A true account of all the real estate within my county which has been sold by me, as well as a list of all the real estate redeemed," etc. In the affidavit here brought in question the latter clause is wholly omitted. The forms given in the Code are so short, plain, and simple that it is hard to explain their frequent nonobservance; but the curative section 25 of the same chapter 31 is so broad and comprehensive that I should be inclined to think it cured these irregularities in the list of sales mentioned above. But for the reason already given I am of opinion there is no error in the decree complained of, and that it should be affirmed.

(40 W. Va. 100)

## JOHNSON et al. v. MINEAR.

(Supreme Court of Appeals of West Virginia  
Dec. 18, 1894.)

Appeal from circuit court, Tucker county.  
Bill by Henry J. Johnson and W. L. Phillips against David S. Minear. From a decree for plaintiffs, defendant appeals. Affirmed.

A. B. Parsons, for appellant. Lipscomb & Lipscomb, for appellees.

BRANNON, P. Johnson and Phillips brought a chancery suit in the circuit court of Tucker

county against Minear to set aside two tax deeds for lands sold for taxes November 12, 1880, and they were set aside, and Minear took this appeal. For reasons given in the case of *Phillips v. Minear* (decided this term) 20 S. E. 924, the decree appealed from is affirmed.

(40 W. Va. 169)

**CROTHERS' ADM'RS v. CROTHERS et al.**

(Supreme Court of Appeals of West Virginia.  
Feb. 1, 1895.)

**EVIDENCE — DECLARATIONS AS TO OWNERSHIP — STATEMENTS AGAINST INTEREST — ACTION BY ADMINISTRATORS — TRANSACTIONS WITH DECEDENT.**

1. When a transfer of property has been made, a declaration by the transferer that he is still the owner of the property, made after such transfer, is not admissible against the transferee.

2. Declarations of a deceased person, claiming ownership of specific property, are not competent evidence in favor of his administrators, or others claiming title under him, whether such declarations of ownership were made before or after the title of the adverse claimant commenced. *Masters v. Varner's Ex'rs*, 5 Grat. 168.

3. A person interested may give evidence against his own interest, both at common law and under section 23, c. 130, Code.

4. The purpose of section 23, c. 130, Code, was to enlarge the competency of witnesses. It does not per se render any incompetent who are competent at common law. The exception therein does not create incompetency, but leaves the cases specified in it just as they were at common law.

5. Children of a decedent, who are his distributees, are competent witnesses to prove a transfer by their father of personal estate in favor of the transferee.

6. By common law a person is a competent witness in a case if the proceeding cannot be used as evidence for him, though he may be interested in the question in issue, and may entertain wishes on the subject, and may even have occasion to contest the same question in his own case in a future suit. This rule has not been changed by section 23, c. 130, Code 1891, as to the competency of a person to testify against the representatives of a deceased person in relation to a transaction had personally by the witness with the deceased person.

(Syllabus by the Court.)

Appeal from circuit court, Ohio county.

Bill by W. B. Crothers and John McDowell, administrators, against L. M. Crothers and the Bank of the Ohio Valley. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

W. W. Arnett, for appellants. Caldwell & Caldwell, for appellees.

**BRANNON, P.** This was a chancery suit in the circuit court of Ohio county by the administrators of Samuel J. Crothers, deceased, against L. M. Crothers, to set aside a transfer purporting to have been made by said decedent to L. M. Crothers of certificates for \$10,000 stock of the Bank of the Ohio Valley, at Wheeling, and, the bill having been dismissed, the administrators appeal. The grounds on which the plaintiffs base their prayer for the annulment of such transfer of stock are undue influence, fraudulent

representation, and the mental imbecility, from old age, of Samuel J. Crothers, and the charge that the written transfer is a forgery. Without giving the evidence, I may dismiss the first three grounds as unsustained by it; or, as would be more appropriate to say, there is no evidence to detail as to those grounds.

As to the allegation of forgery. The detail of evidence on this point could answer no purpose for future cases. The only persons present at the execution of the transfer of stock besides Samuel J. Crothers, the father, L. M. Crothers, a son, were Lizzie Crothers and Mrs. Dorrance, two of his daughters. The father did not sign the transfer with his own hand, but directed his son L. M. Crothers to sign his name to the formal transfer printed on the stock certificates. The two daughters are very definite in their evidence that on an occasion when L. M. Crothers was about to go to Wheeling the father suggested that he take the certificates with him to the bank in Wheeling, and have the transfer formally made on the stock book; that L. M. Crothers was disposed to postpone it, saying to his father that he was then confined to his bed, and that another time would do; but the father, being in the seventy-seventh year of his age and feeble, was urgent to have the transfer at once made, and caused his son to fill up and sign for him the written transfers. There is no showing to the contrary of the evidence of these two ladies. If they are to be believed, they clearly establish the transfer of the stock. W. B. Crothers, another son, and one of the administrators bringing this suit, says that after this alleged transfer his father stated that he had stock in the Wheeling bank, and could not account for the fact that he was getting no dividend upon it, thus negating all idea that already the stock had been assigned to L. M. Crothers; but this evidence can avail nought—First, because W. B. Crothers is not a competent witness as to a communication with the deceased, since he is a party plaintiff, and interested to secure this fund for distribution, part of it going to himself, outside of his liability for costs (*Seabright v. Seabright*, 28 W. Va. 463); and he also is giving a declaration of a party made after assignment to overthrow the title of the assignee of that party (*Casto v. Fry*, 33 W. Va. 44, 10 S. E. 799); and also because the self-serving declaration of Samuel J. Crothers is not admissible for himself or his estate, because it is a declaration in his own behalf (*Masters v. Varner's Ex'rs*, 5 Grat. 168). Mr. Dorrance states that the old gentleman stated to him that he had given L. M. Crothers this stock to make up a loss to him in the sale of a farm mentioned below. Now, this admission is admissible to sustain the transfer, because it is against the interest of the party making it, and not, like that made to William B. Crothers, going to sustain his title. I regard Dorrance's

evidence as of great force, in corroboration of the evidence of Lizzie Crothers and Mrs. Dorrance. There is, in a legal point of view, no evidence contra this positive evidence. There is a circumstance which, at first view, seems quite strong against the genuineness of the signature to the transfer; and it is this: that the two ladies present at the making of this signature say the old gentleman told his son, L. M. Crothers, to write his name so as to resemble his handwriting as nearly as he could do so, and that the signatures themselves bear the look of tremulousness of the old man's hand. Why, we may ask, did the old man wish his writing simulated? It would be natural that he should simply direct his son to write his name, and have his daughter witness it, as she did. The old man, too, could write himself, but he was feeble and in bed, and wrote with difficulty. He may have thought that, as his handwriting was known at the bank, it would be better to imitate it. This circumstance, I confess, is one which inspires suspicion; but it is only a circumstance, and not of a conclusive nature, and stands alone, without any evidence to be linked with it, and is overborne by the positive evidence above stated. If these ladies were not truthful, they would hardly have told this adverse fact. There is another circumstance, hardly worth the mention, in my judgment, and this is that Samuel J. Crothers also transferred on the same date to L. M. Crothers some stock in an Ohio glass-manufacturing company, and, in a suit in Ohio by those administrators to overthrow it for like causes with those on which this suit is based, L. M. Crothers made no defense. He says he knew not the contents of the complaint in that case, and he says and proves that he was advised by counsel not to defend, because the stock was of very little value, not worth the cost of attendance in defense of the suit, and might call upon him, if he were owner, to contribute as a stockholder to pay debts of the concern.

I think the circuit court was bound on the evidence to decide the case as it did, and find the transfer genuine. This being so, we have nothing to do with the justice of the matter, as between the father and L. M. Crothers and the other children; but some good reasons appear. L. M. Crothers owned a farm, and his brother W. B. Crothers importuned him to sell it, but L. M. Crothers objected to doing so, when his father, at the instance of William B. Crothers, advised him to do so, and he did so against his will, and bought from his father with its proceeds stock in a Pittsburgh bank, which broke, and left the stock a dead loss to L. M. Crothers, while the very farm he had unfortunately sold developed into an oil field, from which William B. reaped large returns, which but for his sale L. M. Crothers would have realized; and the old man, long before his death and the transfer of the Wheeling bank stock,

declared he intended to make up this loss in some measure to the unfortunate son, and he carried out this settled purpose by the transfer of the stock in question. Moreover, when L. M. Crothers sold his farm, he moved upon a farm belonging to his father close by the home in which his aged father and mother and maiden sister lived, and worked it for their support, while all the others of his seven children went off to themselves. L. M. Crothers is a man 52 years old, and for a number of years worked the farm and supported his father, mother, and sister, and his father declared his kindness to him and his own obligation for it. So we see good reason for the transfer, which I mention as not only going to repel undue influence, false representation, and imbecility, but to negative what I think is the only matter of importance under the evidence; that is, the imputation of forgery of the transfer. The evidence is substantially on one side, that of the defendants. That being so, of course, we cannot reverse. The burden to establish the basis on which the plaintiffs predicate their case lying on them, they must establish it by full proof, not to say proof beyond reasonable doubt. I agree with what, from an opinion of Judge Paull in the case, seems to have been his view, that it is not a case of conflicting evidence, and therefore it seems hardly necessary to say that, if we treat it as a case of conflicting evidence, the opinion of the circuit court must stand. *Bartlett v. Cleavenger*, 35 W. Va. 719, 14 S. E. 273; *Prichard v. Evans*, 31 W. Va. 141, 5 S. E. 461. Even if we regarded the conclusions to be derived from the evidence doubtful, as we do not, we could not reverse the court below. *Reger v. O'Neal*, 33 W. Va. 164, 10 S. E. 375. We must see that the court below erred plainly in weighing and deciding on the evidence.

As said above, the evidence of Lizzie Crothers and Mrs. Dorrance makes it clear, if we believe them, that the transfer is not a forgery. But it is urged that they are incompetent as witnesses. They are not incompetent to give the evidence they gave at common law, as they are neither parties nor interested, because they give evidence to support the transfer, which takes the property away from distribution, in which they would share, and forever excludes themselves from any share in it. It is well settled that, where a witness testifies against his interest, the rule that interest disqualifies does not apply. 1 Greenl. Ev. § 410. So the common law does not debar these witnesses. Then does the statute (section 23, c. 130, Code)? It does not. Its object was to widen, not narrow, the competency of witnesses—to make those competent not competent before, and not to create or enact incompetency. It is often important to remember this in construing this statute so radically innovating on the law of evidence. *Gilmer v. Baker*, 24 W. Va. 84; *Page v. Whidden*,

59 N. H. 507. Its first clause is a revolution and reversal of the common-law rule excluding a witness because a party to the suit or interested in its event. It makes persons, so far as their being parties or interested would exclude them, competent. But the second clause contains exceptions to this sweeping declaration of competency, because it declares that no party to a suit, or any one interested in its event, or any person from, through, or under whom any such party or interested person derives any interest by assignment or otherwise, shall be examined, in regard to any personal transaction or communication between such person and a person deceased, insane, or lunatic, against the executor, administrator, heir, distributee, assignee, legatee, devisee, or survivor of one deceased, or the assignee or committee of an insane person. This exception originates no new incompetency, but only continues, in certain cases, the old incompetency of the common law; takes them out of the general enactments of the first clause of section 23. Opinion in Kilgore's Adm'r v. Hanley, 27 W. Va. 455. Where the statute is a mere proviso or saving clause in the act abolishing the common-law disqualification of interest, it does not make incompetent such testimony as would be competent at common law. Abb. Tr. Ev. 61. So, these two female witnesses, being competent by common law, are not made incompetent by the statute. In Robinson v. Robinson, 20 S. C. 567, 573, this view of such a statute is held, and that case is otherwise apposite in this case, as it holds that, in an action by an administrator to settle an estate, two distributees may prove the execution of a note by the deceased, with them as sureties, because testifying against their interest.

The following theory is relied upon by counsel as a reason for rejecting the evidence of Lizzie Crothers and Mrs. Dorrance: A month before the transfer of bank stock, Samuel J. Crothers conveyed to L. M. Crothers a farm for the consideration of \$15,000, and the purchaser executed to Lizzie Crothers a note for \$10,000, and to Mrs. Dorrance one for \$5,000, making up the \$15,000. Those notes were gifts by the father to his daughters, and it is urged that this and the bank-stock transfer are one common transaction, though a month apart, by which L. M. Crothers, Lizzie Crothers, and Mrs. Dorrance stripped their old father of substantially all his remaining estate, to the injury of the remaining four children, and that we ought to treat both as one transaction, and thus make Lizzie Crothers and Mrs. Dorrance interested to sustain the transfer of bank stock, and thus exclude them as witnesses. For argument, say that they feel an interest in repelling the charge made in common against the deed from the father to his son L. M. Crothers, the gift of said purchase money to

the daughters, and the transfer of the bank stock to L. M. Crothers; that the old man was imbecile, subjected to undue influence and misrepresentation,—still the interest they feel is only a feeling, a bias going to their credit, and that interest, viewed in the strongest light, is only an interest in the question involved in this suit, for they have no legal interest in its event. The decision in this suit could not be given in evidence against them or for them, in a suit involving their right to the notes. They get or lose nothing under said transfer. To exclude the witness, he must have an interest to be affected by the result of the suit by force of the adjudication, and though he may feel a bias in the struggle, and may even be interested in the question litigated, and may have to litigate the same question in future litigation of his own, that does not exclude him. Gilmer v. Baker, 24 W. Va. 72; Masters v. Varner, 5 Grat. 168; Clements v. Kyles, 13 Grat. 477; 1 Greenl. Ev. § 389. The interest, to exclude, must be not only in the result of the suit, but must be a present, certain, vested interest, not an interest uncertain, remote, or contingent, though it matters not how small the interest may be. 1 Greenl. Ev. §§ 390, 391. To exclude a witness, he must be interested in favor of the party calling him. Sims v. Givan, 2 Blackf. 461; Kennedy v. Barnett, 1 Bibb, 154. What benefit can flow to these witnesses from L. M. Crothers' success? So far as actual interest, in a legal point of view, is concerned, it is against him. As pertinent, not to the point of competency, but to the grounds for the charge of undue influence and confederation of these three parties, and going to repel them, I will add that the gift to Lizzie was because she was a maiden lady 46 years of age, broken in health and helpless, and had spent many years living with and caring for her aged father and mother. All the other children, except Mrs. Dorrance, who was poor, were well situated in the world and independent. Why should she not be provided for? The provision for her came, not from undue influence, fraud, and corruption, but from the strongest emotions of the father's heart to provide for the woeful years of this daughter, when both father and mother would be gone. The old man's heart was beating faintly under the weight of years and disease, but its pulsations were strong to shield a dependent daughter from the chills of biting poverty. Cold would have been his heart had he departed without doing this high duty! In this act a judge cannot see fraud and vice, but noble action. If it do some prejudice to other children in paltry dollars, so it be the old man's free act, a court cannot criticise it on that score. He can make an unjust disposition if he choose. Martin v. Thayer, 37 W. Va. 38, 16 S. E. 489. Decree affirmed.

(41 W. Va. 177)

**FORD et al. v. FRIEDMAN et al.**

Supreme Court of Appeals of West Virginia.  
Feb. 2, 1895.)

**SALE OF GOODS—WAIVER OF BREACH OF CONTRACT—FAILURE TO RESHIP.**

Where goods are shipped by the seller to one who had given an order for them, but they are shipped so late that the buyer is not bound under the contract to accept them, and he writes to the seller that it is too late to accept them, and that he will be compelled to return them, and the seller replies by mail, recognizing the buyer's right to reject and return the goods, but asking him to accept them, and saying, if he will do so, that he will give the buyer an extra credit on the same of 30 days, and the buyer does not in any way reply to such offer within a reasonable time, and does not reship or in any way attempt to return the goods to the seller, the buyer will be presumed to have assented to the seller's offer, and to have accepted the goods, and will be liable therefor as purchaser.

(Syllabus by the Court.)

Error to circuit court, Mason county.

Action by C. P. Ford & Co. against J. Friedman & Co. From a judgment of the circuit court reversing a judgment of a justice's court for plaintiffs, plaintiffs bring error. Reversed.

Tomlinson & Wiley, for plaintiffs in error.  
John E. Beller and J. S. Spencer, for defendants in error.

**HOLT, P.** The plaintiffs, C. P. Ford & Co., of Rochester, N. Y., sued defendants, J. Friedman & Co., general retail merchants of Point Pleasant, W. Va., before a justice, for a part of a bill of shoes sent on order, and on the 19th day of October, 1893, obtained a judgment for \$169.10, with interest from that date. Defendants appealed to the circuit court of Mason county, and, neither party requiring a jury, the whole matter of law and fact was submitted to the court; and the circuit court, having heard all the evidence, was of opinion that plaintiffs were not entitled to recover, whereupon the plaintiffs moved the court to set aside the finding and grant them a new trial; but the court, on the 30th day of November, 1893, overruled the motion, and gave judgment for defendants, to which ruling the plaintiffs excepted, and brought the case here by writ of error. The bill of exceptions sets out all the evidence, from which the undisputed facts are as follows: Some time in December, 1892, Mr. Marshall, a salesman of plaintiffs, came to defendants' place of business in Point Pleasant, and took from them an order for about \$1,000 worth of shoes for the spring trade of 1893. Defendants, being then too busy to make out list of quantities and sizes, agreed to send by mail the quantities and sizes wanted on the order. On the 13th day of January, 1893, plaintiffs wrote to defendants as follows: "Our salesman Mr. Marshall sent us a mem. order from you, stating that you would send for what goods you would require for spring shipment later. As we have such a large number of orders to

make for spring, we would be pleased to have yours as early as possible, to give us plenty of time to make and ship to you without delay." On the 24th day of January, 1893, defendants wrote to plaintiffs, giving quantities and sizes wanted on their order. By letter of 27th January, 1893, plaintiffs acknowledged the receipt thereof, and say: "As requested, we will make and ship these goods at once." On the 3d day of March, 1893, plaintiffs made shipment of part of the goods ordered, amounting in value to \$694.38. These came to hand, and were accepted by defendants, about the 6th day of March, 1893. Defendants, after opening the goods, and finding those they most needed not among them, wrote to plaintiffs that they need not send the rest. Some time after that, but before the 8th of April, plaintiffs' salesman Mr. Marshall was again at Point Pleasant, soliciting from defendants another order. They told Mr. Marshall that they had not yet received all the goods of their first purchase; that it was then too late, and they did not want them. Mr. Marshall told defendants, if they came, not to accept them, but to ship them back. On the 8th day of April, 1893, plaintiffs made another shipment on the original order, amounting to \$162.30. Leaving out of view the sending by express, on the 29th day of April, one pair of shoes, charged at \$3.25, these are the goods in controversy. This shipment of \$162.30 was, in some way not explained, delayed on the railroad, not reaching Point Pleasant until the 22d day of April. The invoice, however, had reached defendants by mail, and they had made frequent inquiry at the depot for the goods. On the 18th day of April plaintiffs shipped to defendants another part of the original order, this part amounting to \$44. On the 20th day of April, 1893, defendants wrote to plaintiffs saying, in postscript, that they would be compelled to return their last invoice, meaning the one of \$162.30, as it was too late to be getting them then. This letter is as follows: "Point Pleasant, W. Va., April 20, 1892. Mess. C. P. Ford & Co., Rochester, N. Y.—Gents: We send you inclosed check for \$694.38, per our account in full, less five per cent. and 45 ex. Please acknowledge receipt, and oblige, yours, truly, J. Friedman & Co. P. S. Gents: We will be compelled to return your last invoice, as it is too late to be getting them in now." On the 22d day of April, 1893, the shipment amounting to \$162.30 reached the depot at Point Pleasant, and on the same day or early next morning the drayman brought them to the store of defendants, saying, "There are the two boxes of goods or of slippers that you have been looking for so long." Defendants told him that they did not want them, and he took them back to the depot. When the shipment of 18th of April came to hand does not appear, but we may infer about the same time. These goods of 18th of April were accepted, and some time after paid for. On the 24th

day of April, 1893, plaintiffs received defendants' letter of 20th of April, and at once replied by letter of 24th April, recognizing defendants' right to return the goods, as they had said they would do, but asking them to keep the shipment, and they would give defendants an extra dating on the same of 30 days. This letter is as follows: "(Dictated.) Rochester, N. Y., April 24th, 1893. Messrs. J. Friedman & Co., Point Pleasant, W. Va.—Gentlemen: Inclosed find herewith your receipt for your remittance of the 20th inst. We notice that you say in your letter of remittance that you will be compelled to return goods on our last invoice on account of its being too late to receive now. We regret exceedingly that you should be compelled to do so. We have been doing our best with all our customers this season to get their goods through on time as nearly as possible. Owing to the new lasts and patterns this season which we have had to get out, with large numbers of orders received, it has been impossible for us to get out the patterns and do any better than we have for our customers. We ask you, with this explanation, to be lenient with us; and, if you will keep these goods on your last shipment, we will give you an extra dating on the same of 30 days. We do not carry any goods in stock; and have no way of disposing of goods except at considerable loss. Awaiting the favor of your reply, we remain, yours, truly, C. P. Ford & Co." This shipment of 8th April of \$162.30 was never reconsigned or sent back to plaintiffs, but was left in the depot, where it still was on the 19th day of October, 1893, when this suit was instituted. On the 11th day of May, 1893, C. M. Whittier, depot agent, wrote to defendants about this lot of goods and two others, as follows: "May 11th, 1893. J. Friedman & Co., City—Gentlemen: We are holding three different lots of goods refused by you on account of coming in late, and in the future will have to refuse same back after leaving freight house, except you take up in regular way the expense bill, re-mark and consign in the regular way to be returned, when we will advance the charges if guaranteed. We take this action in order to avoid holding goods in our freight house so long for disposition, as we have no authority to return to consignor without a regular course we have to follow in cases of this kind, which compels us to carry shipments two or three weeks, or two or three months, and sometimes longer. Hoping you will not consider this notice too stringent, and see the position we are placed in, I am, as ever, your obedient servant. Resp't yours, [Signed] C. M. Whittier, Agent." Defendants returned to plaintiffs their statement of June 15th, with remark that plaintiffs' invoices of 8th of April and 29th of April (one pair shoes, \$3.25) had been returned to them. On the 21st day of June, 1893, plaintiffs sent defendants the following letter: "(Dictated.) June 21, 1893. Messrs. J.

Friedman & Co., Point Pleasant, W. Va.—Gentlemen: We have just received from you our statement of June 15th, returned with remark that our invoices of April 8th and 29th had been returned to us. We find in looking up the correspondence that you wrote to us April 20th that you would be compelled to return our last invoice to us, as it was too late for them, and we replied on April 24th, asking you to keep the goods on your last shipment, and that we would give you an extra dating on them of 30 days' time. We heard nothing from you in regard to this matter until you returned our statement of May 25th, with remarks that invoices of April 8th and 29th had been returned to us, and that you would send a tracer after them. We have never received the shoes from you, and the above is all the correspondence we have ever received from you in regard to the same. Of course, we cannot credit the goods to your account until they have been delivered to us. If you will have the kindness to have tracer sent and find where the goods are shipped to, and also send us bill of lading of the shipment, we will endeavor on our part, from this end, to keep trace where the goods were sent. They may have been returned through mistake to some other firm in this city or some other city. Hoping this explanation will be satisfactory, and awaiting the favor of your reply, we remain, very truly yours, C. P. Ford & Co." To which defendants sent the following reply, of June 24, 1893: "C. P. Ford & Co.—Gents: Yours to hand, and will state we have already sent another tracer after the goods returned to you, which you claim you have not received, as per request. Yours, truly, J. F. & Co. Pt. Pl., W. Va., June 24th, '93." On 24th July, 1893, defendants sent to the plaintiffs the following letter: "Point Pleasant, W. Va., July 24, 1893. Messrs. C. P. Ford & Co., Rochester—Gentlemen: In reply, your statement 20th inst., in which you request to make out a bill against the R. R. Co. for your bill April 8th and 29th, will say the position we are in, exactly as we wrote you 20th April, that the goods came too late for us, and we never expected same, and told the agent here to return same. We to-day went to the Ohio R. R. office, and told them to send tracer after those goods, and the reply we have received that the goods is still here at the depot. So you can order the goods back from the R. R. Co., or you can let us know, and we shall attend to it for you. Yours, truly, J. Friedman & Co." To this letter plaintiffs replied, on 1st of August, 1893, as follows: "(Dictated.) Rochester, N. Y., Aug. 1st, 1893. Messrs. J. Friedman & Co., Point Pleasant, W. Va.—Gentlemen: Your letter of July 24th was received during the writer's absence from home. We need hardly say that we were greatly surprised to receive a letter from you at this late day to the effect that bill of goods shipped to you April 8th were still at the depot in your place, and that, if we wished you

to do so, you would have the goods ordered back. To write such a letter after having written to us several times that you had sent tracer to show delivery of the goods in Rochester is certainly contrary to the letters previously received from you. To repeat what we have already written you in our letter of June 21st, you advised us on April 20th that you would be compelled to return the goods in our last invoice. We wrote you on April 24th, asking you to keep the goods, and that we would give you an extra dating of 30 days on last shipment. We heard nothing from you until you returned our statement of May 25th, with remarks that invoices of April 8th and 29th had been returned to us, and that you would send tracer after them. We wrote you in reply to that letter that we had never received the shoes from you; in regard to the matter, that we, of course, could not credit the goods to your account until they had been delivered to us; asked you to have the kindness to send tracer to find where the goods were shipped to, and to send us bill of lading of the shipment, and that we would endeavor on our part, from this end, to help trace where the goods were sent, thinking they might have been returned through mistake to some other firm in this city. In reply to that, you wrote us on June 24th, stating: 'Yours to hand, and we have already sent another tracer after the goods returned to you, which you claim you have not received, as per your request' Not hearing anything further from you, on July 20th we notified you that it being too late in the season to dispose of these goods to any other parties except at a large loss, and as you had been unable to trace these goods and show delivery to us, we must ask you to collect the amount from the railroad company. Notwithstanding your letter of July 24th, this is the way the matter now stands, and we must hold you responsible for goods shipped to you on April 8th and 29th. From what we have written you cannot say, nor would any one else say, but what we have done what is right in taking this position. When you first informed us that the goods arrived too late, we advised you that we would give you 30 days' extra time. You did not reply for more than one month. You then wrote us that you had returned the goods. We wrote you within three days for you to send a tracer. We hold several communications from you since that time, saying that you have sent a tracer to show the goods had been returned to us. As we expect to do what is right by our customers, we certainly shall hold them to giving us the same kind of treatment. We could not accept the goods if they were returned to us at this time, either by you or the railroad company, as we are in no way to blame in the matter, and have abundant evidence to prove the same. Very respectfully yours, C. P. Ford & Co." The one pair of shoes sent by express on the 29th day of April, in com-

pletion of the order, we may infer, defendants say were returned by mail; but they never came to the hands of those who had sent them. Other letters passed that are in the record, but they bring out no new facts, and throw no light upon the points in controversy, which are purely legal.

Counsel for plaintiffs, C. P. Ford & Co., in the presentation and argument of their case, make three points: (1) That, upon the delivery of the goods to the common carrier, they became the property of defendants, J. Friedman & Co., and were beyond the control of plaintiffs, except as to right of stoppage in transitu, which right exists only when the consignee is insolvent. To weed out the irrelevant as we go, no such right of stoppage exists or is claimed in this case. (2) Defendants are liable because they failed to return the goods within a reasonable time. (3) Defendants did not notify the plaintiffs within a reasonable time of their refusal to accept and pay for the goods.

For the purposes of this case, to avoid repetition and promote clearness of meaning, the term "delivery" will be used in the sense of transfer of possession; the term "receive," in the sense of receiving the possession; and the term "accept," in the sense of receiving the possession with the intention of retaining the goods, in performance of the contract of sale. See *Tied. Sales*, §§ 114, 115.

A delivery to the common carrier for transportation to the purchaser is a delivery to the purchaser, unless a contrary intent appears. The carrier receives as the agent of the purchaser. But the proposition cuts no figure in this case, for the following reasons: (1) The goods were by the contract of sale to be sent as one consignment as a whole, at one and the same time, and not by installments. (2) They were to be made and shipped at once, "for the spring trade." The term "at once" is not to be taken literally, for that would be unreasonable, seeing that the goods had to be manufactured before they could be sent; but the term indicates that a prompt making and sending of the shoes was expected on the part of the buyer, and promised on the part of the maker and seller. One of the defendants, examined as a witness, says: "The custom was that in such cases you would get the shoes within two or three weeks." Evidence is admissible to show what the parties thought about the time of performance. See *Tied. Sales*, § 100. What is a reasonable time in such a case depends upon the facts of the particular case, and, as they were ordered for the spring trade, plaintiffs were bound by their contract to make and ship them at least as early as the opening of spring,—that is to say, about the 1st of March; certainly not later than the 6th day of March, the date of receiving the first consignment. Instead of sending the full order at that time, plaintiffs undertook to send them by installments;



and, instead of sending them at once, deferred shipping the goods in controversy until the 8th of April; and by some delay, not explained, they did not reach their destination until the 22d day of April, when spring was then almost two-thirds gone. But we need not pursue further this branch of the case, for plaintiffs, after having received defendants' letter of 20th April, in which they say they will be compelled to return this last invoice, wrote in reply their letter of 24th of April, in which they recognize defendants' right to return these goods on account of their being sent and received too late to be accepted, and in the same letter offer to give defendants an additional credit of 30 days if they will keep the goods. Now came the time of the defendants to speak and to act. Goods had been sent to them on their order, which came to hand out of season, too late, and they notified the seller and consignor that they would be compelled to return them. The consignor says, in reply: "We concede your right to return the goods, but regret exceedingly that you feel compelled to do so. We have been doing our best to get the goods of our customers through on time, as nearly on time as possible. Owing to the new lasts and patterns this season which we have had to get out, with the large number of orders received, it has been impossible for us to get out the patterns and do any better than we have for our customers. We ask you, with this explanation, to be lenient with us, and, if you will keep these goods, we will give you an extra dating on the same of 30 days. We do not carry any goods in stock, and have no way of disposing of them except at a considerable loss." Did the defendants return the goods as they said they would be compelled to do, reassign and reship them? Or did they, within a reasonable time, notify the consignor that they would not accede to his last proposal to keep the goods? They knew the goods were in the depot, for the agent pointed them out, asked them by letter to reassign them if they did not intend to accept them. They did not even answer the plaintiffs' letter containing the new proposal until after more than 30 days had elapsed. During this time they had received and accepted the \$44 shipment made on the 18th day of April, 10 days after the one in controversy; and when they did answer, by returning to plaintiffs their statement of account sent on the 25th day of May, it was accompanied with the remark that the invoices of 8th April and 29th April (the goods here sued for) had been returned to plaintiffs, and they would send a tracer after them; and, when the goods had failed to come to the plaintiffs, they wrote to defendants on the 21st day of June, requesting them to send to plaintiffs the bill of lading of the reshipment. Instead of sending the bill of lading as requested, they sent a letter of 24th June, saying that they had sent another tracer. Finally, on the 24th of July,

1893, they mailed to plaintiffs the letter saying "the goods are still here at the depot." A strange letter, in view of the fact that the depot agent, by letter of 11th May preceding, had requested defendants to re-mark and reassign the goods which they had refused to accept, which re-marking and reassignment defendants, though both examined as witnesses, make no claim of ever at any time having made, or of authorizing any one to make for them.

Upon the facts as they appear by this record, there can be but one conclusion: Such delay on the part of defendants, unexplained, was not reasonable, and such conduct was not consistent with the requirements of fair dealing, and on both grounds the law holds them liable for the goods as purchasers thereof. See *Bartholomae & Co. v. Paule*, 18 W. Va. 771; *Thompson v. Douglass*, 35 W. Va. 337, 13 S. E. 1015. Not having rejected plaintiffs' proposal to keep the goods within a reasonable time after they came to the depot, and not returning them as promised, they are presumed to have accepted them. See *Tied. Sales*, § 115. Actions may speak louder than words. Defendants not only made no reply for more than 30 days to plaintiffs' proposition that they should keep the goods in controversy, on an additional credit of 30 days, but during that time received and accepted the installment of shoes shipped on the 18th day of April. This amounted to their assent to keep the shipment of 8th of April, which came to the depot on the 22d of April, which they said they would return, but did not return; and when at length, on the 21st day of June, they notified plaintiffs by mail that they had returned them, they sent no bill of lading, did not return them, but knew they were then lying in the depot, and that they were not returned, because they had failed and refused to re-mark and address them, in order that they might be returned. The judgment must be set aside, and judgment be rendered for the plaintiffs.

(40 W. Va. 161)

KESTER et al. v. LYON et al.

(Supreme Court of Appeals of West Virginia.  
Jan. 19, 1895.)

COMMISSIONS OF EXECUTORS—CHANCERY PRACTICE  
—COMMISSIONER'S REPORT—ABSENCE OF EXCEPTIONS—EFFECT—ERROR NOT APPARENT—REVIEW OF EVIDENCE.

1. Commissions to an executor on uncollectible debts ought not to be allowed. If entitled to anything for service as to them, it must be specific compensation.

2. Exceptions to a report of a commissioner in chancery must point out the particular errors with reasonable certainty, so as to direct the mind of the court to them. Where exceptions are taken to certain parts of a report, the others not excepted to are admitted to be correct, both as regards the legal principles and the evidence on which they are based.

3. If a report is not excepted to, it is taken to be correct as to adult parties, and will not be examined by either the lower or appellate

court, and no advantage of any error therein can be taken, unless it be error apparent on the face of the report; but such an error can be taken advantage of in either court at the hearing, without exceptions.

4. To show such error on the face of a report, in the absence of such exceptions as bring before the court the evidence before the commissioner, recourse may be had to the pleadings and exhibits therewith, provided it be impossible that the alleged error could not have been affected by extrinsic evidence.

5. If such report be excepted to within the 10 days after completion during which it lies in the commissioner's office for examination, the commissioner must return the exceptions, with such remarks thereon as he thinks proper, and the evidence relating to the exceptions, and such evidence will be considered on the hearing of such exceptions; but, if no exceptions be filed within those 10 days, the evidence on which the commissioner acted is not required to be returned by him, and forms no part of the report, and will not be considered on the hearing of any exceptions that may be afterwards taken to the report, unless made a part of the report by the report itself, or unless it be brought up by order of the court.

6. Where a bill or other chancery pleading exhibits a document, the document is a part of such bill or pleading as fully as if incorporated therein.

(Syllabus by the Court.)

Appeal from circuit court, Harrison county.

Bill by Celia Kester and Samuel O. Kester against James M. Lyon, executor, and others. From a decree for plaintiffs, James M. Lyon, executor, appeals. Affirmed.

John Bassel, for appellant. W. Scott, for appellees.

BRANNON, J. This is an appeal taken by James M. Lyon from a decree of the circuit court of Harrison county in a suit brought by Celia M. Kester and Samuel O. Kester, her husband, against Lyon, to compel a settlement of his accounts as executor of Cyrus Ross, deceased, and to surcharge and falsify certain settlements which he had made before a commissioner of the county court. One item of complaint by the appellant against the decree is that it disallows and refuses to Lyon \$3,165.48, which had been allowed him in ex parte settlements as commission on insolvent uncollectible debts belonging to the estate. The executor was allowed commissions, and no complaint is made to the percentage of commission. We cannot sustain the claim for a commission on uncollectible debts. The statute bearing on the subject is that the fiduciary shall be allowed "any reasonable expenses incurred by him as such; and also, except in cases in which it is otherwise provided, a reasonable compensation in the form of a commission on receipts or otherwise." Code, c. 87, § 17. The usual mode of compensation to the fiduciary for service is by a commission on receipts, but where that affords no basis, some other process is allowable, but generally a per centum, greater or less, on receipts will answer all purposes. If a small commission is not just, the commissioner or pro-

bate court can increase it. *Estill v. McClintic*, 11 W. Va. 399. There are instances where it has been allowed on disbursements. *Boyd v. Oglesby*, 23 Grat. 674. But how insolvent assets can give any basis or measure for commission we cannot see. I have not found any instance of its application. No money from them has ever come to the hands of the fiduciary. It would be a dangerous precedent to adopt. If the fiduciary gets commission on debts solvent or insolvent, what interest has he to use energy to collect them? This estate was a large one. It had many debts outstanding, and thousands of dollars were uncollectible. The executor gives evidence that he spent much time and effort in actual litigation, and otherwise by personal and diligent service, to realize these assets, and he says his commission on receipts is utterly inadequate compensation. Likely it is. My observation has been that the usual 5 per cent. on receipts, in cases of estates of size and complication, is too small a compensation for the labor and responsibility; but the executor is not to be compensated on the basis of percentage of uncollectible debts. If he rendered service as to them demanding compensation, he should have rendered specific charges for specific service. We should be reluctant to overrule the action of a county or circuit court allowing a certain commission, rather than a lower or higher one, but not when the basis of allowance is unheard of and dangerous, and affords no just gauge. The commissioner and circuit court properly refused to allow this commission.

Another complaint against the decree is that it charges the executor with interest on moneys in his hands to an amount greater than the interest actually received by him. He says in his evidence, what is no doubt true, that of the large amount of money in his hands a good deal was often idle; that he had to keep on hand a considerable amount to meet current expenses of litigation; that litigation between two contesting wills lasted from 1873 to 1888, and in these many years it was difficult, and at times impracticable, to find borrowers; that loans to cattle graziers would be made in the spring, and return in the fall, and for a time lie idle. He reported interest received by him to the large sum of \$4,753.28, a circumstance attesting in favor of his energy in making loans. The amount of interest charged against him exceeded what he received by \$1,403.19. He received some on loans in excess of lawful rate, which excess was not debited to him; but deducting that, the excess of charge of interest over all receipts was \$3,296.84. Doubtless there is some hardship on the executor herein, but the case of *Granbery v. Granbery*, 1 Wash. (Va.) 249, reviewed and approved in *Burwell v. Anderson*, 3 Leigh, 348, will not allow us to depart from the principle carried out by this decree of charging interest on balances of

money in the executor's hands at the close of each year of his executorship covered by the account.

Another complaint by appellant is that he is twice charged with \$647 on account of a debt against Willis and Jarvis. The report on which the decree is based charges principal \$841.72, and interest \$216.88, for "decree against Geo. E. Willis and William Jarvis in their suit against said executor." A former *ex parte* settlement charges the executor with "cash on note of Geo. E. Willis and Wm. Jarvis, \$647." As the balance found in this settlement enters into the account on which the decree is based, if the debt charged to the executor in this account is the same as that for which the \$647 is charged, the executor is wronged to the extent of \$647, with interest from October 20, 1887, to date of last account. Is it the same debt? To show that it is, appellant's counsel appeals to a list of notes which went into the executor's hands, and we find it lists: "(1) Note on G. E. Willis and Wm. Jarvis for \$400." This list is an exhibit with plaintiffs' bill. The first question occurring is whether we can look to this list reciting this note to determine whether the debt for which the \$647 was charged and that charged in the commissioner's report, and entering into the decree, are the same. There were exceptions to the commissioner's report, but none as to this item of charge. This court has decided that exceptions to a commissioner's report have to be of the nature of a special demurrer, and must point out the alleged errors with reasonable certainty, so as to direct the mind of the court to them; and, when the party so excepts, the parts not excepted to are admitted to be correct, not only as regards the principals, but as relates to the evidence on which they are based. *Reit v. Bennett*, 6 W. Va. 417; *Crislip v. Cain*, 19 W. Va. 438; *Chapman v. Railroad Co.*, 18 W. Va. 184, point 9; *Keck v. Allender*, 37 W. Va. 201, 16 S. E. 529, point 1; *Hutton v. Lockridge*, 22 W. Va. 159. Suppose the error not excepted to be apparent on the face of the report, does the failure to except to it waive it, and preclude the party from availing himself of it on the hearing in the appellate court? Does it estop him, if he overlooks it and fails to except to it? The generality of the language of *Crislip v. Cain* would support the contention that it would, yet I think not. *Hutton v. Lockridge*, 22 W. Va. 176. If it would, this would debar Lyons from relief as to this item, as he did not except to it, while he did to others. Without exception, no error of the report can be taken advantage of by adults, unless it be an error on the face of the report. *McCarty v. Chalfant*, 14 W. Va. 531; *Ward v. Ward*, 21 W. Va. 262; *Thompson v. Catlett*, 24 W. Va. 525.

There being no exception, then, to this item of the report, the appellant has no right to ask this court to give him the benefit of it, unless it is to be deemed an error on the face

of the report. What do we mean by the words "face of the report"? Does it mean the face of the report itself alone? or can we include other parts of the record? It does not include depositions, or even documentary evidence, simply filed as such, and not exhibited with pleadings. The case of *Bank v. Shirley*, 26 W. Va. 563, goes to the extent of including the pleadings as part of the report, as it holds that, though there be no exception to a report, and no error appears on the face of the report, yet, when taken in connection with the pleadings error in the report appears, the error will be corrected by the appellate court, it being impossible in such cases to be affected by extrinsic evidence. When we look at the mere face of the pleadings in this case, we are not helped, but we find exhibited with the bill a settlement made by Lyons with a commissioner, and as part of it a list of the estate's notes as stated above, and this list is part and parcel of the bill; for in chancery all exhibits with a bill or answer are parts of that bill or answer, and, generally, where one paper refers to another in a manner so as to identify it, that other paper is a part of the paper referring to it. *Gunn v. Railroad Co.*, 37 W. Va. 421, 16 S. E. 628, and citations in opinion; *Barb. Ch. Prac.* 345; *Bias v. Vickers*, 27 W. Va. 461, and cases cited; *Craig v. Sebrell*, 9 Grat. 131; *Tracey v. Shumates*, 22 W. Va. 476. Thus we have before us this list of notes. Examine it, and it is found that it mentions a note of \$400 on G. E. Willis and William Jarvis. Does it thence follow that this is the same debt charged in the commissioner's report as one arising from decree against George E. Willis and William Jarvis in their suit against said executor, with interest from the date thereof, \$841.72? By no means. There is no earmark of amount, date, or otherwise, save as to debtors. The evidence that is before us does not show it, and, if we could consider all the evidence before us on account of the points excepted to, it is not claimed there is any evidence to show it. It is a mere probability that it is the same, not a certainty, for there may have been two debts on same parties. Oral evidence before the commissioner, not brought up with his report, might have so shown him. Now, remember that *Bank v. Shirley*, supra, only allows us to look at pleadings, and find error in the report, when it is impossible that the result may be affected by any extrinsic evidence; and remember the numerous cases saying that, without exceptions, adult parties shall not impeach a report on grounds and in relation to matters which may be affected by extraneous matters. *Evans v. Shroyer*, 22 W. Va. 581; *Hyman v. Smith*, 10 W. Va. 299; *McCarty v. Chalfant*, 14 W. Va. 531; *Thompson v. Catlett*, 24 W. Va. 524. Others can be given. Under the rule of *stare decisis*, we cannot depart from these decisions to meet what I regard as likely a hard case. Documents filed with brief of counsel render it practically certain that this double charge er

ists, but, as counsel admits, they are no part of the record.

Another complaint is for the first time made in brief of appellant's counsel, and is stated thus by it: "Another error against appellant, apparent upon the face of the report, or, at least, a matter which is a great hardship upon him, is this: Beginning with page 241, Commissioner Lynch makes a statement of the amount of assets in the hands of appellant as executor, and he commences by charging him with \$73,587.96 as of the 20th of October, 1888, and \$2,200.60 of interest collected up to that date. This is an error, as we will now show. On page 187 of record and the three following pages will be found the settlement made by Commissioner Denham of appellant's accounts, from which it will be seen that the commissioner charges appellant with principal, \$72,654.23; interest collected to October 20, 1888, \$2,649.79; and bank dividends, \$264.00,—making the total charges \$75,568.02. And on page 189 he gives total credits of \$1,980.06, leaving a balance on cash account as of October 20, 1888, \$73,587.96, which shows that all the interest up to that time collected or received by appellant was charged to him and settled as of that date. On page 283 of record will be found a settlement of appellant's accounts made by Commissioner Adams as of the 20th of March, 1890, in which appellant is charged with this cash balance of \$73,587.96, and with interest collected up to that date, \$2,200.60, which is interest that had accumulated between October 20, 1888, and March 20, 1890; but Mr. Lynch erroneously charged this item back as having been received prior and up to October 20, 1888; and therefore when this item is carried into appellant's account he loses about two years' interest erroneously charged to him upon the sum of \$2,200.60." But, turning to Adams' settlement, we find it stated thus: "1888, Oct. 20. To balance on cash account at settlement this date, \$73,587.96; to interest collected, \$2,200.60,"—thus showing that Adams reported \$2,200.60 interest as collected up to October 20, 1888, not March 20, 1890. Lynch so found and reported in the report made the basis of the decree. Adams' report did not enter into this report. But, if this were not so, this error does not appear on the face of the report, and Adams' report is called upon to manifest it, and that is no part of the pleading, but of a deposition; and as there was no exception to the report within the 10 days during which it was in the commissioner's office, and never any exception as to this matter, the evidence, including this deposition, cannot be looked into. *Arnold v. Slaughter*, 36 W. Va. 589, 15 S. E. 250; *Holt v. Holt*, 37 W. Va. 305, 16 S. E. 675; *Thompson v. Catlett*, 24 W. Va. 525. The commissioner, if exceptions are filed within 10 days, himself certifies the evidence touching the same, so as to make it manifest that he has sent it up, but he has certified none in this cause. *Ar-*

nold v. Slaughter, 36 W. Va. 589, 15 S. E. 250. Thus we are brought to the conclusion that we cannot reverse the decree.

MOORE et al. v. CONNER et ux.<sup>1</sup>  
(Supreme Court of Appeals of Virginia. April 10, 1890.)<sup>2</sup>

DESCENT — COLLATERALS OF THE HALF-BLOOD — WHEN THEY TAKE PER STIRPES.

Code 1887, § 2548, provides two courses of descent, the first commencing with intestate's children and their descendants and ending with his mother, brothers, and sisters, and their descendants; and the second beginning with the grandfather and ending with the husband or wife and his or her kindred. Clause 10 provides that, if there be no father, mother, brother, or sister, nor any descendant of either, nor any paternal kindred, the whole shall go to the maternal kindred, and, if there be no maternal kindred, it shall go to the paternal kindred; that, if neither maternal nor paternal kindred, it shall go to intestate's husband or wife; or, if he or she be dead, to his or her kindred, in the like course as if he or she had survived the intestate, and died entitled to the estate. Section 2549 provides that collaterals of the half-blood shall inherit only half so much as those of the whole blood; but, if all the collaterals be of the half-blood, the ascending kindred, if any, shall have double portions. Section 2550 provides that when intestate's children, mother, brothers, and sisters, or his grandmother, uncles, and aunts, or any of his female lineal ancestors living, with the children of his deceased lineal ancestors, male and female, in the same degree, come into the partition, they shall take per capita; and where, a part of them being dead and a part living, the issue of those dead have right to partition, such issue shall take per stirpes, but whenever those entitled to partition are all in the same degree they shall take per capita. *Held*, that where an intestate left surviving no father and no children or descendants, but left a mother and four nieces and nephews of the half-blood, such nieces and nephews took per stirpes, and not per capita.

Appeal from circuit court, Appomattox county.

Action by Robert W. Conner and Lou R. Conner, his wife, against Joseph M. Moore and others, for partition. From a decree for plaintiffs, defendant Joseph M. Moore appeals. Affirmed.

Edward S. Brown and Wm. B. Tinsley, for appellants. Chas. H. Sackett, for appellees.

RICHARDSON, J. This is a controversy between certain of the heirs at law of William B. Moore, late of Appomattox county, in respect to the mode of partition of an undivided two-sevenths vested interest in remainder, of which he died seised, in a tract of 462 acres of land in which his mother had a life estate. Said William B. Moore had attained his majority, and he died intestate, but left a widow, who was not entitled to dower because her husband was not entitled to the possession of said interest

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

<sup>2</sup> This opinion, though delivered April 10, 1890, was not filed until December 22, 1890.

during coverture. He left no children, nor descendants of any, nor did he leave a father. His heirs at law were his mother, Rebecca T. Moore, and four nieces and nephews of the half-blood. The facts are these: William Moore, the father of said William B. Moore, was twice married, and he had three children by each marriage. The children by the first marriage were Blake B. Moore, Amanda Phelps, and Mrs. Trent. The children by the last marriage were the said William B. Moore, Henrietta Moore, and Susan Bagby. Prior to his death, to wit, on the 20th day of March, 1868, William Moore, the father of said two sets of children, conveyed to Jesse T. Davidson, trustee, said 462 acres of land, it being his old homestead place, in said county of Appomattox, and certain articles of personal property, upon the following trusts, as stated in the language of the deed: "For the sole and separate use and benefit of Rebecca T. Moore during her natural life, free from the control, debts, liabilities, or marital rights of her husband; that the said trustee shall permit her to hold quiet and peaceable possession of the land and personal property aforesaid, taking to herself, free from any marital rights, the use and enjoyment, rents and profits, during her life, with power, however, to sell or dispose of, by gift or otherwise, according to her will or pleasure, any or all of the personal property aforesaid, and at the death of the said Rebecca T. Moore the said trustee, Jesse T. Davidson, shall convey the said tract of land, and such portion of the personal property aforesaid as may remain undisposed of, if there be any, to the said Susan Bagby and Henrietta Moore; to have and to hold the same in severalty, share and share alike, to them and their heirs, forever." The said Henrietta Moore and Susan Bagby both departed this life intestate and without issue, and the husband of the said Susan is also dead. William Moore, their father, Blake B. Moore, their half-brother, and Mrs. Trent, their half-sister, all died before either the said Henrietta or Susan. Blake B. Moore left two children, to wit, Joseph M. Moore and Martha R., wife of Fletcher B. Moore. Mrs. Trent left one child, Lou R. Conner. Subsequent to the death of both Henrietta and Susan, the said Amanda Phelps also died intestate, leaving only one child, George W. Phelps. On the — day of —, 1884, the said William B. Moore departed this life intestate, and without issue, leaving surviving him, however, a widow, the said Mary V. O. Moore. On the 17th day of September, 1887, the said Rebecca T. Moore, the life tenant, and mother of the said William B., Henrietta, and Susan, also departed this life, having first made and published her last will and testament, which was proved and admitted to record at the October term, 1887, of the county court of said county of Appomattox. By the fifth clause of her

will the testatrix devised all her interest in said tract of 462 acres of land to Charles H. Sackett, in trust for her niece Martha R. Moore during her natural life, and at her death to be equally divided among her children then living, and the descendants of any who may have died, said descendants taking their parents' shares. The said Martha R. Moore has six children, to wit, Neola E., wife of T. M. Howerton, Rebecca T. Moore, Jr., James W. Moore, Baker B. Moore, William W. Moore, and Minnie S. Moore, all of whom are under the age of 21 years. In August, 1888, Robert W. Conner and Lou R., his wife, filed their bill in the circuit court of Appomattox against James T. Davidson, trustee in said deed from William Moore to him, dated 20th of March, 1868; George A. J. Pinnell, executor of Rebecca T. Moore, deceased; Joseph M. Moore; Mary V. O. Moore, widow of William B. Moore, deceased; Charles H. Sackett, trustee, under the will of Rebecca T. Moore, deceased, for Martha R. Moore and children; Fletcher B. Moore and Martha R. Moore, his wife; T. M. Howerton and Neola E., his wife; Rebecca T. Moore; James W. Moore; Baker B. Moore; William W. Moore; and Minnie S. Moore; the last six being the children of Martha R. Moore, all of whom are under 21 years of age. The object of the suit was to have partition among the heirs of Henrietta Moore, to have partition among the heirs of Susan Bagby, and to have partition among the heirs of William B. Moore.

After setting forth substantially the facts as above stated, the bill of the plaintiffs alleges that Henrietta Moore and Susan Bagby each acquired, by the said deed from William Moore to Jesse T. Davidson, trustee, dated March 20, 1868, a vested, fee-simple, undivided half interest in said 462-acre tract of land, subject to the life estate of the said Rebecca T. Moore in the whole tract, which interests, upon the death of each, descended to her heirs at law; and that the said Henrietta Moore predeceased the said Susan Bagby. William B. Moore was the full brother and one of the heirs at law of both Henrietta Moore and Susan Bagby, and his two-sevenths interest in said tract of land—which is the sole subject of controversy here—was derived by inheritance from them. And in the like manner Mrs. Rebecca T. Moore, the mother of William B. Moore, derived from the said Henrietta, Susan, and William B. Moore the interest devised by her in trust for Martha R. Moore for life, remainder in fee to her children. And the four nephews and nieces of the half-blood, who come into this petition, likewise derive their interests by inheritance from the said Henrietta, Susan, and William B. There is, however, no controversy except as to the interests of said half-bloods, inherited from William B. Moore. The plaintiffs, in their bill, claim that on the death of William B. Moore, intestate, his share in said tract of

land (two-sevenths) passed to his mother and said four nephews and nieces, and that the same must be divided into five parts, giving to the mother two-fifths; to George W. Phelps, the only child of Amanda Phelps, a deceased half-sister of the intestate, one-fifth; to Joseph M. Moore and Martha R. Moore, the children of Blake B. Moore, a deceased half-brother of the intestate, one-fifth; and to the female plaintiff, Lou R. Connor, one-fifth. In other words, that the said nephews and nieces, being of the half-blood, take per stirpes, or by stocks, and not per capita. Joseph M. Moore, one of the children of Blake B. Moore, answered the bill, denying the manner of distribution therein insisted upon, and claiming that the nephews and nieces take per capita, and not per stirpes, and that, therefore, the two-sevenths interest of the intestate must be divided into six parts, giving to the mother two-sixths thereof, and to each of the four nephews and nieces one-sixth. At the hearing, in September, 1888, the circuit court rejected the claim thus set up in the answer of Joseph M. Moore, and, holding that the said nephews and nieces take per stirpes, and not per capita, decreed that the two-sevenths interest of the intestate, William B. Moore, be divided into five parts, and that Mrs. Rebecca T. Moore, his mother, take two-fifths, George W. Phelps one-fifth, the said two children of Blake B. Moore one-fifth, and the female plaintiff, Lou R. Connor, one-fifth; and from that decree Joseph M. Moore obtained an appeal.

We are of opinion that the decree appealed from is unquestionably right. Indeed, it is difficult to perceive how, in the light of the plain provisions of our statute of descents and distributions, any claim to the contrary could be seriously asserted. Yet such claim is here asserted, and it has been argued by counsel for the appellants with a degree of learning and ability worthy of a better cause. The statutory provisions which govern the case are found in sections 1-3, c. 119, Code 1873, and are the same as sections 2548-2550, Code 1887. The case is this: The intestate, William B. Moore, left no descendants, no father, no brother, nor sister, but he left a mother and four nephews and nieces,—a nephew, the son of a deceased half-sister; a niece, the daughter of another deceased half-sister; and a nephew and niece, the children of a deceased half-brother. It is conceded that, the nephews and nieces being collaterals of the half-blood, the mother takes a double portion; but it is contended that the nephews and nieces take per capita, which would result in dividing the estate for distribution into six parts, two of which would go to the mother, and one to each of the nephews and nieces. By section 2548, Code 1887, it is provided that, when any person having title to any real estate of inheritance shall die intestate as to such estate it shall descend and pass in parcenary to such of his kindred, male and female, as

are not alien enemies, in the following course: First, to his children and their descendants; second, if there be no child, nor the descendant of any child, then to his father; third, if there be no father, then to his mother, brothers, and sisters, and their descendants. These three clauses of section 2548 provide for the most prominent and usual features in the course of descents. But it was present to the mind of the lawmakers that many cases would necessarily arise in which those standing in more remote degrees of kinship should be provided for. Hence, by the fourth clause of said section, it is provided that, if there be no mother, nor brother, nor sister, nor any descendant of either, then one moiety shall go to the paternal, the other to the maternal, kindred, in the following course: First, to the grandfather; if none, then to the grandmother, uncles, and aunts, on the same side, and their descendants; if none such, then to the great-grandfathers, or great-grandfather, if there be but one; if none, then to the great-grandmothers, or great-grandmother, if there be but one, and the brothers and sisters of the grandfathers and grandmothers and their descendants; and so on in other cases without end, passing to the nearest lineal male ancestors, and, for want of them, to the nearest lineal female ancestors in the same degree, and the descendants of such male and female ancestors. Thus two general courses of descent are provided, the first commencing with the children of the intestate and their descendants, and ending with his mother, brothers, and sisters, and their descendants; and the second beginning with the grandfather and ending with the husband or wife and his or her kindred; it being provided by the tenth and last clause of said section 2548 that, if there be no father, mother, brother, or sister, nor any descendant of either, nor any paternal kindred, the whole shall go to the maternal kindred, and, if there be no maternal kindred, the whole shall go to the paternal kindred. If there be neither maternal nor paternal kindred, the whole shall go to the husband or wife of the intestate; or, if the husband or wife be dead, to his or her kindred, in the like course as if such husband or wife had survived the intestate, and died entitled to the estate. Thus the law in general terms prescribes the course of descents, and designates the persons or classes who shall inherit. But it was foreseen that a class of persons entitled to the inheritance—such as mother, brothers, and sisters—would, in the nature of things, often be disturbed by the death of one or more members, and that, in cases like the present, collaterals of the half-blood would come into the partition, and that the descendants of the dead members of the class and the collaterals of the half-blood and their descendants should be provided for, and their rights defined. These objects were effected by sections 2549, 2550. By the first of these sections, which is entitled "How col-

laterals of half blood inherit," it is declared that "collaterals of the half blood shall inherit only half so much as those of the whole blood; but if all the collaterals be of the half blood, the ascending kindred, if any, shall have double portions." In the present case, the collaterals all being of the half-blood, the intestate's mother takes a double portion. About this, however, there is no controversy. By the second of the sections last above referred to (section 2550), and which is entitled "When parties take per stirpes, and when per capita," it is provided that: "When the children of the intestate or his mother, brothers and sisters or his grandmother, uncles and aunts, or any of his female lineal ancestors living, with the children of his deceased lineal ancestors, male and female in the same degree, come into the partition, they shall take per capita or by persons; and where a part of them being dead and a part living, the issue of those dead have right to partition, such issue shall take per stirpes or by stocks, that is to say, the shares of their deceased parents; but whenever those entitled to partition are all in the same degree of kindred to the intestate they shall take per capita or by persons."

In order to uphold his contention that these nephews and nieces of the half-blood take per capita, the appellant attempts to construct a class so composed as to effect his purpose; and to that end he wrests from their proper connections two clauses of the statute, and in doing so destroys the grammatical sense and the consistency of the provisions regulating the prescribed course of descents and distributions. First he takes from section 2549—it being the latter clause thereof—the provision: "But if all the collaterals be of the half blood, then the ascending kindred, if any, shall have double portions"; and, second, he takes from section 2550 this language: "When \* \* \* any of his female lineal ancestors living, with the children of his deceased lineal ancestors, male and female, in the same degree, come into the partition," etc. Now, let us look into these provisions, and see if the proposed use of them can serve the desired purpose. It is certain that the last clause of section 2549 contributes nothing to that end. The entire section relates only to collaterals of the half-blood. Its caption is, "How collaterals of the half blood inherit." It states affirmatively, not what others shall inherit, but what collaterals of the half-blood shall inherit. Its obvious meaning is that, if all who inherit are collaterals of the half-blood, some of them of the ascending kindred and some not, those of the ascending kindred shall have double portions. The clause relied upon was not intended to alter in any way a previously established class. On the contrary, the disjunctive words "but if," introducing the last clause of the section, show that the class of persons referred to is the same mentioned in the first clause of said section. Moreover, in the present case, all who

inherit are not collaterals of the half-blood, for the mother is among those who inherit, and her presence in the inheriting class makes it a very different case. It is therefore clear that the clause in question has no bearing whatever in aid of the appellant's contention. To illustrate the meaning of the clause: Suppose, under the sixth clause of section 2548, a living uncle of the half-blood came into the partition with a child of a deceased uncle of the half-blood, and the two inherit an estate from the child of a half-brother of these uncles; the living uncle, being of the ascending kindred, would take a double portion. Second. As to the provision from section 2550, which is relied upon, it must be borne in mind that that section embraces four distinct classes, to wit: (1) The children of the intestate; (2) his mother, brothers, and sisters; (3) his grandmother, uncles, and aunts; (4) any of his female lineal ancestors living, etc.—to which, in case some of the class are dead, the subsequent provision for taking per stirpes or per capita applies; and these four classes are distinctly in unison with and explanatory of the like number of classes mentioned in the "course of descents" prescribed by section 2548 in which the question may arise, and are arranged in the same order. Hence in the course of descents prescribed in section 2548 we have: First, "to his children and their descendants;" second (clause 3), "to his mother, brothers, and sisters;" third (clause 6), grandmother, uncles, and aunts; fourth, other cases, respecting the division of moieties under the subsequent clauses of the section. In none of the intervening cases can the question of taking per stirpes arise. The present case in each instance comes under the second head (clause 3), and we have no concern with the others. In searching for the class entitled to partition in the present case, we must stop when the law stops, at "mother, brothers, and sisters." So, also, in seeking the necessary explanation under section 2550, we must call a halt when we reach the corresponding class there given. Section 2548 prescribes the "course of descents generally." So in this, as in every, case arising under the statute, reference must first be had to that section to ascertain to which class it belongs. The other divisions are but explanatory of how the estate shall be partitioned under the proper class when discovered, especially when some of those entitled to take are descendants of deceased members of the class, or some of the class are collaterals of the half-blood. Having thus determined the class, no number of deaths in it, short of its total extinction, will affect the interest of any survivor of that class. This, in the present case, is the pivotal point of inquiry, for an effort is made to establish a class out of subsequent explanatory provisions, and contrary to the previously established course of descents generally.

In the case at bar there can be no question but that the third clause of section 2548, cit-

ed above, is the one under which the distribution must be made; and, this being so, the manner of distribution is plainly directed by sections 2549 and 2550. The last clause of section 2550 is in these words: "Whenever those entitled to partition are all in the same degree of kindred to the intestate, they shall take per capita, or by persons." Now, if the heirs in this case consisted of the four nephews and nieces of the half-blood and a nephew of the whole blood,—say, for instance, a child of Susan Bagby,—and no others, then the estate would have to be divided into six parts, and the nephew of the whole blood would get a double portion, or two-sixths. All who inherit would then be in the same degree of kindred to the intestate. But, as it is, we have the living mother, which establishes the class for division much nearer to the intestate. Again, for illustration, let us suppose the descendants of the half-brothers and sisters numbered 48 instead of 4, then the application of the rule contended for by the appellant would reduce the mother's share to two-fiftieths. It is thus made clear that the statute cannot be so warped as to put the mother in a class in which she will have to share per capita with her grandchildren and step-grandchildren. Thus it is seen that the clauses relied on by the appellant are far from upholding his claim. Both of them relate to a more remote degree of kindred than we have to deal with in the present case. Counsel for the appellant with apparent earnestness rely upon *Davis v. Rowe*, 6 Rand. 355; *Garland v. Harrison*, 8 Leigh, 368; and *Ball v. Ball*, 27 Grat. 325; but they afford no support to the claim asserted. In fact, one of them—*Garland v. Harrison*—is very much like the case in hand. That was a case in which a bastard son died without issue, leaving his mother and two bastard brothers by other fathers as his heirs, and it was held that the two bastard brothers, being regarded as of the half-blood only, could take only half so much as the mother. It is clear that neither of the cases referred to in any way affects the case in hand. For the reasons above stated, we are clearly of opinion that the decree appealed from is without error, and the same must be affirmed.

(31 Va. 79)

POPE et al. v. TRANSPARENT ICE CO.<sup>1</sup>  
(Supreme Court of Appeals of Virginia. Jan. 31, 1895.)

#### APPLICATION OF PAYMENTS.

1. Where neither of the parties to a payment makes any application thereof, equity has power so to do.

2. Where no application of moneys paid has been made by the parties, a surety has no power to make the same.

3. Where a trust deed secured three notes, payable at different dates, with no priorities,

and the land was foreclosed on failure to pay the first, and the remaining proceeds were not sufficient to pay the other two notes, and one of them was protested, and the indorser charged, but the other was not protested, and the indorser was released, the proceeds remaining from the sale will be applied on the note on which the indorser was discharged.

4. Where neither party makes application of money paid, the law presumes that the debtor intended to make that application which was most to his advantage.

5. The holder of different notes secured by deed of trust may apply the entire proceeds of the sale under the deed to the notes last maturing, and will not be prevented thereby, either in law or in equity, from obtaining judgment against a surety on the note first falling due, and which was the only note indorsed.

Appeal from circuit court, Roanoke county.

John Pope appeals from a decree by which the proceeds of a sale under a deed of trust were divided between two notes secured by said deed, without preference. The appellant had lost the security of an indorsee by failing to protest his note, while the other note had the benefit of the indorsee. Reversed.

John Dunlop, for appellant. Jas. Caskie and Scott & Staples, for appellees.

KEITH, P. The Transparent Ice Company conveyed certain property, by deed of trust dated February 13, 1891, to J. A. Dupuy, to secure three notes of the Richmond Ice Company, for \$2,778.06 each, payable at the First National Bank of Roanoke, Va., in four, six, and nine months, respectively, from date, with interest from date. The trust creates no priorities as to these notes, but the note falling due at four months, having been first negotiated, became thereby entitled to priority of payment when the property was subsequently sold upon a decree in this cause. There remained after the payment of this note the sum of \$1,432.82. When the property was advertised for sale the Transparent Ice Company procured an injunction, for reasons stated in its bill, and the trustee and creditors under this deed, and certain other prior lien creditors, were made defendants, and such proceedings were had that the property of the plaintiff was sold; and, the proceeds proving insufficient to pay all its debts, this controversy arises as to the proper application of a payment upon the two notes secured in the deed of trust, payable at six and nine months. In these two notes the Richmond Ice Company was payee, and afterwards indorsed them to the present holder, the appellant. At maturity the first note was duly protested, and the liability of the Richmond Ice Company, the indorser, was thereby established. When the second note fell due, the appellant, for some reason, failed to have it protested, and the indorser was thereby discharged. It is contended upon the part of John Pope, the appellant, that the whole of the sum of \$1,432.82 should be appropriated to the unsecured note, while, upon the part of the Richmond Ice Company, it is claimed that the whole of that sum should be

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.



applied to the note upon which it is bound as indorser. The circuit court referred the case to a commissioner to ascertain the lien; and the commissioner returned a report in which he places the debt held by the appellant, evidenced by the two notes, in the same class, finding that there was no priority between them; and that report was confirmed by the decree of the circuit court, which is now sought to be reviewed here.

There are certain undisputed principles of law, applicable to the subject of the appropriation of payments, which I shall state without referring to authorities to support them, as they are universally accepted.

The first is: Where a debtor makes a payment, he has the undisputed right to make such application of it as he sees fit. If a debtor fails to exercise his right, the creditor may then make the application; and, if the power be exercised by neither, it becomes the duty of the court, and in its performance a sound discretion is to be exercised. It is said that the interest of the debtor and the creditor only are to be considered, and none others have any right to insist on the mode in which the payments shall be appropriated. In *Gordon v. Hobart*, 2 Story, 243, Fed. Cas. No. 5,608, Judge Story said "that the right of appropriation of payments was one strictly existing between the original parties, and no third person had any authority to insist upon any appropriation of such money in his own favor." To the same effect, see *Coles v. Withers*, 33 Grat. 186. Even sureties, so much favored by the courts in many respects, enjoy, in this particular, no advantage over others. The supreme court of Connecticut, in the case of *Bank v. Benedict*, 15 Conn. 437, declares that: "A surety of a debtor has no voice in the appropriation of payments made by the debtor." "The debtor and creditor have the sole right of controlling the payment, and the doctrine that sureties will be favored in the construction and enforcement of contracts has no application in such a case. To do so would be to defeat the object and end of suretyship, and to hold that the surety might have the money which was paid by the debtor so applied as to leave the creditor a loser, notwithstanding his care and vigilance." And this seems to be the general current of judicial opinion. In the case just cited the court held that to allow the indorser to direct the application of the money would be inequitable, and that neither the debtor nor creditor having exercised their privilege, the court would apply it to the most precarious debt. These may be considered cardinal rules by which courts are governed in the exercise of their discretion. Subordinate to these are certain minor rules by which the courts are influenced when neither the debtor nor the creditor has exercised his unquestioned right in making application of the payment in controversy. As was said by this court in the case of *Chapman v. Com.*, 25 Grat. 721, "where there are

no other circumstances upon which the court can lay hold, it will apply the payment to the debt oldest in point of time." As said by the same court in *Coles v. Withers*, 33 Grat. 186: "The general rule, subject to exceptions is: Where there are two debts, the one secured and the other not, the court will apply the payment to the debt for which there is no security, and the reason given is that without such application the creditor will lose part of his debt." And the court further says "that this rule is sustained by the uniform current of authorities all over the country." Now, in this case the deed of trust creates no priorities among the debts secured; and the debts, though falling due at different dates, came into existence at one and the same time. The debtor has made no application of the money under the control of the court, nor does it appear that it has the slightest interest in the disposition which the court may make of this question. Its only interest is to see that its property, or the proceeds of it, is applied in accordance with the trust which it created upon it; and it is one and the same thing, to the Transparent Ice Company, whether the whole of this disputed sum shall be appropriated to the note due in six months, or to the one due in nine months, or shall be equally divided between them, as was done by the decree appealed from.

Nor does it appear that the creditor, the appellant here, has exercised, or that he has been in a position to exercise, the right of appropriation which devolves upon him, his debtor having failed to give any direction upon the subject. Unlike the debtor, however, he is vitally interested in the decision of the question. Upon the note due at six months, as has been before stated, he holds the Richmond Ice Company as indorser, while the note due at nine months is wholly unsecured, except by the deed of trust before referred to. The case then is before us stripped of all the circumstances and facts upon which courts have usually laid hold to aid their discretion in the application of payments, where that duty has been imposed upon them by the failure of both debtor and creditor to exercise their confessed rights, save that upon one note there is an indorser, while the other is wholly unsecured, save by the deed of trust. It is believed that this question has not hitherto been thus presented in this court. In all the reported cases there has been some other fact sufficient to influence the decision. Elsewhere, however, it seems frequently to have arisen.

There is some diversity of authority, as courts have inclined to the common-law rule that the application was to be made, where not otherwise directed, in the interest of the creditor, or to the rule of the civil law that, under such circumstances, regard was to be had primarily to the interest of the debtor. The great weight of authority seems to be that in such a case as that now under con-

sideration, where the court has no peculiar fact to aid its discretion, the application must be made to that debt which is least secured, or, in other words, in the interest of the creditor; and this seems to have been the principle of *Chapman v. Com.*, 25 Grat. 721, where it was applied to the oldest debt, and the law as recognized in *Coles v. Withers*, where it is said that in such a case it should be applied to the least secured or most precarious debt. Judge Gibson says in *Harker v. Conrad*, 12 Serg. & R. 301: "Where neither party has made the application, the law presumes, in ordinary cases, that the debtor intended to pay in the way which at the time was most to his advantage." But here, as we have seen, the debtor has made no application, and can have no sort of interest in the decision of the question by the court. "Where, however," Judge Gibson goes on to say, "the interest of a debtor could not be promoted by any particular appropriation, there is no ground for a presumption of any intention on his part; and the law then raises a presumption, for the same reason, that the payment was received in the way that was most to the advantage of the creditor." In the case of *Mathews v. Switzler*, 48 Mo. 301, the court says: "The substantial question here is: Shall the original creditor, who holds all the notes, have the full benefit of all the securities which he took for his own protection? He was not satisfied with the security of the deed of trust, and therefore required an additional name upon one of the notes. In the meantime he has surrendered no security, and done nothing to prejudice the right of the surety upon the note." There it seems that, so far from the court applying the payment so as to exonerate the surety, the fact that one note was made secure by the addition of a surety's name was the reason which determined the court to apply the payment to the unsecured debt. Where a creditor has two claims against the same debtor, the one secured and the other not, upon a payment being made the court will apply it to the debt for which no security was taken. And Munger on Application of Payments lays it down as law that the holder of different notes secured by deed of trust may apply the entire proceeds of the sale under the deed to the payment of those last maturing, and will not be prevented thereby, either in law or equity, from obtaining judgment against a surety on the note first falling due, and which was the only note indorsed. And the same conclusion is stated in 18 Am. & Eng. Enc. Law, p. 251. I am therefore constrained to the conclusion that in accordance with the preponderance of decisions in other states, and the law as recognized by this court in the cases of *Cole v. Withers*, 33 Grat. 186, and *Smith v. Loyd*, 11 Leigh, 512, where neither the debtor nor creditor has applied the payment, and the court is called upon, in the exercise of its discretion, to

make an application of it, and there is no other fact or circumstance, upon which the court can lay hold, to guide and direct its discretion, the payment must be appropriated to that debt which is least secured, and that, therefore, the circuit court of Roanoke county should have appropriated the whole of the sum in dispute to the note of the Transparent Ice Company falling due at nine months from date thereof, instead of distributing the money between the two notes, and for this error the decree complained of must be reversed.

(91 Va. 99)

**BELL et al. v. FARMVILLE & P. R. CO.**<sup>1</sup>  
(Supreme Court of Appeals of Virginia. Feb. 7, 1895.)

**CHANGE OF VENUE — WAIVER OF IRREGULARITIES — MUNICIPAL AID TO RAILROADS — CURATIVE ACT.**

1. Where a cause is removed from the circuit court of one county to that of another, and the parties appear in the latter court and contest the matter, jurisdiction is thereby acquired, although the clerks of both courts failed to make note of the order of removal, as provided by section 3318, Code 1887.

2. Where a cause is removed from one county to another, papers filed in the first county before removal are a part of the record in the case.

3. The legislature may authorize a county or municipality to subscribe to the stock of a railroad company, and to issue bonds to pay for it; and, if the conditions precedent to the exercise of such power have not been complied with, the legislature can cure all irregularities by subsequent legislation.

4. Acts 1887-88, p. 128, recited that C. and P. counties had subscribed for stock in a certain railroad, and paid the subscription in conditional bonds, as previously authorized by law, and enacted that upon completion of the railroad the conditional bonds should, in the discretion of the boards of supervisors of said counties, be exchanged for coupon bonds, stating that the sum due was for value received, and that on the delivery of said coupon bonds certificates of stock should be handed over to the said counties. Said coupon bonds were never exchanged as above by the supervisors. *Held*, that by said act all irregularities and defects in the proceedings and election by which said conditional bonds were authorized were cured. Harrison, J., dissenting.

Appeal from circuit court of city of Petersburg; B. A. Hancock, Judge.

This was a proceeding by William Flanagan and Robert Bell to enjoin the enforcement of certain bonds issued by Powhatan county in aid of the Farmville & Powhatan Railroad Company, and from a decree declaring said bonds valid an appeal is taken. Affirmed.

Wm. M. Flanagan and E. P. Buford, for appellants. Pegram & Stringfellow, for appellee.

**BUCHANAN, J.** The first assignment of error in this case is that the circuit court of the city of Petersburg, which entered the

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

decree appealed from, had no jurisdiction of the case. It appears from the record that the suit was brought in the circuit court of Powhatan county by the appellants, William Flanagan and Robert Bell, citizens and taxpayers of that county, for the benefit of themselves and other taxpayers, against the Farmville & Powhatan Railroad Company and the board of supervisors of that county, to enjoin the railroad company from asserting and exercising any rights under an alleged subscription of \$40,000, made by that county to the railroad company, and to restrain the board of supervisors from levying taxes to pay the bonds issued to pay such subscription, to set aside and annul the same, and for general relief. After the cause had been pending in that court from January, 1891, to April, 1892, during which time the bill and amended bill, petitions, demurrers, and answers had been filed, the case was removed to the circuit court for Chesterfield county, because the judge was so situated that in his judgment it was improper for him to try the cause. In December of that year, by consent of parties, the cause was removed from the circuit court of Chesterfield county to the circuit court of the city of Petersburg. The papers copied into the record show these facts. But the clerk of the circuit court of Powhatan county failed to make and certify copies of the rules and orders made in his court in the case before its removal to Chesterfield county, as required by section 3318 of the Code. The clerk of the circuit court of Chesterfield was guilty of the same negligence when the case was removed from his court to the circuit court of the city of Petersburg. It is contended by the counsel of appellants that, since the suit was brought in the circuit court of Powhatan county, and there is no record evidence of its removal to the circuit court of the city of Petersburg, the last-named court had no jurisdiction of the case. If there had been no appearance in the case in that court by the party raising the objection to its jurisdiction, it might present a question of some difficulty. But the appellants here (the complainants in the court below) consented to the docketing of the case in that court, and the following order was entered at its December term, 1892: "This cause, which was removed to this court from the circuit court of Chesterfield county, was this day docketed in this court by consent of the parties by counsel; and thereupon, on motion of the plaintiffs by counsel, leave is given them to file their supplemental and amended bill No. 2, which is accordingly filed." The case was then proceeded in to a final decree, without objection upon the part of any one. The circuit court of Petersburg had general jurisdiction of the class of cases to which this case belongs, and by consenting that this case might be docketed and proceeded in in that court the appellants waived all right to object to its

jurisdiction, even though there had never been any order removing the case from the circuit court of Powhatan county. The mere fact of a party taking and agreeing to a continuance is evidence of his having made himself a party to the record, and of his having recognized the case as in court. It is too late afterwards for him to say that he has not been regularly brought into court. *Harvey v. Skipwith*, 16 Grat. 415. If other authority were required for a proposition of law so plain, it will be found in a decision of this court in the case of *McAlexander v. Hairston*, reported in 10 Leigh, 486. There an action of slander was instituted in the circuit superior court of law and chancery for Floyd county. The judge of that court, being so situated that he could not try the case, removed it, after the issues had been made, to the county court of the county. Trial was had in that court, and a judgment rendered. Upon a writ of error the circuit superior court of Montgomery county reversed it, on the ground that the county court had no jurisdiction of the case; but upon a writ of error to this court the judgment of the circuit court was reversed, and that of the county court affirmed. In delivering the opinion of this court in that case, Judge Stanard said: "Without deciding, or even considering, the question whether the order of the superior court, made by consent of the parties, removing the case to the county court for trial, would proprio vigore place the case, in its then condition, in the county court for trial, \* \* \* I am of opinion that parties may, by consent, make up the pleadings and issue in a case, and have it docketed in any court having jurisdiction for the trial of such a case; that over a case so docketed, on the parties appearing before the court in which it may be so docketed, making no objection to the regularity of the docketing of it, that court may exercise jurisdiction; and that the objection to the jurisdiction of the court, coming for the first time after the trial and judgment in the case, cannot be sustained."

The appellants insist further, if it be held that the circuit court of the city of Petersburg had jurisdiction of the case, the papers filed in the case before it was docketed in that court cannot be considered as parts of the record. This view cannot be sustained. The whole record as copied was before the circuit court when it decided the case. This is shown by the proceedings had and pleadings filed in the circuit court of the city of Petersburg. In the second amended and supplemental bill, filed in the case after it was docketed in that court, the statement is made that the original bill was then pending in that court. The final decree in the case dissolves the injunction granted in the case, and dismisses the original and amended and supplemental bills. These bills, with all the other pleadings, and the proofs taken in the case, must, therefore, have been before the court when that decree

was entered. It is not to be presumed that counsel would argue and the court decide a case in the absence of these papers, when the record shows as a matter of fact that all of the papers were then in that court.

Another ground of objection relied upon by the appellants is that the bonds issued by the county of Powhatan in payment of its stock subscription to the railroad company are invalid because of numerous irregularities attending the election authorizing their issue. Among the more important of these are the allegations that the order of the county court directing the election was irregular and void; that no legal notice was given of the election; that the election itself was irregular and illegal; that the meetings of the board of supervisors appointing commissioners to make the subscription of stock to the railroad company, and also their meetings directing the bonds to be issued, were illegal; and that the bonds issued are payable at a different date from that provided by the statute authorizing their issue. The record shows that the election whose validity is in question was held on the 7th day of August, 1886; that the stock subscription was made on the 5th day of September of that year; that the bonds were issued by the board of supervisors, and delivered to the railroad company, on the 14th day of October, 1887, and were turned over by that company to the Bermuda Construction Company on account of what the railroad company owed that company for building the railroad; and that the construction company disposed of them to various holders. The holders of the bonds, who are parties to this suit, claim that they are bona fide purchasers for value, and that, although the proceedings had prior to their issue, and which were conditions precedent, may have been irregular, or even in violation of the law which authorized their issue (which is denied), still the recital on the face of the bonds that they were issued pursuant to the law which authorized their issue estops the appellant from questioning their validity. They also claim that the county of Powhatan and its taxpayers are estopped from questioning their validity by reason of their failure to interfere and enjoin their issue when they were about to be issued, before the rights of bona fide third parties had accrued, and by receiving and keeping the proceeds or benefits derived from them. They claim that the bonds were used for the purpose of paying for the construction of the railroad through the county, and that no objection was made to the action of the board of supervisors in issuing and delivering them to the railroad company, or any steps taken to question their validity, until the 16th day of December, 1890, when this suit was brought, and the injunction hereinbefore mentioned obtained. This was more than four years after the election was held, more than three years after the bonds were issued, and several months after the railroad was completed.

It is also contended by the appellees that,

even if the facts stated in the bill and amended bills were true, and the matters of estoppel relied upon were held to be insufficient, still the appellants are not entitled to the relief sought, because the action of the authorities of Powhatan county in making the subscription to the railroad company and in issuing and delivering the bonds in payment thereof was ratified and confirmed by the general assembly by act approved February 8, 1888. If it be true, as claimed, that the legislature has ratified and confirmed the action of the county in making such subscription and issuing such bonds, it will be unnecessary to consider any of the questions raised in the case as to their regularity or validity; for the power of the legislature to authorize a county or other municipality to make such a subscription to the stock of a railroad company, and to issue bonds with which to pay it, is settled in this state. And it is also settled that if, by reason of mistake, carelessness, or other cause, the conditions precedent to the exercise of such power by the municipality have not been complied with, the legislature can cure all irregularities by subsequent legislation, and make such contracts as valid and binding as if all the conditions precedent had been strictly complied with. *Redd v. Supervisors*, 31 Grat. 695; *Supervisors v. Randolph*, 89 Va. 614, 16 S. E. 722. The effect of the act of February 8, 1888, will now be considered. The act is as follows:

"Whereas the counties of Cumberland and Powhatan have each subscribed forty thousand dollars to the capital stock of the Farmville and Powhatan Railroad Company, and have paid such subscription in conditional bonds, as authorized by an act of assembly approved February fifth, eighteen hundred and eighty-six, entitled "An act to authorize a subscription by the counties of Cumberland and Powhatan to the stock of the Farmville and Powhatan Railroad Company"; therefore,

"1. Be it enacted by the general assembly of Virginia, that on the completion of the Farmville and Powhatan Railroad, as proposed, across the counties of Cumberland and Powhatan, respectively, the said conditional bonds, issued by the said counties respectively, shall, in the discretion of the respective boards of supervisors of said counties, be exchanged for coupon bonds, stating that the sum due is for value received, aggregating an equal amount, with like conditions as to rate of interest and time and place of payment of principal and interest. On such exchange being made, there shall be delivered to such county, certificates of stock of the Farmville and Powhatan Railroad Company for an amount equal to that of said coupon bonds delivered."

The general rule of construction is that a statute ought not to be given a retrospective effect, unless it can be ascertained with certainty from the language of the act that such was the intention of the legislature. Mr.

Dillon says (volume 2, Mun. Corp. § 544): "Subsequent legislative sanction within constitutional limits is equivalent to original authority, but the intention of the legislature to validate the subscription or the bonds must clearly appear from the terms of the curative act." Mr. Cooley says: "Legislation of this character is exceedingly liable to abuse; and it is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively." Cooley, Const. Lim. p. 456. Testing the act in question by these rules, it would seem that its only effect would be to give to the boards of supervisors of those counties, respectively, the right, if they chose to exercise it, of exchanging coupon bonds for the conditional bonds theretofore issued, and to receive an equal amount of stock of the railroad company therefor, without in any way depriving those counties, or their taxpayers, of the right of setting up any defense which they might have to the validity of the conditional bonds. This seems to be the fair and legitimate construction of the act, for there is nothing in it that shows with clearness and certainty an intention to ratify. As was said in *State v. Stoll*, 17 Wall. 436: "If the legislature intended to do what is claimed, they ought to have done so openly, intelligibly, and in language that could not be misunderstood. And as a doubtful or obscure declaration would not be justifiable, so it is not to be imputed." *Hayes v. Holly Springs*, 114 U. S. 120, 126, 5 Sup. Ct. 785. To give it the construction contended for, would be to hold, it seemed to me, that an act passed ostensibly for the purpose of giving a privilege or granting a power would result in taking away a right, or in cutting off a remedy; and, if it were a question of first impression in this court, I would be unwilling to give it the construction contended for. But the same question has been before this court once upon this very statute, and once upon a similar statute, and the court adopted the construction contended for by the appellees.

In the case of *Redd v. Supervisors*, reported in 31 Grat. 695, a statute was held to ratify and confirm a subscription to a railroad company made by that county. The people of Henry county had voted a subscription of \$100,000 to the capital stock of the Danville & New River Railroad Company. Before the bonds were issued, a suit was brought by taxpayers of that county to enjoin the issue of the bonds with which to pay the subscription, alleging that the proceedings which led up to the subscription were irregular and illegal. While that case, which had been appealed, was pending in this court, the general assembly passed a statute, which will be found in the Acts of Assembly of 1878-79 (page 282). In the preamble of that act it is recited that a subscription of \$100,000 had been voted by the peo-

ple of that county to the stock of that railroad company, and then it is recited that it has been suggested that the said subscription of \$100,000 may require the imposition of an annual tax in excess of the amount on the \$100 value of taxable property specified in section 62, c. 61, of the Code of 1873. For that reason the statute was passed which authorized the supervisors of that county to carry out the wishes of the majority of the voters of that county as expressed by said vote, or which may hereafter be expressed by the voters of said county, and to assess and levy such tax as might be necessary to pay that subscription, or any such subscription to said company as might hereafter be made, etc. The act seems to contemplate that the vote already taken might, for some cause, be held invalid, and that another election might be necessary in order to authorize the county to make such subscription. At that very time a case was pending upon appeal in this court, as stated above, to test the validity of the subscription already made. Notwithstanding these facts, this court held that, if there had been any defects or irregularities in the election or other proceedings leading up to the subscription, they were all cured by that statute. The judge delivering the opinion of the court on this point said: "Since the foregoing opinion was written, it has come to my knowledge that the governor of the commonwealth has approved an act passed by the general assembly authorizing the supervisors of Henry county to carry out the wishes of the majority of the voters of Henry county as expressed by the vote taken on the 11th day of September, 1875, and to assess and levy such annual tax as may be necessary to pay the subscription of one hundred thousand dollars, notwithstanding the limitations prescribed by the sixty-second section of chapter 61 of the Code. The conclusions which I have reached in this case are independent of the special act referred to, but it may be as well to say that, if there were any defects or irregularities in the proceedings reviewed in this opinion, which might offset the subscription made by the supervisors, they are cured by this legislation. That such legislation is valid, seems to be well settled. Defective subscriptions may in all cases be ratified where the legislature could have originally conferred the power. Mistakes and irregularities are of frequent occurrence in municipal elections, and the state legislature has often had occasion to pass laws to obviate such difficulties. Such laws, when they do not impair any contract, or injuriously affect the rights of third persons, are never regarded as objectionable, and certainly are within the competency of the legislative authority." The provisions of that statute, both in the preamble and in the enacting clause, are very similar to the act we are considering. Its provisions show no more clearly or certainly that it was intended by the legis-

lature to have a retrospective effect than does the act of February 8, 1888.

In the case of *Supervisors v. Randolph*, reported in 89 Va. 614, 16 S. E. 722, the act of February 8, 1888, was brought before this court for construction. In that case the judge delivering the opinion of the court said: "Besides, whatever ground of objections there might be if the case stood upon the act of February 5, 1886, alone, any irregularities which may have occurred in the proceedings under that act were cured by the act of February 8, 1888. The latter act recognized the validity of the subscription that had been made, and all that had been done under the prior act, and in express terms authorized the issue of coupon bonds, on completion of the railroad across the counties of Cumberland and Powhatan, in lieu of the conditional bonds which had already been issued to the railroad company under the prior act. This it was clearly competent for the legislature to do, both on principle and authority."

These authorities seem to be conclusive of the question that the effect of the act of February 8, 1888, was to cure all irregularities or defects in the bonds, or in the proceedings leading up to their execution. Having reached this conclusion, it renders a decision of the other questions raised unnecessary. Our opinion, therefore, is that there is no error in the decree of the circuit court of the city of Petersburg, and that it should be affirmed.

**KEITH, P.** I concur fully in the conclusion reached by Judge BUCHANAN in the opinion just read in this case, and I think the decree appealed from should be affirmed. Such irregularities as may have existed antecedent to the issuing of the bonds by the county of Powhatan have been cured by the act of assembly referred to. This would be my judgment were the question one of first impression, and my confidence in its correctness is, of course, greatly strengthened by the decisions of this court in the case of *Redd v. Supervisors*, 31 Grat. 695, the opinion in which was delivered by Judge Burks, and in the very recent case of *Supervisors v. Randolph*, 89 Va. 614, 16 S. E. 722, in which the opinion was delivered by Judge Lewis, construing the statute relied upon here.

**HARRISON, J.** (dissenting). I am unable to concur in the conclusion reached by my brethren in this case. I cannot see that the act under consideration ratifies anything, or was intended to be retrospective in its operation. It seems to me the only purpose of the act was to give the county of Powhatan the privilege of issuing coupon bonds in the place of conditional bonds. The county declined to exercise this privilege. And the act, which, on its face, was intended as a benefit, is now made the means of ruin to the beneficiary, so far as the payment of this large debt is concerned. My views on this subject are so fully expressed in the reason-

ing of Judge BUCHANAN against his conclusion that I deem it unnecessary to say more, except to add that I do not attach to the two cases relied on for his conclusion the weight given them by him. The construction of the act was not necessary to the decision of either of those cases. In *Redd v. Supervisors*, 31 Grat. 695, the case had been decided on its merits in favor of the railroad without regard to the act; and in the case of *Supervisors v. Randolph*, 89 Va. 614, 16 S. E. 722, the county itself had ratified all prior proceedings by accepting the privilege given in the act, and issuing the coupon bonds. This the county of Powhatan declined to do, and was, therefore, in my opinion, entitled to all defenses against the conditional bonds which she could have made before the act was passed, and is not estopped to make that defense by its letter or spirit.

(91 Va. 18)

#### BRISTOW v. CATLIN.<sup>1</sup>

(Supreme Court of Appeals of Virginia. Jan. 17, 1895.)

#### SUPERSEDEAS ON APPEAL—EFFECT—ORDER APPOINTING RECEIVER.

A supersedeas is only intended to stay further proceedings until the appellate court can pass on the questions involved in the appeal, and therefore a receiver in whose hands the court places certain property is not guilty of contempt in dealing with the property pending an appeal and supersedeas on the order appointing him receiver.

Original proceeding in the supreme court of appeals to punish E. A. Catlin for contempt of court. Rule discharged.

Pollard & Lands, for petitioner. Preston & Leake and Meredith & Cocke, for respondent.

**HARRISON, J.** On the 11th day of September, 1894, this court, sitting at Staunton, Va., upon the petition of L. C. Bristow, trustee, appellant, awarded a rule against E. A. Catlin, president of the Home Building Company, returnable November 8, 1894, to this court at its place of session at Richmond, to show cause, if any, why he should not be attached, fined, and imprisoned for contempt of the order of this court. This rule was executed upon E. A. Catlin September 20, 1894. The order allowing the appeal in the case of *Bristow, Trustee, v. Home Building Company, Perpetual*, now under consideration, is in these words: "Appeal allowed and supersedeas awarded. Bond required in the penalty of \$100.00, conditioned as the law directs." The petition asking that the rule be awarded sets forth that said E. A. Catlin was continuing to control the property placed in his hands by the injunction order, and to collect the rents arising therefrom, in violation of the supersedeas awarded on ap-

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

peal, and in contempt of this court. It is insisted that the effect of the supersedeas was to overturn the condition of affairs at the time the appeal was allowed, and put the parties back in the condition they were before the injunction was granted and the receiver appointed; that it was the duty of said E. A. Catlin, after the supersedeas was awarded, to deliver the property under his control as receiver to L. C. Bristow, trustee. This construction of the effect of the supersedeas would give it the force, temporarily at least, which a final judgment on the appeal would have. The very question which the appeal was intended to litigate would have been disposed of in advance of the hearing by mere operation of the appeal itself. We think this is a misapprehension of the effect of a supersedeas in a case like this. A supersedeas is only intended to stay further proceedings, to leave matters in the condition it finds them until the appellate court can hear the case, and pass on the questions involved in the appeal. It informs the sheriff that the record has been moved into the appellate court for the correction of errors, and enjoins upon him to give notice to the other party to appear in the appellate court and answer the complainant in error. 4 Minor, Inst. pt. 1, p. 854; 1 Rob. Prac. (Old Ed.) p. 660. A writ of supersedeas is usually awarded to a final judgment at law or a decree for money to stop its enforcement until the appellate court can review the errors complained of in the proceeding in which the judgment or decree was rendered. It leaves the case to stand in statu quo until this is done. The writ of supersedeas in this case required nothing of the lower court, nor of the opposite parties, except to appear, and have a rehearing. It made no order against them, and required nothing of them except to forbear all further proceedings until the appellate court had reviewed the decrees complained of. The receiver, E. A. Catlin, had been appointed as such by competent authority. He had not been relieved of the responsibility of taking care of the property which had been placed in his hands. He would have no more right to turn said property over to L. C. Bristow, trustee, after notice of the supersedeas, than to have placed it in the hands of any stranger to the controversy. It was of the utmost importance to all concerned that the property should be cared for pending the appeal by some suitable and authorized person. It would have been competent for either party to this controversy to have gone into the circuit court and asked for the appointment of a receiver to take charge of the property pending the appeal. See *Moran v. Johnston*, 26 Grat. 108. It would have also been competent for the receiver himself to have applied to said court for its guidance and direction, after notice of the supersedeas, and this would have been the proper course for him to pursue; but, inasmuch as he did no

more than he would have been authorized to do by the court had he made the application, and as no one has been prejudiced by his action in the matter, and it is admitted at bar that no contempt was intended, the court is of opinion that said rule should be discharged, and the petition dismissed.

(91 Va. 18)

### BRISTOW v. HOME BLDG. CO.<sup>1</sup>

(Supreme Court of Appeals of Virginia. Jan. 17, 1895.)

#### APPEALABLE ORDER—APPOINTMENT OF RECEIVER—INJUNCTION—NOTICE.

1. A refusal to dissolve an injunction appointing a receiver is an appealable order, although the causes in which the question arises are still at rules.

2. Notice should be given to the adverse party in interest where an application is made to court for an injunction and appointment of a receiver, except in case of most obvious necessity for prompt action.

3. Where a court refuses to dissolve an injunction, it is equivalent to holding that upon full notice and argument the injunction ought to have been granted.

4. A company held deeds of trust upon certain property for a sum far in excess of its value, when the grantor made a general assignment, in which the property in question was included. The court began to administer the assignment through the trustee named. The company then asked for a receiver for the specific property upon which it had a lien, to collect rents for its benefit, and that the trustee under the assignment be enjoined from disturbing the property, which was granted. *Held* not error.

5. When the mortgaged premises will probably be insufficient to pay the debt, and the mortgagor is insolvent, the mortgagee is entitled to the rents, to satisfy the anticipated deficiency, and may obtain a receiver for the purpose.

Appeal from circuit court, Henrico county; B. R. Wellford, Jr., Judge.

Bill by Robert F. Luck and others against L. C. Bristow, trustee, the Home Building Company, and others. From an order appointing a receiver, Bristow appeals. Affirmed.

Pollard & Sands and Bristow & Beveridge, for appellant. Preston & Leake and Meredith & Cocke, for appellees.

HARRISON, J. George D. Gaines, of the city of Richmond, being the owner of lot No. 178 in the plan of Sidney, adjacent to the city of Richmond, in the county of Henrico, and desiring to improve the same, borrowed from the Home Building Company, Perpetual, the sum of \$20,000, for which he executed nine bonds, the first eight being each for the sum of \$2,200, and the ninth for the sum of \$2,400. Said lot 178 was divided into nine lots, and he executed nine separate deeds of trust, securing one of said bonds upon each of said lots. These several deeds were each dated October 6, 1892, and were all recorded on the 24th day of December, 1892, in the clerk's office of the county

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

court of Henrico county. The money thus borrowed was used in paying off a balance of purchase money due on said lot 178, and in erecting dwelling houses thereon. On the 22d day of July, 1893, the said George D. Gaines executed a general deed of assignment to L. C. Bristow, as trustee, in which he sets forth that he is largely indebted in sundry sums of money due and to become due; that he is unable to meet the demands of his creditors; that a large amount of his indebtedness is secured by deeds of trust and other liens on his real and personal estate, and that he is unable to renew or meet said obligations. He then conveys to said L. C. Bristow, trustee, all of his property, real and personal, consisting of a large amount of improved and unimproved real estate situated in the city of Richmond, and county of Henrico, Va., and elsewhere, and a large personal estate of different kinds, to be held by said L. C. Bristow, trustee, subject to the terms and provisions of the trust. Among other real estate conveyed in this deed, is the same property which was conveyed by deed dated October 6, 1892, to the trustees of the Home Building Company, Perpetual, to secure to said company the \$20,000 loaned by it to said Gaines. This general deed of trust, after securing first a fee of \$200 for services in preparing said deed and other expenses attending its execution and recordation, including 5 per cent. commission to the trustee, secures the creditors of said George D. Gaines, aggregating a very large amount, in several classes. Large powers are given the trustee in the matter of selling, renting, and improving said property. He is empowered to take charge of all real estate, collect all rents, and pay the same out under the terms and provisions of said trust. The \$20,000 debt due the Home Building Company, Perpetual, is secured in the second class, along with a large number of other creditors.

As before stated, this deed was recorded on the 24th day of July, 1893, and on the 25th day of July, 1893, Robert F. Luck, Jr., J. L. Butler, and William S. Gunn, suing for themselves and all other creditors secured in said deed, filed their bill in the circuit court of Henrico, praying to have the trust created by said deed administered under the orders and decrees of said circuit court, and asking that said Bristow, trustee, be required to give bond and security for the faithful discharge of his duties as such, and, in default of his doing so, that an injunction be awarded restraining said Bristow from executing said trust, and that a receiver be appointed to take charge of the property conveyed in said deed. To this bill the creditors of Gaines, including the said Home Building Company, Perpetual, L. C. Bristow, trustee, and others, were made parties defendant. Upon the filing of this bill the court, on motion of the plaintiffs, entered an order requiring said L. C.

Bristow, trustee, to enter into bond before the clerk of the circuit court of Henrico county in the penalty of \$5,000, with proper security, to be approved by said clerk, and restraining and enjoining said Bristow, trustee, from executing said deed until he should execute said bond. In accordance with said order, the bond was given on the 26th day of July, 1893. On the 15th day of September, 1893, the Home Building Company, Perpetual, presented its bill to the judge of the hustings court of the city of Richmond, setting forth its prior deed of trust, securing \$20,000, on lot 178, subdivided into nine lots, and evidenced by the nine deeds of trust already described, charging that said debt was due; that in accordance with the terms of the deed of trust securing it they could now sell said property; that the debts secured in the Bristow deed of trust were all subsequent to their lien; and that the value of the property upon which said company held this prior deed of trust was not sufficient to pay said company and certain mechanics' liens resting thereon. To this bill L. C. Bristow, trustee, George D. Gaines, and the creditors of said Gaines are made parties defendant. The prayer is that L. C. Bristow, trustee, his agents and attorneys, be enjoined and restrained from exercising any control over the property on which said company had a lien, and that they be enjoined from disposing of any rents already collected from said property, and that a receiver be appointed to take charge of this particular property, rent it out, and hold the rents until the further order of the court; that the liens on this property be ascertained, and the property sold, and the proceeds applied to the payment of its lien; and for general relief. The judge of the hustings court granted the prayer of the bill, awarded the injunction asked for, and appointed E. A. Catlin as receiver to take charge of said property and collect the rents, requiring him to execute bond with approved security in the penalty of \$1,000. The said L. C. Bristow, trustee, filed his answer to this bill, and on the 9th day of December, 1893, by counsel, moved the circuit court of Henrico county to dissolve the injunction granted as aforesaid, and discharge the receiver, Catlin, which motion the court overruled; and thereupon said L. C. Bristow, trustee, obtained from one of the judges of this court an appeal and supersedeas to said order refusing to dissolve said injunction, and to the order granting the same.

The first question presented for our consideration is whether or not the appeal in this case has been improvidently awarded, and should be dismissed. It is contended that the refusal of the court to dissolve the injunction appointing a receiver was an interlocutory decree, which did not settle the principles of the cause, and therefore no appeal lay from it. Both these causes were



pending at rules, and neither had progressed far enough for the court to settle any of the conflicting rights of creditors; but the effect of the court's refusal to dissolve the injunction in the suit of the Home Building Company, Perpetual, v. L. C. Bristow, Trustee, and others, was to decide that the property held by the receiver in that case was, for the present at least, in proper hands, and should not be under the control of L. C. Bristow, trustee, who had given bond in the first and main suit, brought to administer the entire fund; and, this being the question then in dispute between the parties, the order refusing to dissolve the injunction settled that important question. In the case of Baltimore & O. R. Co. v. City of Wheeling, 13 Grat. 40, Judge Moncure said (in which all the court concurred): "The refusal of the court to dissolve the injunction adjudicated the principles to this extent: that the injunction had not been improvidently awarded, and that, as the cause then stood, it ought to still be continued. It is, therefore, such an order as may be appealed from." As before stated, the important question which most concerned the parties to this controversy was, who was entitled to the possession and control of the particular property placed in the hands of the receiver in the Home Building Company suit, L. C. Bristow, trustee, or said receiver? This question was decided in favor of the receiver by the order refusing to dissolve the injunction, and we think this court has the power to entertain an appeal from that order to review the same.

Having, then, the right to review the action of the court below, we come next to consider whether or not the injunction was improvidently awarded, and the appointment of the receiver improper, under the circumstances relied on in the suit in which that order was entered. It is contended, first, that it was error to grant the injunction and appoint a receiver without notice to the parties to be affected thereby. This court has repeatedly held that notice should be given to the adverse party in interest of an application to the court for an injunction and the appointment of a receiver, except in cases of the most obvious necessity for prompt action, and where the ends of justice would be defeated by delay for the notice to be given. It is unnecessary to multiply authorities, which are well-nigh unanimously arrayed in support of this well-settled and obviously wise rule. The court is of opinion that the necessity did not exist for the action of the court without notice to the adverse party in this case. But, inasmuch as the propriety of the court's action in granting the injunction and appointing the receiver has been considered and argued by both parties before the circuit court upon the motion made there to dissolve said injunction and discharge the receiver, and that court has sustained the original order by refusing to dissolve said injunction and discharge the receiver, there

can be nothing gained now by dismissing the proceeding for the want of notice, when the injunction was asked for. The action of the court in refusing to dissolve the injunction was equivalent to holding that, upon full notice and argument, the injunction ought to have been granted. 20 Am. & Eng. Enc. Law, pp. 24, 25, and note.

It is further contended that the judge of the hustings court of Richmond erred in granting the injunction and appointing the receiver, and that the circuit court of Henrico erred in overruling the motion to dissolve said injunction and discharge said receiver. These two assignments of error will be considered together. The Home Building Company, Perpetual, had a specific lien of upwards of \$20,000 on certain property belonging to George D. Gaines. This company had certain prior and specified rights, set forth in its deeds of trust, securing this large debt. The said George D. Gaines made a general assignment of all his property, real and personal, conveying also the property upon which the said Home Building Company, Perpetual, held its lien. It is charged in the bill asking for the injunction and appointment of a receiver that the property covered by the deed of trust of said building company was not sufficient in value to pay the debt of said company. This charge is not denied in the answer of L. C. Bristow, trustee, to said bill, nor is it questioned in the argument of the case here. As already stated, some of his creditors had filed a bill in chancery convening all the creditors of said George D. Gaines, and asking to have his general deed of trust administered under the orders of the circuit court of Henrico. Under said general deed, the trustee was authorized to collect all the rents arising from the real estate of said Gaines, including that upon which the building company held its lien, and the first money realized was dedicated to the payment of counsel fees, commissions to the trustee, and a large number of creditors who were secured prior to said building company. The Home Building Company, Perpetual, was confronted with this condition of affairs: A large debt of over \$20,000, due from an insolvent debtor; no security for it except a lien by deed of trust upon a specific piece of real estate, which was confessedly insufficient to discharge it; a trustee in a general deed of assignment, collecting the rents from the property upon which it held its special lien, with power to appropriate said rent to other purposes than the satisfaction of the company's debt, if the company chose to stand by and let it be done. It was important for said building company to promptly take the necessary steps to have the rents, arising from the property upon which it held a lien, applied to the discharge of its debt. The suit of L. C. Bristow, trustee, had not yet matured. It was pending at rules. The building com-

pany had not yet been served with process as a party defendant, and it proceeded to file a bill praying for an injunction, and asking to have a receiver appointed to take charge of the property upon which it held a lien, rent the same, and collect the rents, and hold them subject to the future order of the court. On the 14th day of September, 1893, an order was entered granting the injunction restraining L. C. Bristow, trustee, his agents or attorneys, from disposing of the rents already collected by them from this property, and also from exercising any further control over said property, and appointing E. A. Catlin a receiver, to rent the houses and collect the rents, and to keep the money so collected until the further order of the court, as prayed for in the bill, and requiring said Catlin to enter into a bond and security as such receiver. To this bill L. C. Bristow, trustee, filed his answer, and on the 9th day of December, 1893, by counsel, moved the judge of the circuit court of Henrico to dissolve this injunction and discharge the receiver, which motion, upon a full hearing of all the facts, the court overruled. And from these two orders—the one granting and the other refusing to dissolve the injunction—the case is before this court on appeal.

It is insisted by counsel for appellant that the general creditors' bill filed by L. C. Bristow, trustee, for the purpose of administering the entire estate of George D. Gaines conveyed in the general deed of trust under the orders of the court was sufficient, and that all of the rights of the Home Building Company could have been secured in that suit, and that the suit instituted by the building company was obnoxious to the doctrine which forbids a multiplicity of suits. Counsel for appellees, on the other hand, contend that their large debt was placed in a different position under the general deed of assignment than it occupied as a prior lien on specific property, especially as to the application of accruing rents; that the whole scope of the general bill was to administer the trust as set out in the deed of assignment; and that, unless they took some action, their large debt would have been allowed to increase by reason of accruing interest, while the rents of the property securing that debt would have been appropriated under the general deed to other purposes. The doctrine is well settled that unnecessary suits to administer the same estate will not be allowed. Does this proceeding belong to the class of suits forbidden by the rule just stated? We think not. The right to have a receiver appointed to hold rents, to supply any deficiency which may exist after sale is made, when the debtor who is personally liable for the deficiency is insolvent, and in this way obtain a specific lien upon the rents to pay such deficiency, is supported by the highest authority. *Clarke v.*

*Curtis*, 1 Grat. 289; *Beverley v. Brooke* and *Beverley v. Scott*, 4 Grat. 187; *Bank v. Hupp*, 10 Grat. 41. In the case of *Astor v. Turner*, 11 Paige, 436, the rule is stated thus: "When the mortgaged premises will probably be insufficient to pay the amount due upon the mortgage, and the person who is personally liable for the mortgage money is insolvent, the mortgagee, after the mortgage has become due, is in equity entitled to such rents and profits to satisfy the anticipated deficiency, and may obtain a lien thereon for the purpose by the appointment of a receiver." See, also, *High, Rec. § 588*, citing *Hamberlain v. Marble*, 24 Miss. 596; also *High, Rec. § 643*. There are many authorities to the same effect in the state reports and federal reports, but we deem it unnecessary to refer to more. That the Home Building Company then had the right to have the rents of this property applied to its debt cannot be doubted. The only question is as to the mode of doing it. It is true, as contended by counsel for appellant, that the appellee might have proceeded in the main suit, as he was named as a party to it, and accomplished all that he did by the injunction suit; but, having taken the proceeding by injunction, and L. C. Bristow, trustee, being in no way injured thereby, and the rights of the company being secured without damage to the rights of any one else, we see no reason for dismissing the proceeding because some other mode might have been adopted. Both cases are in the same court, under control of the same judge, who can treat the injunction suit as a petition in the main suit, or can hear the two causes together, which is the more common practice in Virginia, and thus have the entire matter under the same control, to be administered in accordance with the rights of all parties concerned. For the foregoing reasons, we are of opinion that there is no error in the decrees complained of, and they must be affirmed.

(91 Va. 68)

# HUTCHINGS v. COMMERCIAL BANK et al.<sup>1</sup>

(Supreme Court of Appeals of Virginia. Jan. 31, 1895.)

CONSTRUCTION OF STATUTE — MARRIED WOMAN'S ACT—CURTESY—DEATH OF TENANT—LIABILITY OF ESTATE.

1. Acts 1877-78, p. 248, § 2 (Married Woman's Act), after providing for the separate estate of married women, curtesy, and dower, provided, further, that the sole and separate estate created by any gift, grant, devise, or bequest should be held according to the terms thereof, "and to the provisions and limitations of this act, so far as they are [not] in conflict therewith." *Held*, that the word "not," as inserted in brackets, was omitted by inadvertence, and its insertion was necessary in order to effect the manifest legislative intent.

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

2. Under said act, as construed above, the property is conveyed to a trustee "for separate use and benefit, to have, use, and enjoy the same, unto her and her assigns, free from debts and liabilities of her husband," and she is created an equitable separate estate, which must be governed by the provisions of the instrument originating the same, and the wife may devise the same to others than her husband.

3. Where a married woman becomes lessee of property for a term of years, her estate is solely for rent during the whole term, although she died soon after making the lease, and the property is occupied by others, against whom the right of distress for rent is never exercised by the landlord.

n rehearing. Modified.

or former opinion, see 17 S. E. 477.

HARRISON, J. In April, 1890, the Commercial Bank of Danville, Va., filed its bill in the circuit court of Danville against John R. Hutchings, P. H. Boisseau, administrator of the estate of Sue R. Hutchings, deceased, Lucy Hutchings and Sue Hutchings, infant children of Sue R. Hutchings, deceased, and D. Blair, seeking to subject the interest of John R. Hutchings, as tenant by the entirety, in the separate real estate of his wife, Sue R. Hutchings, to the payment of a certain debt due said bank from said John Hutchings; and, further, to settle certain accounts between the estate of Sue R. Hutchings and John R. Hutchings, and to subject the separate estate of Sue R. Hutchings to a debt due by her, as indorser for said John R. Hutchings, and to have an account of the money advanced by John R. Hutchings to his wife in erecting a dwelling house upon her land, and to have anything thus shown to be due said John R. Hutchings applied to the payment of the debt due plaintiff. Answers were filed, and the cause referred to a commissioner, who made a full report of all the facts and the evidence, and then it came on to be heard by the court upon exceptions taken said report by both sides. The court, by decree dated June 11, 1891, partially disposed of the principles of the cause, and remitted the same for further inquiries; and under this order a second report was made, to which exceptions were taken, and on the 24th day of March, 1892, the court entered a second decree, fully settling the principles of the cause and the rights of the parties. It is from these two decrees that an appeal was allowed to this court. On the 6th day of April, 1893, this court delivered its opinion affirming the decrees appealed from, and on the 21st of June, 1893, a rehearing was granted; and we are now called upon to decide the case upon said rehearing.

It appears from the record that Mrs. Sue Hutchings, late of Danville, left a will, which was duly probated in said city on the 1st day of January, 1889, in which she gives her two children all her real and personal estate. The real estate passing under this will consisted of the following separate estates of Sue R. Hutchings: First, a house

and lot on West Main street, in Danville, which was conveyed as a gift, by her father, Thomas B. Doe, by deed dated January 10, 1881, to a trustee for the separate use and benefit of the said Sue R. Hutchings, for her to have, use, and enjoy the same, or her assigns, forever, free from debts and liabilities of her husband. Second, a lot on Broad street in said city, bought by Mrs. Hutchings at the sale for partition of her father's lands, and paid for with her interest in the estate of her father, and conveyed, by deed dated April 16, 1884, by the sale commissioner (Mrs. Hutchings and her husband, John R. Hutchings, uniting in the deed), to a trustee for said Sue R. Hutchings, in trust for the sole and separate use of the said Sue R. Hutchings, the wife of said John R. Hutchings, to sell, convey in trust, or devise the said real estate as the said Sue R. Hutchings may desire. Third, an undivided one-third interest in a lot on Broad street in said city, bought by said Sue R. Hutchings at the sale for partition of her father's lands, and paid for with her interest in the estate of her father, which was conveyed by mistake, by the sale commissioner, to John R. Hutchings, and subsequently, by deed dated June 21, 1888, in which said mistake was recited, conveyed by said John R. Hutchings and Sue Hutchings to a trustee for the sole and separate use of said Sue R. Hutchings, and for her to sell, convey, and otherwise dispose of as she pleases. Fourth, an undivided one-seventh interest in certain unsold lands lying just outside the said city, and belonging to the estate of Thomas B. Doe, the father of Mrs. Hutchings, to which one-seventh interest she is entitled as one of the heirs of said estate. It is insisted by the appellees that these lands, being acquired since the act known as the "Married Woman's Law" (see Acts 1877-78, p. 247), and before the adoption of the Code of 1887, are held by Mrs. Hutchings subject to the provisions of said act; and whether or not her husband has curtesy in them is to be determined solely by that act, without reference to the law as it was prior thereto. The appellees further insist that said act is to be so construed that when there is a conflict between it and the deed or deeds under which the separate estate is held the act must prevail. On the other hand, it is contended by appellants that the act did not mean to create a conflict between it and the separate estate as created by the deed; that it was only intended to protect married women in their property rights when they were not otherwise protected; that said statute did not destroy the equitable separate estates created by deed, devise, etc., but in terms recognized and excepted them from its operation.

The second section of the act in question (see Acts 1877-78, p. 248) provides as follows: "All real and personal estate hereafter acquired by any woman, whether by gift, grant, purchase, inheritance, devise or bequest, shall be and continue her sole and sep-

arate estate subject to the provisions and limitations of the preceding section, although the marriage may have been solemnized previous to the passage of this act; and she may devise and bequeath the same as if she were unmarried; and it shall not be liable to the debts and liabilities of her husband: provided that nothing contained in this act shall be construed to deprive the husband of curtesy in the wife's real estate, nor the wife of dower in her husband's estate, and provided further, that the sole and separate estate created by any gift, grant, devise or bequest shall be held according to the terms and powers and be subject to the provisions and limitations thereof, and to the provisions and limitations of this act, so far as they are in conflict therewith," etc. It would appear from the last words quoted from the act that equitable separate estates are made subject to the provisions of the act, and yet, just preceding these words, the act declares: "And provided further, that the sole and separate estate created by any gift, grant, devise or bequest shall be held according to the terms and powers, and to the provisions and limitations thereof." Here we are confronted with an irreconcilable conflict in the act itself, in this: that in the same sentence equitable separate estates are recognized, preserved, and upheld, and at the same time destroyed by being made subject to the provisions of the act. It is clear that the act intended to recognize and preserve equitable separate estates; otherwise, reference to them was useless. The latter part of the section just quoted makes equitable separate estates subject to the provisions of the act, "so far as they are in conflict therewith." In the act of April 4, 1877, the word "not," just before the word "in," is in the enrolled bill, but omitted in the printed acts. If this were all, the difficulty would be easily removed, for in such cases the enrolled bill would govern (*Spangler v. Jacoby*, 58 Am. Dec. 573), but when this section was amended and re-enacted by the act of March 14, 1878, the word "not" was omitted in both the enrolled bill and the printed acts. The word "not" having been inadvertently omitted from the original act, its omission from the amendment is not surprising, in the hurry of legislation. The omission of the word "not" at the point indicated makes the whole act incongruous and unintelligible, while, with that word incorporated, it is easily understood, clear, and makes the whole act harmonious. It is apparent that the omission was an inadvertence. To adopt a literal construction of the act, as it stands, would lead to absurd results; and we cannot suppose the legislature to have intended such results. We appreciate the danger, and consequently the great caution to be exercised by courts, in construing statutes, not to add to or take from them one jot or tittle, except in cases where the duty is plain, in order to give an intelligent effect to the statute, and

thereby carry out the manifest intent of the legislature. It will be observed that in this case the legislature manifested its intention by having the word "not" incorporated in the original act, as shown by the enrolled bill, and that all legislation on the subject since the amendment of March, 1878, has been careful to uphold and preserve equitable separate estates. See Code 1887, § 2294, which provides as follows: "Nothing contained in the preceding sections of this chapter shall be construed to prevent the creation of equitable separate estates. Such estates shall not be deemed to be within the operation of said sections, but they shall be held according to the provisions of the respective settlements thereof, and shall be subject to, and governed by the rules and principles of equity applicable to such estates." If evidence, outside the amended act of March, 1878, itself, were permissible to demonstrate the intent of the legislature, and to show that the omission of the word "not" in said act was a mere inadvertence, the prior and subsequent legislation on the same subject ought to be persuasive to establish that fact. Sutherland, a learned author on Statutory Construction, says: "When one word has been erroneously used for another, or a word omitted, and the context affords the means of correction, the proper word will be deemed substituted or supplied,"—citing a large number of authorities,—and adds: "This is but making the strict letter of the statute yield to the obvious intent." *Suth. St. Const.* § 260, p. 341. The same author says, to "enable the court to insert in a statute omitted words, the intent thus to have it read must be plainly deducible from other parts of the statute." It is plainly deducible, from other portions of this act, that the word "not" was inadvertently omitted. Another author says: "You must not violate the spirit by pretending to protect the letter of the law." *Potter's Dwar. St. p. 129, § 23, rule Vattel.* Statutes must be interpreted according to the intent and meaning, and not always according to the letter. *Potter's Dwar. St. 144.* See, also, *End. Interp. St. c. 11, § 295, p. 399*; and, also, *Church of Holy Church v. U. S.*, 143 U. S. 457, 12 Sup. Ct. 511; *Matthews' Case*, 18 Grat. 989. The omission of the word "not" in this act makes the obvious intent of the law impossible of being effected; its insertion makes the plain reason of the law prevail over the letter. We have said enough to show that the insertion of the word "not" in the second section of the act of March 14, 1878, in the sixteenth line of that section from the top, between the words "are" and "in," making the sentence in the line read, "so far as they are not in conflict therewith," is necessary to carry out the manifest intent of the legislature, and also to show that its insertion is the performance of a judicial duty, sanctioned by abundant authority of the highest repute.

Under this married woman's law (Acts 17-78, pp. 247, 248), read with the aid of the hint thrown upon it by the foregoing interpretation, it is plain that the legislature recognized and carefully upheld and preserved equitable separate estates when it said: and provided further that the sole and separate estate created by any gift, grant, devise, or bequest, shall be held according to its terms and powers, and be subject to the provisions and limitations thereof." With this act thus construed there is little difficulty in determining the rights of John R. Hutchings as tenant by the curtesy in the separate real estate of his wife, Sue R. Hutchings. He has an undivided one-seventh interest of said Sue R. Hutchings in the unsold lands belonging to the estate of her father, Thomas B. Hutchings, lying just outside the city of Danville, in a clearly separate legal estate, held under the act of 1877-78; and such is all the requisites for curtesy except marriage, seisin by the wife of estate in inheritance during coverture, birth alive issue, and death of wife leaving husband surviving. It follows that the said John R. Hutchings is entitled to curtesy in the interest of his wife in this land, although she has devised said land to her children,—the act providing "that nothing contained therein shall be construed to deprive the husband of curtesy in the wife's real estate."

As to the house and lot on Main street, sold by a trustee for Mrs. Sue R. Hutchings under a deed from her father, Thomas B. Hutchings, and a lot on Broad street, held by a trustee for Mrs. Hutchings under a deed from the sale commissioner, united in by her husband, and the undivided one-third interest in the other lot on Broad street, held by a trustee

Mrs. Hutchings under a deed from John Hutchings and his wife, each more fully before described, these three properties represent the equitable separate estate of Sue R. Hutchings, and must be governed and controlled by the terms and provisions, and subject to the provisions and limitations, of the respective deeds under which the same is held. The provisions and limitations in these three deeds, setting forth Sue R. Hutchings' power over the property conveyed therein, have already been recited; and, without prolonging this discussion further, it is sufficient to say that the estate conveyed in each was so limited as to give her the use of the property, and deprive the husband of curtesy therein, provided she exercised her right to dispose of said properties by will. As she has done, leaving said property to her children. This case is fully covered by, and must be controlled by, the doctrine laid down by this court in the case of Chapman Price, 83 Va. 392, 11 S. E. 879. The court is therefore of opinion that the circuit court at Danville erred in sustaining the exception taken by the appellees to the commissioner's report, and in holding that John R. Hutchings was entitled to curtesy in the property

held under these three deeds, and therefore erred in appointing a receiver, with directions to rent out said properties with a view to applying the rents to the payment of the debts of said John R. Hutchings.

The second assignment of error is that the court erred in sustaining the exceptions taken by J. D. Blair and the Commercial Bank to the commissioner's report for having reported that Mrs. Sue R. Hutchings' estate was only indebted to J. D. Blair for the rent of a certain warehouse property leased by Mrs. Hutchings from the time of the commencement of the lease until the death of Mrs. Hutchings. It appears from the record that on the 26th day of September, 1888, Mrs. Sue R. Hutchings leased from J. D. Blair one-sixth interest in a certain warehouse in Danville for three years from the 1st day of October, 1888, and ending the 1st day of October, 1891, at \$400 for the first year, and for the second and third years each \$500. In addition, the lessee was to pay all taxes, assessments, levies, water and gas rents, fire insurance, and ordinary and temporary repairs, etc., which may be assessed against J. D. Blair, as one-sixth owner of the warehouse, during each of said three years' lease. It further appears that Mrs. Hutchings executed a deed of trust, contemporaneously with the lease, upon certain real estate owned by her, securing the amount due under the lease to Blair. Mrs. Hutchings and others, partners with herself in the warehouse business, took possession of the property under the lease; and on the 15th day of December, 1888, Mrs. Hutchings died, the surviving partners continuing to occupy the property until the end of the lease. The master commissioner reported that there was due to J. D. Blair from the estate of Sue R. Hutchings, under her contract of lease, the sum of \$1,499, with interest on \$1,400, part thereof, from January 1, 1892, till paid; and further ascertained that Mrs. Hutchings' estate was only primarily bound for 2½ months' rent and interest thereon, amounting to \$94.50, and that Mrs. Hutchings was only bound secondarily, or as surety, for the residue; that those who had occupied the property after her death were primarily bound for the residue accruing after her death. To this action of the commissioner, exception was taken by the bank and J. D. Blair, and sustained; the court decreeing that Mrs. Sue R. Hutchings was primarily bound to Blair for the whole of the rent, \$1,499, with interest as aforesaid. Mrs. Hutchings' death did not release her estate from her obligation under the lease from Blair; the lease continued the property of her estate, and the liability to pay what she had contracted to do also continued on her estate. The evidence does not show that Blair ever canceled or modified the lease, nor does it appear that he ever looked to any one else for the rent accruing under said lease; and while, under the statute, he had a right of distress against the property of any sub-

tenant of Mrs. Hutchings, he was not bound to exercise that right, and she could not compel him to do so. The decree sustaining this exception to the commissioner's report was plainly right.

The third assignment of error alleges that the court erred in sustaining an exception taken by the bank to the commissioner's report for not crediting on the indebtedness of J. R. Hutchings to his wife the sum of \$1,883.75, with interest on same from December 1, 1887, to July 27, 1891, shown to have been paid by him, out of his own money, to her, after his indebtedness to her accrued. It appears from the evidence that J. R. Hutchings was indebted to his wife in the sum of \$2,386.04, and that while thus indebted he advanced his wife, out of his own means, the sum of \$1,883.79. It was proper that the amount thus advanced by him for her out of his own means, with its accrued interest, should be credited upon the amount he owed her, and therefore the court did not err in sustaining this exception to the report of the commissioner.

For the foregoing reasons, we are of opinion that the decrees of the circuit court of Danville of the 11th day of June, 1891, and the 24th day of March, 1892, appealed from, are erroneous, and must be reversed, in so far as they hold that John R. Hutchings is entitled to curtesy in the separate equitable estate of his wife, Sue R. Hutchings, held under the three deeds mentioned herein,—one from Thomas B. Doe to J. T. Brightwell, trustee, dated June 10, 1881; one from E. E. Bouldin, commissioner, et al., to S. M. Embry, trustee, dated April 16, 1884; and the third from John R. Hutchings and wife to S. M. Embry, trustee, dated June 21, 1888,—and in so far as said decrees appoint P. H. Boisseau, sergeant, of Danville, a receiver to take charge of said three properties, or either of them, and rent the same, collect the rents, and report his acts in that behalf to the court. The court is further of opinion that in all other respects there is no error in the said decrees.

#### ROBINSON v. COMMERCIAL & FARMERS' BANK et al.<sup>1</sup>

(Supreme Court of Appeals of Virginia. Jan. 24, 1896.)

On rehearing. Affirmed.

For former report, see 17 S. E. 739.

RIELY, J. This case was decided by this court, at its place of session at Wytheville, on June 15, 1893, and the decree of the chancery court of the city of Richmond, from which the appeal was taken, affirmed. A rehearing was granted, and in this way the case is again before this court.

After hearing the arguments of counsel, and giving due consideration to the matters complained of, we are satisfied that the decision reached by the court at the former hearing, in the opinion delivered by Judge LACY (17 S. E. 739), is entirely correct. Such being our conclusion, it is unnecessary to discuss anew the questions raised. We are of opinion that there is no error in the decree of the said chancery court, and that it must therefore be again affirmed.

#### FIELD v. ALBEMARLE COUNTY.<sup>1</sup>

(Supreme Court of Appeals of Virginia. Jan. 17, 1895.)

##### COUNTIES—LIABILITIES—FIRES SET BY EMPLOYEES.

1. The plaintiff permitted a force of hands engaged in working the county roads to occupy his barn, and while there they negligently caused it to burn. *Held*, that the county was not responsible for the loss.

2. Counties, being political divisions of the state, cannot be sued except in cases where by statute such suits are allowed, as in cases growing out of contracts with them, but not for injuries resulting from the negligence of their officers or servants.

Error to circuit court, Albemarle county.

James G. Field's barn was burned by the negligence of some men who were engaged in working the county roads. From a judgment holding the county of Albemarle not liable for the damage he sustained he brings error. Affirmed.

Jas. G. Field, in pro. per. Micajah Woods, for defendant in error.

KEITH, P. James G. Field filed his petition before the board of supervisors in the county of Albemarle, in which he complained that in the month of October, 1890, he had permitted one Peyton, who was then engaged with a force of hands, plows, carts, mules, and horses in working and repairing the highways of said county, to occupy a barn and stable upon his farm in said county; that the said barn and stable were, on the night of the 3d day of November, 1890, wholly destroyed by fire, and that the fire was the result of the negligence of the county, its agents and servants. He alleges that his loss, after deducting the sum of \$250, the amount of a policy of insurance upon the stable, amounted to \$1,187.50, and this sum he prays the board of supervisors to allow to be paid to him. The board rejected his claim, and, upon successive appeals to the county and circuit courts of the county of Albemarle, the action of the board of supervisors was sustained, and thereupon he appealed to this court for a writ of error, which was allowed.

The learned judge of the circuit court, whose opinion is filed with the brief of the attorney for the defendant in error, consid-

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

ed that this case was ruled by that of *y v. County of Albemarle*, reported in 86 Va. 195, 9 S. E. 1004, and we are unable to discover any material distinction between the two cases. That was a case in which the plaintiff brought suit for injury to the person by the wrongful and negligent act of the agents and servants of the county of Albemarle. Here the injury sustained by the plaintiff in error was to his property by the alleged wrongful act of the same defendant. In each case the remedy is by an action for the wrong, and not upon any contract, express or implied. The opinion of the court in the case cited from 86 Va. and 9 S. E., delivered by Lacy, J., in our judgment correctly pounds the law in that case. The authorities are fully considered, and the conclusion arrived at is that "counties, being political divisions of the state, cannot be sued except in cases where by statute such suits are allowed, as in cases growing out of contracts with them, but not for injuries resulting from the negligence of their officers or servants." It follows, therefore, that the judgment of the circuit court was plainly right, and that it must be affirmed.

**ROANOKE BRICK & LIME CO. v. SIMMONS et al.**

Supreme Court of Appeals of Virginia. Feb. 7, 1895.)<sup>2</sup>

**IN FIDE PURCHASERS—CONSTRUCTIVE NOTICE—VENDOR'S LIEN.**

1. A grantee assumed payment of 92 notes, of \$35 each, to the R. B. & L. Co., and in the deed the grantor covenanted "that he had done no act to incumber said land, except the deed of trust above mentioned." No deed of trust is mentioned above, nor was there any on record. *Held*, that said recitation put all claimants through the grantee upon inquiry to said company concerning said deed.

2. Where a beneficiary in a deed of trust put on record remembers that there was such a deed, but cannot find it, it is insufficient as constructive notice to one put on inquiry as to such deed.

3. All vendor's liens for the purchase money of property, unless expressly reserved on the face of the instrument, are abolished by Code 1890, c. 119, § 1.

Appeal from circuit court of City of Roanoke; J. A. Dupuy, Judge.

Suit by James S. Simmons, trustee, and others, to establish the lien of an unrecorded deed of trust securing the Roanoke Brick & Lime Company certain notes. From a decree against it, it appealed. Affirmed.

J. B. Moomaw, for appellant. T. W. Miller, Scott & Staples, and T. D. Ranson, for appellees.

KEITH, P. The Roanoke Brick & Lime Company, by deed dated April 21, 1890, sold

to W. A. Meeks certain real estate in the city of Roanoke for \$4,000, \$500 of which was paid in cash; and for the balance Meeks executed 100 negotiable notes, in the sum of \$35 each, payable in monthly installments, the first of them falling due on the 21st day of the ensuing May. Meeks paid eight of these notes, and by deed dated December 30, 1890, he sold the same property to James N. Ranson, Jr., for the sum of \$7,500, \$2,500 of which was paid in cash; and, for the residue, Ranson assumed the payment of the 92 \$35 notes, executed by Meeks to the Roanoke Brick & Lime Company, remaining unpaid at the date of the deed, and executed for the residue of the purchase money two notes of \$890 each, payable in one and two years from date. The first deed referred to, from the Roanoke Brick & Lime Company to Meeks, is a conveyance with general warranty, and with all the usual covenants as to quiet enjoyment, for further assurances, etc. In the second deed, Meeks covenants that he has a right to convey the said land to grantee; that he has done no act to incumber said land, except the deed of trust above mentioned; that the grantee shall have quiet enjoyment of said land; that it is free from incumbrance; and that the party of the first part shall execute such further assurances as may be requisite. By deed of even date with that last referred to, James M. Ranson conveyed his property to James S. Simmons, as trustee, to secure the payment of the two notes above referred to, of \$890 each, which he describes as the unpaid purchase money on the property conveyed. The two notes thus secured were negotiated before maturity, and are held, one by the Fidelity Loan & Trust Company, and the other by Thomas D. Ranson, executor of James M. Ranson, Sr., deceased. Upon default being made in the premium of the last two notes secured in the deed of trust of December 30, 1890, James S. Simmons, the trustee therein named, was called upon by the Fidelity Loan & Trust Company to make sale of the trust property, and it was accordingly advertised for sale on May 10, 1893. In this advertisement the trustee declares that he would sell subject to a prior deed of trust executed by W. A. Meeks to secure the Roanoke Brick & Lime Company the payment of \$3,500 in monthly installments of \$35 each, as evidenced by the negotiable notes of said Meeks, dated April 21, 1890, and payable to the Roanoke Brick & Lime Company, with interest. As soon as this advertisement was brought to the attention of the Fidelity Loan & Trust Company, it remonstrated with Simmons for subordinating its lien to a lien in favor of the Roanoke Brick & Lime Company, and declaring that there was no such deed of trust upon record; that it had taken these notes without any notice of such preferred lien, and was therefore not affected by it; and that, in point of fact, it had no existence. Yielding to these remonstrances,

Reported by F. S. Kirkpatrick, Esq., of the Newburg bar.

Rehearing pending.

Simmons withdrew the first advertisement, and again advertised the property to be sold on the 22d of May, 1893. And thereupon the Roanoke Brick & Lime Company filed its bill, in which it is charged that the 100 \$35 notes mentioned in its deed to W. A. Meeks dated April 21, 1890, were secured by deed of trust of even date therewith, which for some reason had not been recorded, and had been subsequently lost. It avers that James M. Ranson, Jr., was fully aware of the existence of the deed of trust executed by Meeks when he bought the property, and took the property subject to the lien of said deed. An injunction was awarded upon this bill, prohibiting Simmons, trustee, from selling the land in the proceedings mentioned. To this bill the Fidelity Loan & Trust Company, Simmons, and James M. Ranson and others were made parties defendant. It is taken for confessed as against Meeks. The Fidelity Loan & Trust Company answered, claiming that it acquired the note due two years from date, secured by the deed from Ranson to Simmons, trustee, before its maturity, for value, and without notice of the existence of a prior deed of trust. Thomas D. Ranson, the holder of the first of the two notes secured by the deed to Simmons, also answers, and denies, not only all knowledge of any prior lien in favor of the brick and lime company, but denies that any such deed as the one alleged to have been lost was ever executed. He claims also to be a holder of the note for value, and without notice of any antecedent equity. Simmons, the trustee, also answers the bill, and denies any knowledge of the execution of the deed of trust which the plaintiff, by his bill, seeks to establish, either actual or constructive. He says that he does not know whether James M. Ranson, his grantor, had notice or not. He admits that he had an impression, based not upon knowledge, but upon hearsay, that there was a lien upon the land by reason of the deed of trust referred to, but was satisfied, after investigation, that this impression was erroneous, and therefore withdrew the first advertisement, and inserted another, in which no reference to the alleged deed of trust executed by Meeks to secure the complainant was made. Issues having been thus made by the pleadings, the plaintiff took the depositions of W. B. Moomaw, its secretary and treasurer, and J. W. Neal, a member of the firm of real-estate agents by whom the sale from the brick and lime company to Meeks was negotiated. In the view which we have taken of the case, the other depositions and proofs introduced on the part of the defendant need not be specially adverted to. The circuit court entered a decree dismissing the bill, and to that decree an appeal was allowed by one of the judges of this court.

It may be conceded that there is enough on the face of the deed from Meeks to Ranson, dated December 30, 1890, to put Ran-

son, and all who claim under him, upon inquiry as to the existence of the deed of trust upon the property therein conveyed, antecedent to the deed under consideration, for it expressly appears that Meeks refuses to covenant that he has "done no act to incumber said land," but declares, on the contrary, that he has "done no act to incumber the said land, except the deed of trust above mentioned." There is no deed of trust above mentioned in the deed, but it does appear that the grantee, James M. Ranson, Jr., covenants to pay the 92 notes of \$35 each to the Roanoke Brick & Lime Company. Any one, therefore, reading this deed with ordinary care, would probably—indeed, naturally, if not necessarily—conclude that the reference to the deed of trust had relation to the 92 notes of \$35 each; and going one step further back in the chain of title, and reading the deed of the 21st of April, 1890, along with that of the 30th of December, one could hardly escape the conclusion that the Roanoke Brick & Lime Company was the beneficiary of the trust, if one existed. I feel little hesitation in saying that the recital as to the purchase money in the deed of December 30, 1890, taken in connection with the refusal of the grantor in that deed to warrant against incumbrances generally, was at least sufficient to put any man exercising reasonable caution upon inquiry, and sufficient also to direct and point that inquiry to the Roanoke Brick & Lime Company as the person likely to be interested. If there was enough on the face of the deed to put them upon inquiry, and that inquiry, if prosecuted, would have informed them as to the rights of the brick and lime company, they will be charged in a court of equity with the knowledge of every fact of which they would have become possessed had the inquiry which it was their duty to make been prosecuted. As was said by Judge Moncure in *Burwell's Adm'r v. Fauber*, 21 Grat. 446: "Bona fide purchasers, for value and without notice, are favorites of a court of equity, and that court will not disarm such a purchaser of a legal advantage; but purchasers are bound to use a due degree of caution in making their purchases, or they will not be entitled to protection. The purchaser is bound not only by actual, but also by constructive, notice, which is the same in its effect as actual notice. He must look to the title papers under which he buys, and is charged with notice of all the facts appearing upon their face, or to the knowledge of which anything there appearing will conduct him. He has no right to shut his eyes or his ears to information, and then say he is a bona fide purchaser without notice." As was said by Justice McLean in the case of *Brush v. Ware*, 15 Pet. 114: "No principle is better established than that a purchaser must look to every part of the title which is essential to its validity. The law requires reasonable diligence in a purchaser to ascertain any defect of title, but, when such defect is brought



his knowledge, no inconvenience will ex-  
e him from the utmost scrutiny. He is  
oluntary purchaser, and, having notice of  
fact which casts doubt upon the validity  
his title, are the rights of innocent par-  
to be prejudiced through his negligence?"  
thorities might be multiplied practically  
hout limit. I will content myself, how-  
r, by referring only to Long v. Weller, 29  
st. 347, and Pom. Eq. Jur. §§ 595-597, in-  
sive.

Assuming, therefore, that there was enough  
this deed to put a reasonably prudent man  
on inquiry, and that it pointed to the  
Roanoke Brick & Lime Company as the  
source of information, and that those whose  
duty it was to make the investigation are to  
be charged with knowledge of all defects,  
which could have been thus acquired, how  
ends the case? It is not to be presumed  
that the information thus obtained would  
have been other than that which the brick  
& lime company has been able to place in  
its record as the result of its efforts to es-  
tablish its case against these defendants.  
At the utmost, therefore, that could have been  
learned of the pretensions of the plaintiff,  
the facts as stated by the witnesses ad-  
duced by the plaintiff to testify in its behalf.  
It has been said that inquiry should have  
been addressed to the brick and lime com-  
pany. It would have been more accurate to  
address it to the officers of the brick and lime com-  
pany. To which of the officers did the law  
make it the duty of the defendants to apply  
for information? If to the president, then  
there is nothing in this record which shows  
that the president had any knowledge on the  
subject. He is not examined as a witness,  
he probably would have been if he had  
any personal knowledge of the existence  
of this deed. Inquiry, then, of the presi-  
dent, we have a right to assume, would have  
been fruitless; and, if that inquiry would  
have been a discharge of the duty imposed  
on the defendants, they must stand ac-  
cused of all blame in failing to make it,  
the law requires no man to do a vain  
thing. But grant that, failing to get satis-  
factory information from the president, the  
duty then devolved upon the defendants to  
inquire of the secretary and treasurer, and  
what would have been the result? The sec-  
retary would have answered—we must now  
hold that he could only have answered—in  
the language of his deposition. The third  
question propounded to W. P. Moomaw, sec-  
retary and treasurer of the plaintiff's com-  
pany, is as follows: "Q. I notice by the bill  
of exhibits in case of Roanoke Brick &  
Lime Company v. James S. Simmons that  
Roanoke Brick & Lime Company sold to  
A. Meeks a piece of property described  
said bill as lying in the city of Roanoke,  
on the north side of Campbell St., for the  
sum of \$4,000, \$500 of which was paid in  
cash, and the balance was evidenced by one  
hundred interest-bearing notes, payable in

the sum of \$35 each, monthly. State wheth-  
er or not Meeks executed a deed of trust to  
secure these notes. If so, was the same  
placed on record? A. There certainly was  
a deed of trust prepared, but it appears that  
it is not on record, and cannot be found;  
and, when my attention was called to the  
matter of the deed of trust, I was so sure  
that it could be produced that I went im-  
mediately to look for it among my papers. But  
I know that I have seen the deed of trust  
somewhere. Am satisfied that I had it in  
my possession at one time." Now, that an-  
swer is the plaintiff's case. The rest of the  
deposition adds not one jot or tittle to its  
force, nor does the deposition of J. W. Neal,  
real-estate agent. On the contrary, the ef-  
fect of the further direct examination and  
of the cross-examination is to diminish,  
rather than strengthen, the proof of the ex-  
ecution of the deed, in so far as this answer  
tends to establish it; for, conceding to wit-  
nesses entire veracity of purpose, and without  
meaning to attribute to them the slightest  
intentional misstatement of the facts, the  
impression cannot be resisted that these gen-  
tlemen are speaking rather as to their im-  
pressions of their usual course of business in  
like cases than from any very distinct re-  
collection of the facts in this particular case.  
It was very remarkable that such a paper  
should have been lost. It appears that the  
100 \$35 notes were taken to the vault of the  
National Exchange Bank. The deed of  
trust, Mr. Moomaw says, was delivered to  
him at the same time; and yet the utmost  
care was observed with reference to the pres-  
ervation of each of the 100 notes, and the  
utmost negligence with reference to the  
preservation of that paper which imparted  
to them their chief value. It creates the  
suspicion in one's mind that the parties here  
were at the time resting content with the  
personal security that they had for the pay-  
ment of these notes. It is part of the gen-  
eral history of those times, of which the  
courts may take judicial notice, that there  
was the utmost activity in the real-estate  
market; that prices were advancing from  
day to day; houses and lots were speculated  
in as freely as stocks and shares. The very  
property in question here advanced from  
\$4,000 in April to \$7,500 in December, and it  
was not unreasonable that entire confidence  
should have been felt in the solvency of per-  
sons who were dealing in property so rapid-  
ly enhancing in value. This plaintiff exe-  
cuted its deed to Meeks on the 21st of April.  
It did not acknowledge it until the 7th of  
the ensuing January, though the witnesses  
say that the \$35 notes were delivered im-  
mediately upon the consummation of the  
transaction. This seems hardly in conform-  
ity with the usual course of business, and  
lends additional color to the idea that the  
parties were dealing with each other not up-  
on a very strict business footing. We find,  
too, that the deed of December 30, 1890.

from Ranson, Jr., to Simmons, trustee, though acknowledged on the 31st of January, 1891, was not admitted to record until the 19th of February, 1892,—another striking evidence of the laxity with which affairs were conducted by the parties to these transactions. Upon consideration, therefore, of all the evidence, it leaves the mind in great doubt and perplexity as to whether or not any such deed of trust as that claimed by the plaintiff ever had any existence. But this is not all. Taking the statement of the secretary, Mr. Moomaw, in the terms in which it is made, is it sufficient to establish a lien upon this property against a bona fide purchaser for value, and without notice? It is true, he says quite confidently that the deed of trust was executed; but he does not say what property was conveyed in that deed, and that seems to be fatal to the plaintiff's proof. It is possible that the plaintiff's debt may have been secured by a deed of trust upon other property owned by Meeks, and that would be entirely consistent with the deposition of Moomaw, and of Neal also. The burden of proof is always upon the plaintiff to establish its case, and where it comes into court seeking to set up a lien by virtue of a lost instrument, thereby defeating a lien appearing by the public records, it would seem that the court should require that degree of proof that would enable the court to proceed in its favor with reasonable confidence and certainty. That confidence I do not feel. On the contrary, the record leaves me, after a most careful investigation, unable to say that the plaintiff has sustained its case by satisfactory evidence.

A lien is claimed by the plaintiff, in its bill, upon the further ground that "by the deed of December 30, 1890, James M. Ranson, having assumed the payment of the \$35 notes, became personally liable therefor, and that the assumption operated as a deed of trust or mortgage on the land, which a court of equity would enforce, not only against James M. Ranson himself, but against all subsequent purchasers dealing in any way with the land, with a knowledge of the existence of the lien"; and, of course, if the facts stated constituted a lien, all subsequent purchasers would be affected thereby, and will take the land with a notice of the lien, because it appears upon the face of the deed itself. The plaintiff rests this pretension upon the decisions of this court in the case of *Vanmeter v. Vanmeter*, 3 Grat. 148; *William and Mary College v. Powell*, 12 Grat. 372; *Hobson v. Whitlow*, 80 Va. 784; 2 Minor, Inst. 236; and certain other cases in other states. The facts in the first two cases, cited from 3 and 12 Grat., all arose prior to the Code of 1849, which cut up by the roots the lien of the vendor for unpaid purchase money. Counsel

for plaintiff made a very ingenious and plausible argument to show that those cases, and those of a like character, were not decided upon the doctrine in question. A very casual reference to the cases will be sufficient, I think, to show that it was the vendor's lien, pure and simple, with which the court was dealing in *Vanmeter v. Vanmeter*, for it appears on page 162 that, in the opinion of the court, there was no expressed trust created by the deed there construed, and that bona fide purchasers of the property would have been under no obligation to see to the application of the purchase money and the payment of the debts; but, said the court, "such payment was a part of the consideration for the conveyance, and it is against equity and good conscience that the grantees should be permitted to hold the property without making such payments. A court of equity will therefore treat the subject as in the nature of a trust, and establish a lien on the property while in the hands of the grantees, as a means of compelling its performance." The case of *William and Mary College v. Powell* seems to have been one of an expressed trust,—wholly different from the case under consideration. Nor is there anything, as far as I have been able to discover, in Mr. Minor's invaluable book, cited by the plaintiff, at all tending to sustain the lien which he asserts. Code 1849, c. 119, § 1, declares "that if any person hereafter should convey any real-estate and the purchase money, or any part thereof remain unpaid at the time of the conveyance he shall not thereby have a lien for such unpaid purchase money unless such lien is expressly reserved on the face of the conveyance." This statute was intended to extirpate a great evil, and since its passage, as far as I know, no case has been decided in which the lien thereby abolished has been recognized, except in cases where the facts existed prior to its passage. I do not consider that there is anything in the case of *Hobson v. Whitlow* which is at all in conflict with the statute. In that case, as I understand the facts, no conveyance had been made of the real estate upon which the decree of the court operated. If, however, that case can be construed as authority for the enforcement of a vendor's lien existing, or claimed to exist, otherwise, then, in accordance with the terms of the statute just quoted, it cannot be law, and should not be followed; but I repeat that as I understand the facts of that case, which are somewhat confused, and not easily understood, there is no conflict between the decision of this court in that case and the statute law. Upon the whole case, therefore, I am of opinion that the plaintiff has failed to establish a lien of any kind upon the property in question, and that the decree of the circuit court should be affirmed.

1 Va. 114)

## CARNEAL v. LYNCH et al.

Supreme Court of Appeals of Virginia. Feb. 7, 1895.)

PARTITION—LIFE TENANTS AND REMAINDER-MEN—DECREE FOR SALE—EFFECT ON REMAINDER-MEN NOT IN ESSE—QUANTITY OF LAND SOLD—NOTICE TO PURCHASER.

1. Under section 2432, Code 1887, which provides for the partition and sale of all classes of contingent remainders, and the reinvestment of the proceeds, and section 2562, declaring that "tenants in common, joint tenants and co-parceners shall be compellable to make partition," a life tenant of one moiety of land can maintain a suit for partition against the remainder-men in esse and the fee-simple owners of the other moiety.

2. A tenant for life of an undivided share of an estate, with remainders to his unborn sons, may file a bill for partition, and the decree will be binding on the sons, when in esse.

3. Where property sold under decree of court is correctly represented by a plat which encloses an encroachment of about 2½ feet on street, which plat is referred to in the advertisement of sale, and exhibited on the day of sale, a purchaser cannot plead ignorance of said encroachment.

4. Under Acts 1883-84, p. 494, where a corner lot in the city of Richmond has encroached on the street for 20 years the owner is title by adverse possession to the land encroached on.

Appeal from chancery court of Richmond; James C. Lamb, Chancellor.

J. D. Carneal purchased certain property by a judicial sale, and appeals from a decree declaring the title to be good. Affirmed.

J. L. Anderson, for appellant. Courtney Patterson, for appellees.

HARRISON, J. This is an appeal from a decree of the chancery court of the city of Richmond. It appears from the record that Benjamin Sutton, by the sixth clause of his will, gave to his two grandsons, William

Lynch and Charles G. Lynch, a certain use and lot on the corner of Grace and Jefferson streets, in Richmond, for their uses, with cross remainders to their children; and, in the event of death of both without issue, then said property was to pass to their sister, Mollie A. Lynch, or her issue. Charles G. Lynch died leaving two children, who, under the terms of said will, are now the fee-simple owners of their father's moiety. On the 27th day of April, 1893, William M. Lynch, the life tenant in one moiety of said property, filed his bill in the chancery court of Richmond, praying for a sale of this property for partition, and a reinvestment of the proceeds, and for general relief. To this bill he makes, as parties defendant, his own five children, remainder-men in his moiety; the two children of his brother, Charles, fee-simple owners of their father's moiety; and his sister, Mollie A. Lynch. His children and his

brother's children are all infants, and appear by guardian ad litem. All the proceedings in the case are regular, full, and complete. The commissioner's report and the evidence fully establish the propriety of granting the prayer of the bill. The court decreed the sale, and it was made, in accordance with the terms prescribed, to James D. Carneal. An upset bid was put in, and at a second sale said Carneal became the purchaser at \$11,575; and on the 26th day of June, 1893, the court entered a decree confirming said sale, but reserving to the purchaser leave to have the title examined within a reasonable time. Counsel for the purchaser examined the title, and made two objections thereto. The court overruled both objections, and on the 9th day of August, 1893, entered a decree fully confirming the sale to J. D. Carneal, directing that he forthwith comply with the terms. It is from this decree that the case is before this court on appeal.

There are two assignments of error, which are the two objections made by the appellant to the title to the property. The first is that William M. Lynch being only a life tenant in one moiety of the land, the remainder of said moiety being unascertained, and the other moiety being owned in fee simple by infants, he, the said William M. Lynch, had no power in law to maintain a suit for partition and sale of the whole of said land. This presents the simple question whether a life tenant of one moiety of land can maintain a suit for partition against the remainder-men, in esse, of that moiety, and the fee-simple owners of the other moiety. The bill is framed in a double aspect, being brought under section 2432 of the Code, which provides for the sale of contingent estates, and under section 2562, which provides for the partition of lands. This latter section provides that "tenants in common, joint tenants and co-parceners shall be compellable to make partition," etc. If, then, William M. Lynch, the life tenant in one moiety, is in law a tenant in common with the children of his brother, who are the owners in fee of the other moiety, it would seem clear that he can maintain a suit to compel partition against his cotenants. Mr. Minor says: "A tenancy in common is where two or more persons hold the same land, with interests accruing under different titles, or accruing under the same title, but at different periods, or conferred by words of limitation importing that the grantees are to take in distinct shares." Minor, Inst. p. 494, citing 1 Steph. Comm. 323. Judge Lomax says: "A tenancy in common is where two or more persons hold lands or tenements in fee simple, fee tail, or for term of life or years, by several titles, not by a joint title, and occupy the same lands or tenements in common, from which circumstance they are called 'tenants in common,' and their estate a

Reported by F. S. Kirkpatrick, Esq., of the Richmond bar.

'tenancy in common.'" 1 Lomax, Dig. p. 641. According to these high authorities, one of the conditions creating a tenancy in common is where two or more persons hold the same land, with interests accruing under the same title, but at different times. The record shows that the interests in this land accrued under the same title, viz. the will of Benjamin Sutton. It further shows that the interest of William M. Lynch accrued not later than November 11, 1871,—that being the date of the probate of Benjamin Sutton's will (the record does not show the date of Benjamin Sutton's death),—and that the interest of Dorsie Lynch and Charlie Lynch accrued September 21, 1881; that being the date of the death of their father, Charles G. Lynch. It follows, therefore, that William M. Lynch, the life tenant of one moiety, and the children of Charles G. Lynch, fee-simple owners of the other moiety, are plainly tenants in common. They hold the same land, with interests accruing under the same title, but at different times; and, being tenants in common, the right of either to compel partition in equity is provided for, and must be upheld, under section 2562 of the Code of 1887.

We do not perceive the force of the objection that a life tenant of a part cannot maintain a suit against his cotenants, who own the fee of the other part, for partition. There can be no doubt that the fee-simple owners could maintain the suit for partition against the life tenant, as defendant, and the manner in which the parties to the suit are arranged can make no difference. A party having a life estate, determinable on his marriage, in one-fifth of an estate, applied in chancery for partition. The defendants were entitled to the remaining four-fifths, as tenants in common, in tail, and were together entitled to the reversion of the plaintiff's fifth. The defendants all desired that the property should remain undivided. The master of the rolls said, "As tenant for life, I apprehend there can be no question but that he is entitled to partition," and it was accordingly granted. *Freem. Coten.* p. 553, § 455. "A tenant for life, of an undivided share of an estate, with remainders to his unborn sons, in tail, may file a bill for partition; and the decree will be binding on the sons, when in esse." *Gaskell v. Gaskell*, 6 Sim. 643. "The owner of a life interest in an undivided part of land may have partition, or, if that be impracticable, a sale of the property and a division of the proceeds." *Shaw v. Beers*, 84 Ind. 528. "When the titles are clear upon the record, whatever may be the estates,—whether in fee, for life, or for years,—the court orders a commission of partition to issue." 2 Minor, Inst. p. 487.

It is insisted by the appellants that inasmuch as the will of Benjamin Sutton provides that the moiety given to William M. Lynch for life shall pass at his death to his children, and said Lynch is still living, there-

fore the owners in remainder of that interest are unascertained. Grant that this is so. Section 2432 of the Code, under which this suit is maintained, in one aspect, provides fully for the sale of all contingent interests such as exist in this case, and was intended to facilitate the sale of property where just such difficulties existed. We are therefore of the opinion that under the statutes of Virginia, as well as upon precedent, a tenant for life in one moiety of property may maintain a suit against those who own the estate in remainder of said moiety, whether in esse or not, and the fee-simple owners of the other half, and compel partition of said property, and, if not susceptible of partition in kind, may have a sale and division of the proceeds.

The second assignment of error is that the court erred in overruling the objection of J. D. Carneal to the title on the ground that it was advertised and sold as fronting 67 feet 1½ inches on Grace street, in the city of Richmond, and running back 154 feet, when, as a matter of fact, it fronted on Grace street only 64 feet 7 inches, the difference of 2 feet 5½ inches being embraced in a part of Jefferson street. It appears from the record that there was a plat of this property made, distinctly showing the encroachment on Jefferson street, and that in the advertisement of the property for sale this plat was referred to as being at the auctioneer's office, where it could be seen by any who were interested in the sale. It further appears from the record that this plat, with red lines plainly defining the encroachment of 2 feet 5½ inches on Jefferson street, was exhibited at the sale, examined by bidders, and the encroachment referred to, and discussed in an open and general way; that J. D. Carneal, the purchaser, had every opportunity to see and examine said plat and the papers in the cause; and that, if he did not know of the encroachment of the buildings on Jefferson street, it was his own fault, and no blame attached to any one else. Carneal admits that he saw the plat at the first sale, but says that he did not examine it. His ignorance, then, of the fact disclosed by the plat is no excuse. "It was his duty to make inquiry, and inquiry duly pursued would have led to knowledge. It will not do for him to shut his eyes, and then say that he did not see. Wherever inquiry is a duty, the party bound to make it is affected with the knowledge of all which he would have discovered, had he performed the duty. Means of knowledge, with the duty of using them, are, in equity, equivalent to knowledge itself." *Long v. Weller*, 29 Grat. 347. But is there in fact any deficiency in the width of the lot in question, growing out of the alleged encroachment of 2 feet 5½ inches on Jefferson street? The legislature, by an act approved March 10, 1884 (see Acts 1883-84, p. 494), giving the city council power to remove buildings and other obstructions, where they encroach upon the streets, expressly provides that in every case

ere a building encroaches upon the street a corner lot, and has so continued for a period of 20 years, it shall constitute an adverse possession to, and confer property rights upon, the persons claiming thereunto, as against the city. It appears from the record that this lot and the buildings thereon were conveyed to Benjamin Sutton, December 30, 1858. He and those holding under him had therefore been in possession at the date of the act of March 10, 1884, more than 25 years; and, it being a corner lot, would seem that the legislature had conferred the title of the owners, as against the city, to the encroachment of 2 feet 5½ inches Jefferson street. See *Meyer v. City of Salem* (Neb.) 50 N. W. 763; *City of Wheeling v. Campbell*, 12 W. Va. 36. For the foregoing reasons, we are of opinion that there is no error in the decree complained of, and the same must be affirmed.

N. C. 70)

**TAYLOR v. SIMMONS.**

Supreme Court of North Carolina. Feb. 19, 1895.)

**TRIAL—DEATH OF JUDGE BEFORE CASE SETTLED.**

Where the case and counter case were tried in time, appellant immediately applied to the judge to settle it, and the trial judge afterwards died, a new trial will be ordered.

Appeal from superior court, Craven county, Graves, Judge.

Appeal by John T. Taylor against George Simmons, in which defendant appealed from a judgment in favor of plaintiff. Appellant moves for a writ of certiorari. New trial ordered.

W. Clark, for appellant.

ARK, J. At the last term of this court, at the first term of this court after the term below, the appellant docketed the record, and applied for a certiorari, as the case had not been settled by the judge. In *v. Kimberly*, 92 N. C. 562. By consequence the motion was continued to this term. It appears that the case and counter case were served in time, and that the appellant immediately applied to the judge to settle the case. The appellant would be entitled to a writ of certiorari; but, as the trial judge (his Honor Judge Graves) has since died, we must order a new trial. State v. 107 N. C. 821, 12 S. E. 572. New

C. 62)

**BROWNING et al. v. PORTER.**

Supreme Court of North Carolina. Feb. 19, 1895.)

**MORTGAGE — LIEN — ENFORCEMENT AS AGAINST THIRD PERSONS.**

Where a surety on a purchase-money mortgage retains title to the chattel for which he has paid, pays it without having it assigned to a trustee for his benefit, and the purchaser, after mortgaging it, delivers to him the chattel, the mortgagee has the first lien.

to a trustee for his benefit, and the purchaser, after mortgaging it, delivers to him the chattel, the mortgagee has the first lien.

Appeal from superior court, Halifax county; Graves, Judge.

Action of claim and delivery by B. R. Browning & Son against J. R. Porter. From a judgment for plaintiffs, defendant appeals. Affirmed.

It is agreed: That on November 19, 1887, one P. G. Solomon purchased a bay mare from W. M. Perkins, Jr., for the sum of \$100 (said mare was named "Sally Morgan"); and in payment therefor he executed his note under seal, with one L. Vinson as surety, for said amount, payable the 1st of November, 1888, bearing interest at 8 per cent. from date. Said note retained title to the mare until the whole of the purchase money was paid, and was duly recorded in the office of the register of deeds on March 30, 1888, in book 81, p. 231. On December 7, 1888, the surety, Vinson, upon a demand from said Perkins, paid Perkins \$50, and the same is credited upon the note. Thereafter, Perkins transferred the note to C. W. Garrett & Co.; and on November 9, 1889, Garrett & Co. transferred the note, without recourse, to Vinson, the surety. Said Solomon paid nothing on the note. That said Solomon failed to pay Vinson anything whatever on the note, and afterwards delivered to him the said mare under said note, retaining title, and thereafter he sold the mare to one G. E. Matthews for the sum of \$45, and Matthews sold her to the defendant for \$50, and she is now in the possession of the defendant. On February 6, 1889, the said Solomon, to secure certain advances to be made to him by the plaintiff to the amount of \$80, to be made during the year 1889, executed to said plaintiff a lien and chattel mortgage, conveying one red cow, one single-horse cart, one bay mare, white face, named "Sally Morgan," valued at \$50. No part of said advances has been paid. The mortgage was duly recorded on February 14, 1889, in book 85, page 377, in the office of the register of deeds. That, at the time of the execution of said chattel mortgage to the plaintiff, said Solomon had the possession of the said mare. Judgment: "It is considered by the court that the plaintiff recover of the defendant the possession of one bay mare, Sally Morgan, and, in case possession of said mare cannot be had, then for the sum of \$50, with interest from the 27th day of December, 1893, till paid, and for costs of action." From this judgment the defendant appealed.

S. G. Daniel and MacRae & Day, for appellee.

EVERY, J. When the surety, Vinson, paid the note in full, on the 9th of November, 1887, and failed to have it assigned to a trustee for his benefit, the debt was discharged. *Peebles v. Gay*, 115 N. C. 38, 20

S. E. 173; Liles v. Rogers, 113 N. C. 200, 18 S. E. 104, and authorities there cited. The satisfaction of the debt extinguished the vendor's lien, and the legal estate in the horse, at the time in the possession of Solomon, vested in his mortgagee, who had then a first lien on it, and on breach of the condition, the right to recover the possession of the horse, as he seeks to do in this action. The judgment of the court below is affirmed.

(116 N. C. 69)

**HEATH v. LANCASTER.**

(Supreme Court of North Carolina. Feb. 19, 1895.)

**APPEAL—SETTLEMENT OF CASE—DEATH OF JUDGE—NEW TRIAL.**

Where, on failure of the counsel to agree on a settlement of the case, appellant does not "immediately" (Code, § 550) request the trial judge to settle the same, but delays to do so for several weeks, on the death of the judge, where no excuse for the laches is shown, the judgment will be affirmed.

Action by J. F. Heath against W. F. Lancaster. There was a judgment for defendant, and plaintiff appealed. Motion by plaintiff for certiorari. Affirmed.

W. W. Clark, for defendant.

CLARK, J. The record proper was filed in this court at the first term after the trial below, and a certiorari asked for, as the case had not been settled by the judge. This was the proper course, and, if the appellant was not in laches, the certiorari would issue. *Owens v. Phelps*, 91 N. C. 253; *Pittman v. Kimberly*, 92 N. C. 562. In such case, as the trial judge (his honor, Judge Graves) has since died, a new trial would be ordered. *State v. Parks*, 107 N. C. 821, 12 S. E. 572; *Brendle v. Reese*, 115 N. C. 552, 20 S. E. 721. But in the present case the appellant does not negative laches. It appears that, after the disagreement about settling the case, the appellant did not immediately request the judge to settle the case, as required by section 550 of the Code, but delayed for several weeks to do so. This forfeits his claim to a certiorari, for the reasons given in *Simmons v. Andrews*, 108 N. C. 201, 10 S. E. 1052. An inspection of the record shows no errors of which the appellant can complain, and the judgment must be affirmed.

(116 N. C. 923)

**RIDLEY v. SEABOARD & R. R. CO.**

(Supreme Court of North Carolina. Feb. 19, 1895.)

**FRACTION ON APPEAL—SETTLEMENT OF CASE—DEATH OF JUDGE.**

Where, on appeal, the case and counter case were filed in time, but the trial judge died before settling the case, a new trial need not be granted if the appellee withdraws his counter case and consents to have the appeal tried on appellant's case.

Action by N. T. Ridley against the Seaboard & Roanoke Railroad Company. There was a judgment for plaintiff, and defendant appealed, and moved for writ of certiorari. Granted.

B. B. Winborne and R. B. Peebles, for plaintiff. MacRae & Day, for defendant.

CLARK, J. The case on appeal and counter case were served in time, and the trial judge was promptly requested to settle the case. At the call of the docket at last term, being the first term of this court which was begun after the trial below, the appellant docketed the record proper, and asked for a certiorari to bring up the case on appeal. Counsel consented, however, that the cause might be continued to this term, and that the "case on appeal" might be settled by the judge at Nash court, which was to be held by the judge (Graves) who had tried the cause. His honor died before he could do so. The appellant would be entitled, nothing more appearing, to have the case remanded for a new trial, but the appellee expresses a desire to withdraw its counter case and try the appeal upon appellant's case. The appellant certainly has no ground to object to this. *Drake v. Connelly*, 107 N. C. 463, 12 S. E. 251. The trial judge having died, either the appellee or appellant might, on motion withdraw the case or counter case, and the appeal will be heard upon the statement of the case on appeal made by the opposite party. In such cases the party intending to withdraw the case or counter case properly should notify the opposite party in time, so that the case may be printed, and stand regularly for trial at the first term. This was not done in this instance, but, that there may be no unnecessary delay, the case is set for hearing at the end of the docket at this term. Motion allowed.

(116 N. C. 71)

**PARKER v. COGGINS et al.**

(Supreme Court of North Carolina. Feb. 19, 1895.)

**NEW TRIAL—DEATH OF JUDGE.**

Where appellant's case on appeal and the counter case were duly served, and the judge, who was authorized by written stipulation of counsel to settle the case on appeal, died without doing so, appellant is entitled to a new trial.

Appeal from superior court, Northampton county; Graves, Judge.

Action by W. H. Parker against James A. Coggins and another. Judgment for plaintiff, and defendants appealed. The trial judge having died without settling the case on appeal, as authorized by stipulation of counsel, defendants move for a new trial. Granted.

T. W. Mason, for appellants. R. B. Peebles, for appellee.

CLARK, J. At the call of the district to which this case belongs, in October of last term, being the first term of this court which began after the trial below, the appellant had docketed the record proper. It also appears that the lack of a "case settled on appeal" was without laches on appellant's part, the appellant's case and the counter case having been served in due time, and the judge promptly notified, so that he might name a time and place for settlement. Regularly, a certiorari should then have been asked for, but it was rendered unnecessary by the agreement of counsel in writing that the case on appeal should be settled by the judge at Vance court, which time was afterwards, by another agreement of counsel, which is admitted, continued to Nash court, which began on the 19th of November. The judge (Graves) died during the second week of the time allotted by law for said court, during which term, by the agreement, the case was to be settled. But, if the judge had died after said term, an application for a certiorari was at no time necessary; since it appears in the affidavit of appellant, and is admitted by appellee, that the judge was unable at any time after the beginning of Nash court to discharge any of his duties on account of his mortal illness. Under these circumstances, the appellant has used all due diligence. As it is impossible now to procure the case to be settled, the defendant is entitled to a new trial (*State v. Parks*, 107 N. C. 821, 12 S. E. 572), unless the appellee had asked, as in *Drake v. Connelly*, 107 N. C. 463, 12 S. E. 251, to withdraw his counter case, and try the appeal on the appellant's statement of case on appeal, or the appellant had asked to withdraw his case, and try the appeal on appellee's counter case (*Ridley v. Railroad Co.* [at this term] 20 S. E. 962). It was not laches to fail to print the record, since the appeal could not be heard without the case settled, unless the appellee had notified the appellant in time that he should withdraw his counter case, and ask to have the appeal heard upon appellant's statement of the case on appeal. The case must be remanded, to the end that there may be a new trial.

(116 N. C. 73)

# SMITH v. EASTERN BLDG. & LOAN ASS'N.

(Supreme Court of North Carolina. Feb. 19, 1895.)

## MALICIOUS PROSECUTION—PROBABLE CAUSE—BURDEN OF PROOF—ADVICE OF COUNSEL—IMPLICATION OF MALICE.

1. Where a person arrested on a warrant is discharged by the justice for want of sufficient proof, the burden of showing probable cause for his arrest is on the person who instituted the prosecution.

2. In an action for malicious prosecution, it is error to charge that, if defendant consult-

ed a lawyer in good standing, and laid the whole case before him before causing plaintiff's arrest, and acted on his advice and without malice towards plaintiff, that would constitute probable cause, as these circumstances could only be considered by the jury as evidence to rebut the implication of malice.

Appeal from superior court, Craven county; Brown, Judge.

Action by Isaac H. Smith against Eastern Building & Loan Association for malicious prosecution. Judgment was rendered for defendant, and plaintiff appeals. Reversed.

W. W. Clark, for appellant. M. De W. Stevenson, for appellee.

MONTGOMERY, J. The plaintiff was arrested by the defendant on a warrant issued by a justice of the peace which charged him with forgery, and upon examination was discharged for want of probable cause. The plaintiff thereupon brought this action against the defendant to recover damages for a malicious prosecution of him. Upon the second issue, "Was there probable cause for the prosecution?" the court told the jury "that if they believed that L. J. Moore was a lawyer and counselor of good standing, which is not disputed in the argument in this case, and Reynolds, the general manager of the defendant, went to Mr. Moore with Ward, and then and there Reynolds made a full, clear, and frank statement of the matter, Ward's statement was taken after careful examination by the attorney, and they had reason to place confidence and trust in what Ward said and honestly believed it to be true, and that without any express malice upon the part of Reynolds towards Smith, but under Moore's advice, the warrant was made out upon Ward's affidavit, that would be probable cause; the prima facie case resulting from the dismissal of the warrant would be rebutted, and it would be your duty to answer the issue, 'Yes.'" To this instruction the plaintiff excepted. The discharge of the plaintiff in the said criminal proceeding against him by the defendant made a prima facie case for the plaintiff, he standing, after his discharge, without even a suspicion against him strong enough to bind him over to court, and the dismissal by the justice proving a presumption in favor of plaintiff's innocence. This being so, the onus of proving the existence of probable cause was thrown on the defendant, and his honor should have so instructed the jury. His honor should also have charged the jury that the employment by the defendant or an attorney before the warrant was issued, and its following his advice, did not have the effect of rebutting the prima facie case of the plaintiff, but that it should be considered by them only as evidence to rebut the implication of malice (*Davenport v. Lynch*, 51 N. C. 545), leaving that question, as well as the one of probable cause, to be heard on all the facts and circumstances properly submitted to

them. There was error in the instruction complained of, and the plaintiff is entitled to a new trial.

(116 N. C. 924)

**WELLINGTON & P. R. CO. v. CASHIE & C. RAILROAD & LUMBER CO.**

(Supreme Court of North Carolina. Feb. 19, 1895.)

**INJUNCTION — TRESPASS BY RAILROAD COMPANY — CONDEMNATION OF LAND.**

An injunction will not issue to restrain a railroad company which has instituted condemnation proceedings from wrongfully entering, before the appraisal of damages and the payment thereof into court, when it has given ample bond to cover any damage resulting from such action on its part.

On petition for rehearing. Denied.

For former report, see 19 S. E. 646.

R. B. Peebles and Battle & Mordecai, for plaintiff. F. D. Winston and R. O. Burton, for defendant.

**AVERY, J.** This is a petition to rehear the case reported in 114 N. C. 690, and 19 S. E. 646. The plaintiff instituted a special proceeding to condemn the right of way over defendant's land. The defendant, in its answer, alleged that it would sustain irreparable damage if the road should be built, and, using the answer as an affidavit, obtained a temporary restraining order, which, on the return day, was vacated, upon the filing by the plaintiff of a bond in the penal sum of \$1,000 conditioned for the payment by the plaintiff of all costs and damages recovered by the defendant in this action. The appeal is from the order dissolving the injunction.

We are warranted in assuming that the penal sum mentioned in the bond was fixed by the court after due inquiry, and is therefore amply sufficient to secure to the defendant any damage that may be ultimately recovered of the plaintiff for the wrongful entry upon its land, if, indeed, any wrong has been done. Conceding that the plaintiff is a trespasser, compensation in damages will, nevertheless, as a general rule, be allowed for such an injury, and there is no allegation in the answer that will bring this case within any exception to it. It is contrary to the policy of the law to use the extraordinary powers of the court to arrest the development of industrial enterprises or the progress of works prosecuted apparently for the public good, as well as for private gain. *Lewis v. Lumber Co.*, 99 N. C. 11, 5 S. E. 19. On the other hand, this court has given its sanction to the practice of granting restraining orders till the hearing against a party who by force was impeding the prosecution of such enterprises, on the ground that a trespass was being committed on his premises, when apparently he could be compensated in damages for the injury of which he complained. *Navigation Co. v. Emry*, 108

N. C. 130, 12 S. E. 900. The plaintiff is proceeding, as was said in the former opinion of this court, under a charter authorizing it to appropriate land for its use upon just compensation, and the question of the necessity for taking a proper right of way is not before us. Pending the proceeding for condemnation, ample provision has been made to compensate the defendant for any loss sustained by a wrongful entry on the part of plaintiff; and if it be admitted that the plaintiff is not authorized to enter till after the appraisal, and the payment into court, in accordance with the provisions of the Code (section 1946) "the sum appraised," the plaintiff is still, in the worst aspect of its conduct, committing a trespass, for which it is answerable in damages, the ultimate payment of which is secured in advance by a sufficient bond. The defendant has not only failed to show that he has or will sustain, but even that he may suffer, irreparable injury. The petition is dismissed.

(116 N. C. 77)

**BRITISH & AMERICAN MORTG. CO. v. LONG et al.**

(Supreme Court of North Carolina. Feb. 19, 1895.)

**DISMISSAL OF APPEAL—REINSTATEMENT.**

1. Where a motion to docket and dismiss an appeal is made by appellee, for appellant's failure to docket the case, excuses for failure to docket should be then made, and cannot be taken advantage of on motion to reinstate.

2. The fact that, on an appeal, negotiations for compromise were pending, is no excuse for failure to docket the appeal.

Action by the British & American Mortgage Company against W. W. Long and others. There was a judgment for plaintiff, and defendants appealed. The appeal was dismissed for failure to docket the same, and appellants moved to reinstate the same. Denied.

J. B. Batchelor, for appellants. R. O. Burton, for appellee.

**CLARK, J.** This is a motion to reinstate the case, which was docketed and dismissed by appellee at last term, under rule 17 (12 S. E. vi). A motion was made at that time, by appellants, for a certiorari; but it appearing to the court, by affidavit of the clerk below, which was not controverted, that the appeal had not been sent up because the clerk had repeatedly demanded his fees for the transcript, which appellants had failed to pay, the certiorari was refused. *Bailey v. Brown*, 105 N. C. 127, 10 S. E. 1054; *Andrews v. Whisnant*, 83 N. C. 446; *Sanders v. Thompson*, 114 N. C. 282, 19 S. E. 225. If in fact the fees had been tendered, or if there was other good excuse, it should have been shown at the time the motion to docket and



dismiss was made. *Paine v. Cureton*, 114 U. C. 606, 19 S. E. 631.

The appellants, later, at the same term, moved to reinstate (the motion being continued to this term) on the ground that negotiations were pending for a compromise when the appeal was dismissed. But, in the absence of any request from or agreement by appellee that the appeal should not be docketed, this was no excuse for a failure to docket in proper time. The negotiations could have gone on as well after docketing the appeal as before. In fact, however, the correspondence between the parties shows that the offer to compromise had been made and rejected before the call at last term of the district to which the appeal belonged. Motion denied.

116 N. C. 525)

#### DUNN v. UNDERWOOD.

Supreme Court of North Carolina. Feb. 19, 1895.)

#### DISMISSAL OF APPEAL—NEGLIGENCE OF COUNSEL.

Negligence of counsel is no excuse for failure of appellant to print the record.

Action by W. A. Dunn, receiver, against D. Underwood. Judgment for plaintiff, and defendant appealed. The appeal was dismissed, and appellant moves to reinstate. Denied.

John D. Kerr, for appellant. R. O. Burton, for appellee.

CLARK, J. The appeal was dismissed at last term for failure to print the record. The appellant moved at the same term to reinstate, as required by rule 30 (12 S. E. viii). The reason assigned was that the neglect to print was the negligence of counsel. The court has repeatedly held that having the record printed requires no legal skill, and that, if an appellant intrusts it to counsel, his negligence in such regard is the negligence of an agent merely, not that of counsel. *Griffin v. Nelson*, 106 N. C. 235, 11 S. E. 14; *Stephens v. Koonce*, 106 N. C. 255, 11 S. E. 282; *Edwards v. Henderson*, 109 N. C. 3, 13 S. E. 779; *Turner v. Tate*, 112 N. C. 57, 17 S. E. 72; *Neal v. Land Co.*, 12 S. E. 41, 17 S. E. 538. As the late Chief Justice Pearson expressed it, "there is no use in having a scribe, unless you cut up to it." A rule repeatedly enunciated must be deemed settled. In *Edwards v. Henderson*, supra, the court observed: "To permit an appellant to obtain a delay of six months by his negligence in not complying with this requirement would convert a rule, which was adopted as means for the speedier and better consideration of causes, into a fruitful source of delay. Rather than that, appellees would prefer to argue their causes without the printed record, which the court, in justice to itself

and to litigants, cannot permit. Appellants might as well fail to send up the transcript as not to have it in a condition to be heard, by failing to have the case and exceptions printed." Indeed, in the present case, the appellee agreed that, notwithstanding the dismissal, the case might be reinstated if submitted on printed briefs, under rule 10 (12 S. E. vi.), so as to be disposed of at last term. This offer the appellant accepted, but was again negligent, and failed to do so during that term. It is too late to make the motion anew to reinstate at this term rule 30. Appellees have rights, though appellants are singularly prone to forget it, and among them is the right guaranteed by Magna Charta to all, that justice shall "neither be denied nor delayed." Const. N. C. art. 1, § 35. A delay of justice is often a denial of justice. Motion denied.

(94 Ga. 661)

#### REED v. DOUGHERTY.

(Supreme Court of Georgia. July 30, 1894.)

#### SALE OF LAND—RIGHTS OF VENDOR—ACTION FOR PRICE.

One who has made a contract for the sale and conveyance of land, the agreed purchaser never having entered into possession nor taken a conveyance, has his election of two remedies, if the contract be binding upon the other party. He may either proceed by an equitable action for specific performance, or bring an action at law for damages for breach of the contract. But so long as the title is in himself, although he may have tendered a conveyance, he cannot maintain an action for the purchase money, or for a balance of the same, when some of it has been paid. It follows that the present action, not being one for specific performance, nor for damages for a breach of contract, but for purchase money, is not maintainable, the same being based on a contract signed by the plaintiff only, which contract is in the following terms: "La Fayette, Ga., Jany. 29th, 1891. Received of A. H. Reed one hundred dollars in part payment for the following described lots: 35, 36, 37, 71, 72, 7th Dist. and 4th section. Also 247, 144, 50, one-half of 51, one-half of 58, and forty acres (unknown) and 94 and 95 in 12 Dist., 4th section, on the following terms: Price, \$3,800.00 per acre, \$5,400.00; payments, to wit, \$1,800.00, when deeds and abstracts are delivered; \$200.00 in stock of the Northwestern Southern Investment Co.; the balance, \$3,400.00, notes payable in 12 months, at 6 interest, mtg. back to secure deferred payments"; there being no evidence that the defendant ever took possession of the lands, or that any complete and final delivery of the conveyance tendered to him by the plaintiff was ever made, or that any notes or mortgage had been executed.

(Syllabus by the Court.)

Error from superior court, Walker county; W. M. Henry, Judge.

Action by one Dougherty against one Reed to recover the price of land. Judgment for plaintiff, and defendant brings error. Reversed.

R. M. W. Glenn and Payne & Walker, for plaintiff in error. Copeland & Jackson and Lumpkin & Shattuck, for defendant in error.

PER CURIAM. Judgment reversed.

(93 Ga. 811)

**HARP et al. v. WALLIN et al.**

(Supreme Court of Georgia. July 30, 1894.)

**TESTAMENTARY POWERS—SALE OF LAND.**

The will of the testator containing a direction that, in case his devisee of a specified tract of land "sees cause to send my wife to the asylum, then the land to be sold, and the proceeds to be equally divided," etc.; and the devisee having elected to send the widow to the asylum, and having procured an adjudication that she was insane and that she be sent to the lunatic asylum, and an order to sell the land having afterwards been duly granted by the ordinary on the application of the executor, the power of sale became fully operative, although the widow was not actually sent to the lunatic asylum. And a sale made in pursuance of the power and of the leave granted by the ordinary, if regularly made and without fraud, passed the title to the purchaser; the devisee, so far as appears, not having, previously to the sale, revoked or changed her election, and not having directed or requested the executor not to execute the power.

(Syllabus by the Court.)

Error from superior court, Walker county; O. C. Smith, Judge.

Action by Mary J. Wallin and Mrs. Wameck against Harp and others to set aside an executor's sale. Verdict directed for plaintiffs, and defendants bring error. Reversed.

Copeland & Jackson and R. M. W. Glenn, for plaintiff in error. Lumpkin & Shattuck, for defendant in error.

**LUMPKIN, J.** By his last will and testament, E. A. Wameck devised to Mary J. Wallin a tract of land, to be rented, and the proceeds to go to the testator's wife, Eliza Wameck, and the said Mary J., during the lifetime of the wife, "unless Mary J. Wallin sees cause to send my wife to the asylum; then the land to be sold, and the proceeds to be equally divided into five parts, as follows: One-fifth to Mary J. Wallin"; the will providing as to the distribution to other persons of the remaining four-fifths of the proceeds of the land. Afterwards, Mary J. Wallin presented a sworn petition to the ordinary for a commission of lunacy, alleging that Eliza Wameck was insane. A commission was duly issued, and proper proceedings had authorizing the commitment of Mrs. Wameck to the lunatic asylum, in pursuance of which the deputy sheriff was about to take her to that institution, but was prevented from so doing by her brothers, and in point of fact she was never actually sent to the asylum. Subsequently to the above-mentioned proceedings, the executor of Wameck's will applied to the court of ordinary for an order to sell the land, which was duly granted, and afterwards sold the land at public outcry to Harp, and made him a deed to the same. Mary J. Wallin and Mrs. Wameck filed an equitable petition against the executor and Harp to set aside the sale and cancel the executor's deed. At the trial much evidence was introduced bearing upon the question as to whether or

not the sale by the executor was fairly and regularly made, and free from fraud and collusion. The court, without leaving to the jury the determination of the issues thus made, directed a verdict for the plaintiffs; evidently being of the opinion that, inasmuch as Mrs. Wameck was never actually sent to the asylum, the order of sale granted by the ordinary was, in view of the terms of the will, utterly void. We do not concur in this view, and therefore a new trial of the case will be necessary. It is evident that Mary J. Wallin elected to send Mrs. Wameck to the asylum. This was as effectually evidenced by her suing out the legal proceedings for that purpose as if the adjudication resulting from this proceeding had been carried into effect. Because of this election on her part, the order to sell was properly granted, and became fully operative; and inasmuch as it does not appear that Mary J. Wallin, before the sale took place, either revoked or changed her election, or that she requested or directed the executor not to sell, the power of sale remained operative to the end. The foregoing settles the only material question of law involved in the case, and it is unnecessary to note in detail the numerous grounds of the motion for a new trial. At the next hearing the case should be submitted to the jury upon the questions whether or not the sale by the executor was made regularly and without fraud, and whether or not, if there was fraud, Harp was a bona fide purchaser, without notice of the same, and a verdict should be rendered in accordance with the facts. Judgment reversed.

(93 Va. 780)

**THURSTON v. HUDGINS et al.**<sup>1</sup>

(Supreme Court of Appeals of Virginia. Jan. 24, 1895.)

**MANDAMUS—TO OYSTER INSPECTION—LOCATION OF OYSTER BED—EXERCISE OF DISCRETION.**

1. Section 2153, Code 1887, makes it unlawful for any one to stake in or use for the purpose of planting oysters any natural oyster bed, and section 2137 provides that when one desires to stake in a bed he shall apply to an oyster inspector to have his location ascertained, and that the inspector must make an examination to see whether the place applied for is a natural oyster bed. *Held*, that when an inspector has made such examination, and determined in favor of the applicants that the place applied for is not a natural oyster bed, and assigned them the right to use it, mandamus does not lie to compel him to remove the stakes set around such bed by such applicants, as the duties performed are quasi judicial.

2. Where the official duty involves the necessity on the part of the officer of making an examination or investigation and forming a judgment thereon, mandamus will not lie to compel the performance of the act.

Error to circuit court, Mathews county.

Petition by James B. Thurston for man-

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

damus to compel Thomas J. Hudgins to require the removal of certain stakes from certain oyster grounds. A demurrer to the petition was sustained, and petitioner brings error. Affirmed.

W. B. Talliaferro, for plaintiff in error. John B. Donovan, Maryus Jones, James N. Stubbs, and Robt. McCandlish, for defendants in error.

BUCHANAN, J. James B. Thurston filed his petition in the circuit court of Mathews county at its October term, 1891, praying for a writ of mandamus against Thomas J. Hudgins, one of the oyster inspectors of that county, to compel him to give notice to Sydney T. Mathews and T. Conkling to remove their stakes and other obstructions from certain oyster ground described in said petition, and, in the event of their failure to remove such stakes and obstructions after they had received such notice, to compel the said oyster inspector to remove the same himself at the costs of said Mathews and Conkling. To this petition there was a demurrer, and the court, at its September term, 1893, sustained the demurrer, and dismissed the petition. That judgment of the circuit court is now before this court upon a writ of error.

The plaintiff in error alleges in his petition that the said Hudgins, oyster inspector, as aforesaid, had assigned (improvidently, as petitioner supposed) to the said Mathews and Conkling, as a reservation for planting oysters and shells, 20 acres, or some part thereof, of the bed of Mobjack Bay, lying in said county, and that the said Mathews and Conkling had proceeded to stake in the said described part of the bay so assigned to them by the said inspector for the purpose of planting oysters or shells thereon, and that they are now occupying the same for that purpose. It further alleges that the said 20 acres so assigned, or some part thereof, is a natural oyster bed, rock, or shoal, and that such natural oyster bed, rock, or shoal cannot be assigned to any person for his exclusive use or enjoyment, but must be held in common for the benefit of all the people of the commonwealth. It further alleges that the petitioner and other citizens of the commonwealth had given notice to the inspector requesting him to give notice to Mathews and Conkling to remove their stakes and other obstructions from the bed so assigned them, and that Hudgins, inspector, refused to give such notice, or to remove the stakes and obstructions himself. Section 2153 of the Code provides that: "It shall not be lawful for any person to stake in, or use for the purpose of planting oysters or shells or for depositing oysters while making up a cargo for market, any natural oyster bed, rock or shoal, or any part thereof; nor shall any person, who may have occupied and staked off such natural bed, rock

or shoal, continue to occupy the same. Each inspector shall require any such person within his limits to remove all oysters planted, and all stakes, watch-houses or other obstructions, from said natural beds, rocks or shoals; and if after notice such person refuse or fail to remove his stakes or other obstructions, the same shall be removed by the inspector at the cost of the offender; and, moreover, such offender shall be fined not less than fifty nor more than one thousand dollars." Section 2137 of the Code provides that the residue of the water fronts in excess of what is reserved for riparian owners and the residue of the beds of the bays, rivers, and creeks, other than natural oyster beds, rocks, or shoals, may be occupied by any person for the purpose of planting or propagating oysters thereon. It also provides how any person desiring to make such location and obtain such right shall proceed, which provision is as follows: "It shall be the duty of any such person desiring to obtain a location for planting or propagating oysters on any portion of the water fronts and beds aforesaid, not located or reserved, as hereinbefore provided, for owners and occupants of land as aforesaid, to apply to an inspector to have his location ascertained and designated, and the same shall be marked with suitable stakes, or by other metes and bounds agreed upon between the applicant and inspector, and he shall pay the inspector for his services a fee of one dollar, and also an annual rent of twenty-five cents for each and every acre assigned to him, payable annually on the first day of October, and thereafter he shall have the exclusive right to the use of such location so designated for the purpose aforesaid, so long as he complies with the provision requiring the payment of twenty-five cents per annum for every acre so occupied, subject, however, to the right of revocation by the general assembly." The decision of this case turns upon the question whether the duties imposed upon an oyster inspector by the provisions of the Code above quoted are purely ministerial in their nature, or whether they are duties necessarily calling for the exercise of judgment and discretion in their performance. If they belong to the latter class, the petitioner was not entitled to a mandamus upon the facts stated in his petition, and the demurrer ought to have been sustained; for it is well settled that mandamus will not lie to compel the performance of any act or duty necessarily calling for the exercise of judgment and discretion on the part of the official charged with its performance. 4 Minor, Inst. (3d Ed.) 896, etc., and cases cited; High, Extr. Rem. §§ 24, 44; 2 Spell. Extr. Relief, §§ 1384, 1433. Mr. High says, in section 44, that "where the official duty in question involves the necessity on the part of the officer of making some investigation, and of examining evidence, and forming his judgment thereon,"

mandamus will not lie. "Thus," he says, "where the question involved was whether the relator, a printer to the senate of the United States, was entitled to receive from the superintendent of public printing and print certain public documents, and in determining the question of the relator's right it was necessary for the superintendent to investigate the usages and practice of congress upon the subject, and to examine evidence, before performing his ultimate judgment, it was held that the duty was so far judicial in its nature that its performance could not be controlled by mandamus. So the issuing of a patent for public lands by the commissioner of the United States land office, being a duty which involves the exercise of judgment and discretion in passing upon the proofs presented and in determining the questions of fact involved, mandamus will not lie to the secretary of the interior or to the land commissioner." U. S. v. Commissioner, 5 Wall. 563; Secretary v. McGarrahan, 9 Wall. 298. Under section 2137 of the Code it was made the duty of such inspector, when called upon by any one who desired to make a location or entry of oyster grounds, to ascertain whether the location desired was such ground as, under the law, could be set apart for the exclusive use of the applicant. To do this it would be necessary for the inspector to determine whether the location in question contained any natural oyster bed, rock, or shoal, whether it conflicted with the claims of riparian owners who had superior rights under the statute, or was for any other reason not subject to location by such applicant. This would require the examination of the premises, the investigation of facts, and the forming of his judgment thereon. It is clear, therefore, that the duties of such inspector are not purely ministerial, but quasi judicial, in their nature, requiring the exercise of judgment and discretion in their performance. Not only were these duties quasi judicial, but the inspector had exercised his judgment, and ascertained that said 20 acres of oyster grounds were subject to such entry, and had assigned them. The petition admits this. The object of the petitioner, therefore, was not only to compel the inspector to undo what he had done, but to compel him to do a specific act without reference to the opinion of the inspector upon the subject. It is also well settled that mandamus does not lie to compel an officer to undo what he has done in the exercise of his judgment and discretion, and to do what he had already determined ought not to be done, as is sought in this case. 2 Spell. Extr. Relief, § 1436; State v. Rice (S. C.) 10 S. E. 833; 14 Am. & Eng. Enc. Law, 206; High, Extr. Rem. § 141. We are of opinion that the circuit court committed no error in sustaining the demurrer to said petition, and that its judgment should be affirmed.

(31 Va. 31)

# **BROWN et al. v. BEDFORD CITY LAND & IMP. CO. et al.<sup>1</sup>**

(Supreme Court of Appeals of Virginia. Jan. 24, 1895.)<sup>2</sup>

**CORPORATE STOCKHOLDERS—BILL FOR RELIEF—FRAUD OF DIRECTORS—MULTIFARIOUSNESS—MISJOINDER OF PLAINTIFFS—CREDITORS AND STOCKHOLDERS.**

1. A bill filed by certain stockholders, on behalf of all other stockholders and creditors of a corporation who should come in and be made parties, alleged that they subscribed to stock in the company by reason of fraudulent statements in the prospectus; that the company, through its officers, purchased land from certain of the directors at exorbitant values, and issued fraudulent stock to other directors, and that another director illegally canceled subscriptions to stock; that the officers paid out money for salaries and improvements without authority, and sold stock of the company, and divided the proceeds among some of the directors; and that the company was under the domination of the men who did the wrong, who refused to rectify it. The bill asked that said officers be made parties and required to answer; that they be required to refund to complainants what they had paid in on their stock; that they be required to refund to the company the money illegally expended; that they be enjoined from selling other property; and there was a prayer for general relief. *Held*, that the bill was demurrable, there being a misjoinder of plaintiffs, defendants, and causes of action.

2. A bill in equity is bad when it shows that the complainants' interests are antagonistic, as where creditors and stockholders unite in a bill that asks for a cancellation of subscriptions to stock as to the stockholders, and an enforcement of the same by the creditors.

3. In a suit against a corporation and its officers, various acts of maladministration were charged against the officers, some alleged to have committed one wrong, and some another. *Held*, that these diverse matters could not be united in one suit.

4. Where corporate directors have committed a breach of trust, either by frauds, acts ultra vires, or negligence, and the corporation is unable or unwilling to institute suit to remedy the wrong, a single stockholder may institute that suit on behalf of himself and other stockholders, and for the corporation.

5. A bill in equity may be framed with a double aspect, but the alternative case stated must be the foundation for precisely the same relief.

Appeal from circuit court, Bedford county.

Bill by Olive Brown and others against the Bedford City Land & Improvement Company and others. From a decree sustaining a demurrer to the bill, plaintiffs appeal. Affirmed.

M. M. Gilliam, Berkley & Harrison, Withers & Withers, and H. M. Tyler, for appellants. Kirkpatrick & Blackford and R. G. H. Kean, for appellees.

KEITH, P. This is a bill in equity, brought by R. Lee Brown and 62 other stockholders of the Bedford City Land & Improvement Company, on behalf of themselves and all other stockholders similarly situated, and

<sup>1</sup> Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

<sup>2</sup> Rehearing denied.

other creditors of said company who could come into the suit by petition, and contribute to the cost thereof. They state at a charter was granted by the legislature of Virginia, under the name of the Bedford City Land & Improvement Company, to S. H. Haffin and others, and complain that they are induced to subscribe to the stock of said company through the false and fraudulent representations set forth in the prospectus filed as an exhibit in this cause. The fraud which they claim was perpetrated on them is set out fully in the bill. They allege that the company, being duly organized, purchased from three of its directors, J. M. Berry, Bolling, and Berry, certain real estate, known as the "Brown Residence" and "McGehee Lot," at an exorbitant price, on which there are still due large sums of money; and that, in addition thereto, the said directors were paid a bonus of 300 shares of stock of the Bedford City Land & Improvement Company; that the said company borrowed large sums of money, at exorbitant rates of interest; that it conveyed its real and personal estate to trustees, to secure bonds of the company, aggregating \$30,000, without requiring security of the trustees for the due execution of the trust; that J. M. Berry at that time president of the company, purchased back from the company's vendee 43 lots of land which had been previously sold by the company, and for which lots he paid, or contracted to pay, on the repurchase, about twice the sum which the company had received, and that he was paid out of the funds of the said company more than \$21,000, leaving due and unpaid for said lots about the sum of \$5,000, that J. Lawrence Campbell, now president, has placed this demand of J. M. Berry against the liabilities of said company; that J. M. Berry, while president, canceled subscriptions which had been made to the capital stock by various parties therein named; that D. Wemple and E. W. Dixon subscribed 100 shares of capital stock, and paid for the same; and certificates of stock were issued to them, but that the amount so paid did not go into the treasury, but was received by one or more of the directors of said company, and appropriated to their own use; that R. B. Claytor, one of the directors, canceled the subscription of one Jopson for 100 shares of stock; that large sums of money were paid out to the officers of the company in the form of salaries; that money was illegally expended on the Bedford & James River Railroad; and that all these things were done by the company, its officers and directors, wrongfully and illegally, and constitute a fraud upon the complainants, and against them. The prayer of the bill is that J. Lawrence Campbell, and other officers and directors of the Bedford City Land & Improvement Company, and the Bedford City Land & Improvement Company, be enjoined from doing the things complained of in the bill, and be required

to answer the same; that the said officers, and each of them, be required to refund and pay to the company all moneys paid out in the improvement and development of land, or on account of salaries, commissions, or for any other purpose, and that they be required to pay and refund to each of the complainants all sums of money paid by the complainants upon their subscriptions for stock, with interest thereon; that an injunction be granted restraining the company and its officers from disposing of the properties of the company; that a receiver be appointed; that all proper accounts be taken; and for general relief.

At a subsequent day, an amended and supplemental bill was filed. In that bill the charges and specifications of fraud in the procurement of stock subscriptions are reiterated, and the several acts of malfeasance and misfeasance on the part of the officers of the company are recapitulated; and it is further set out that the defendant company was entirely under the control of the officers, directors, and promoters, who, owning a large majority of the stock, had complete and absolute control of the company; and that, at a meeting held on the very day upon which this suit was instituted, all the fraudulent and illegal transactions complained of in the original and supplemental bills were, notwithstanding the protest of the minority stockholders, ratified and confirmed. They charge that the officers, directors, and promoters are liable, by reason of their fraudulent acts, to the company and to each of the complainants for all the money which complainants have paid in upon their subscriptions, and that the company is entitled to have all the money and assets refunded to it which have been illegally appropriated and expended by the said officers, directors, and promoters; that any appeal to the company, for redress, dominated and controlled by those very persons who have been guilty of the wrongful acts for which redress is sought, would be unavailing; and that, therefore, the complainants were utterly without remedy save in a court of equity. It appears that, since the filing of the original bill, a new board of directors has been elected. They are therefore made parties to the amended bill, together with all those who are parties to the original bill. The prayer is that the officers and directors be required to pay to the company all moneys illegally paid out for any purpose; and that they be required to pay to the complainants the money received upon their subscriptions to stock, with interest; and with prayers for injunction, receiver, and for general relief, as in the original bill.

To these bills the defendants demurred, and the circuit court entered a decree sustaining the demurrer, and dismissing the original and amended bills, and the case is here upon an appeal from that decree.

The contention of the appellees is that the

amended and supplemental bills are to be taken together as stating the case of the plaintiffs, and that they are obnoxious to the objection of multifariousness; that there is a misjoinder of plaintiffs, a misjoinder of defendants, and a misjoinder of causes of action, in that causes of action distinct from one another, arising out of different transactions, are united in one suit. Upon the part of the appellants it is contended that none of these objections exist. It is conceded that a court of equity, in order to prevent a multiplicity of suits, and that it may have before it all persons interested in the matters of dispute, or who may be benefited or injured by the decree, will, when it is necessary to attain the ends of justice, mold its pleadings with regard to substance rather than to form, introduce, it may be, new remedies, or modify the application of the old to meet the wants of society, as they arise. There are, however, established rules and principles which cannot be disregarded or transcended. The bill in this case, in the first place, asks for relief on the part of stockholders who had been fraudulently induced to subscribe to shares of stock in the defendant company. The prayer is for a cancellation of the contract of subscription, and for a return of the money already paid. Had the bill stopped here, it might have been sustained, upon the authority of *Bosher v. Land Co.*, reported in 89 Va. 455, 16 S. E. 360. It goes on, however, to invite the co-operation, not only of all persons belonging to their own class, but of all creditors of the company as well. This is a distinct departure from the decision in the case just cited, which limits carefully and strictly the operation of the principle there invoked, and establishes that where a large number of persons have been, by identical representations, fraudulently induced to become subscribers to a company, they may unite in one bill praying the cancellation of their subscriptions, and make the offending company, and its officers and agents, through whom the fraudulent representations were made, defendants. It is nowhere said in the case as reported that creditors could have been impleaded along with the complainant stockholders. Their rights and interests are not only diverse, but wholly antagonistic. The unpaid subscriptions of the stockholders constitute a trust fund for the satisfaction of the creditors. The creditor, therefore, would naturally seek to enforce the very liability from which the stockholder asks to be relieved. Between the two classes there would seem, indeed, to be an "irrepressible conflict." But this is not all. In the original bill various acts of maladministration are charged against the officers of the company. Some of these acts are attributed to individual officers, some to different groups of officers, and some to the president and directors as a whole. This would seem of itself to be a combination of causes of action so hopelessly diverse as to be incapable of adjustment in one suit.

It is well settled that, for the class of injuries now under consideration, the officers are responsible to the company; but, inasmuch as the very officials who have perpetrated the wrongs are sometimes strong enough to shield themselves from all responsibility through the agency of the company, courts of equity, in order that no wrong may go unredressed, have introduced the principle which permits a stockholder who feels himself aggrieved by the administration of the affairs of the company of which he is a member, and who is unable to induce the company to demand reparation from its offending officials, to go into court, and call to account those by whose acts of omission or commission he has been aggrieved. Such a suit, though brought in the name of a stockholder, is really a suit of the company, and inures to the benefit of the corporation. "Where the corporate directors have committed a breach of trust, either by their frauds, ultra vires acts, or negligence, and the corporation is unable or unwilling to institute suit to remedy the wrong, a single stockholder may institute that suit, suing on behalf of himself and other stockholders, and for the benefit of the corporation." Cook, *Stock & Stockh. & Corp. Law*, § 645.

Conceding that many stockholders may do what a single stockholder may do for himself and others, and that the corporation here was either unable or unwilling to institute suit to remedy the wrongs complained of, as is alleged in the amended and supplemental bill, it may be that this cause of action is sufficiently stated in the bills. But here the plaintiffs came into court as stockholders; they sue as stockholders; the injury is to them as stockholders; as stockholders they are to be taken as having demanded the redress of grievances at the hands of the company; and it is through the company (of which they are members) that the relief sought is to be attained. We have, then, as one cause of action set up in this bill, the complaint that a contract of subscription fraudulently obtained, creating thereby a voidable contract between the complainants and the company, which is disaffirmed by the plaintiffs, and a rescission of which is prayed in one part of the bill, coupled with a cause of action set out by the same plaintiffs against the same defendants, which rests upon their relation as stockholders to the defendant company, which they seek here to maintain only by virtue of their position, as stockholders, and must therefore be considered a distinct act of affirmance and ratification of the very transaction which they in another part of the bill sought to repudiate. It seems to me that this is violative of all rules of pleading, and that to sustain this bill would require this court to disregard well-established principles, which constitute landmarks in our system of equity jurisprudence.

In *Shields v. Barrow*, reported in 17 How. 130, where there was an original and amend-

and supplemental bill, the court said that bill as amended presented, "not only two acts, but two diametrically opposite prayers for relief, resting on necessarily inconsistent cases,—the one being that the court should declare the contract rescinded for imputation and other causes (as in this case); the other, that the court would declare the contract free from exception as to be entitled to be affirmed by a decree for specific performance." The court says, further: "Whether this amendment be considered as leaving the bill in its condition, or as amounting to an abandonment of the original bill for a rescission of the contract and the substitution of a new one for the specific performance, it was equally objectionable. A bill may be originally framed with a double aspect, or may be so framed as to be of that character. But the native case stated must be the foundation for precisely the same relief, and it would produce inextricable confusion if the plaintiffs were allowed to do what was attempted here." How applicable that language is to the case under consideration! I refer, also, to the case of *Yeaton v. Lenox*, 123. In *Pomeroy's Equity Jurisprudence* (section 208) it is said: "In that particular family of suits, whether brought on behalf of a numerous body against a single party, or by a single party against a numerous body, which are strictly and technically 'suits of peace,' in order that a court of equity may grant the relief, and thus exercise its jurisdiction on the ground of preventing a multiplicity of suits, there does not exist among the individuals composing the numerous body, or between each of them and their single adversary, a common right, a community of interest in the subject-matter of controversy, or a common source from which all their separate claims arise; all the questions at issue arise; it is not that, the claims of each individual being separate and distinct, there is a community of interest merely in the question of fact involved, or in the kind and amount of remedy demanded and obtained by each individual." In 1 *Daniel, Prac.* 242, the law is stated as follows: "It is generally necessary, in order to enable a person to sue on behalf of himself and others who stand in the same relation with the subject of the suit, that it should be shown that the relief sought by him is beneficial to those whom he undertakes to represent. Where it does not appear that all persons intended to be represented are equally interested in obtaining the relief, such a suit cannot be maintained; a plaintiff cannot, in one portion of a bill on behalf of himself and all the other members of a company, and, by another portion, seek to establish a demand against the company." This is the law as stated by the court of established authority, after a careful study and discussion of a great mass of authorities, and is in entire harmony with

other approved text writers. Nor has any authority been adduced which decides the contrary of the principles here announced. General expressions are scattered here and there which might seem to warrant a more diverse and incongruous association of parties plaintiff or defendant than is here approved; but no adjudged case, as far as I have been able to examine the decisions, is in conflict with the law as stated above. There is nothing whatever in the case of *Tyler v. Savage*, 143 U. S. 79, 12 Sup. Ct. 340, at all opposed to the views herein expressed; and I regret that this opinion has already reached proportions which forbid a more careful examination of that and other citations.

To maintain this bill would be not to expand and enlarge the rules of equity pleading, but wholly to disregard them; and it seems to us that such a departure from principles established by numerous adjudged cases, and by the most approved text writers, ought not to be made by the courts. If the due administration of justice and the needs of society demand such changes and innovations as seem to us to be here invoked, they can be more wisely and safely intrusted to the reforming hand of the legislative department. In order that all possible injury to the plaintiffs by reason of the dismissal of their bill may be obviated, the decree complained of will be so far modified as to declare that it shall be without prejudice to the right of the plaintiffs, or any of them, to institute such suits at law or in equity as they may deem proper; and, as thus amended, the decree of the circuit court of Bedford county is affirmed.

(43 S. C. 102)

MCGEE v. MERRIMAN et al.

(Supreme Court of South Carolina. Feb. 13, 1895.)

**MASTER'S DECISION—EXCEPTIONS—PREMATURE HEARING THEREON.**

Code, § 294, provides that a master's decision may be excepted to and reviewed in like manner as an appeal, under section 290, which provides that either party may except to a decision on a matter of law within 10 days after written notice of the filing of the decision. *Held* that a hearing of exceptions to a master's report, within 10 days after notice of the decision, is error.

Appeal from common pleas circuit court of Abbeville county; Ernest Gary, Judge.

Action by Henry P. McGee against Sterling C. Merriman and others. From a judgment for plaintiff, defendants appeal. Reversed.

D. H. Magill, for appellants. Saml. C. Caron, for respondent.

TOWNSEND, J. This was an action to foreclose a mortgage given by Sterling C. Merriman and others to secure the payment of three promissory notes given by the same

parties to Agnew & Mattison. The said notes and mortgage were assigned to the plaintiff. Sterling Merriman and Mrs. Letitia Merriman alone answered. The issues were referred to the master. The master filed his report, and Sterling C. Merriman filed exceptions thereto. The case was heard at the June term, 1894, of the court of common pleas for Abbeville county, and the presiding judge overruled the exceptions and confirmed the master's report. To this decision of the presiding judge, Sterling C. Merriman filed numerous exceptions, of which it will be necessary to consider only one,—the first one. The first exception is as follows: "(1) Because the presiding judge erred in forcing the hearing of the argument on the exceptions to the master's report, and rendering judgment thereon, in the absence of the defendants' attorney, and before the expiration of ten days after service of written notice of filing said report." It appears from the "case" that the master filed his report on the 1st day of June, 1894, and that written notice thereof was served upon the defendants' attorney on the 2d day of June, 1894. It also appears that the presiding judge heard the case on said exceptions on the 11th of June, 1894, only nine days after service of written notice of filing of the report. Code, § 294, says that the master's decision "may be excepted to and reviewed in like manner, and with like effect in all respects as in case of appeal under section 290." Section 290 of the Code provides that "either party may except to a decision on a matter of law arising upon such trial within ten days after written notice of the filing of the decision, order or decree." From these sections of the Code it is clear that a hearing of the case could not be forced before the expiration of ten days after the service of notice of filing the master's report, and, as the presiding judge did hear the case on the ninth day after the service of such notice, it was error. It is therefore ordered, adjudged, and decreed that the judgment below be reversed on the ground above indicated, and that the case be remanded to the circuit court. No opinion whatever is expressed as to any other point raised by the appeal.

(43 S. C. 193)

**PAGE v. CRANFORD et al.**

(Supreme Court of South Carolina. Feb. 19, 1895.)

**DURESS—EVIDENCE—MORTGAGE BY TRUSTEE.**

1. The brother of defendant, a married woman, conveyed to her certain land in consideration of her payment of his debts, she to reconvey it to him on the repayment of the amount to her. Such repayment was made, but there was no reconveyance of the land. Thereafter one to whom the brother had sold mortgaged chattels caused a warrant to be issued for his arrest, and when the constable was present to execute the warrant, and to prevent such execution, defendant, with her brother's consent,

mortgaged the brother's interest in the land to such purchaser of the chattels for the amount paid by him therefor. *Held*, that the mortgage was not procured by duress.

2. In such case it was error to make an interest owned by defendant in the land, other than that conveyed to her by her brother, liable for the mortgage debt.

Appeal from common pleas circuit court of Chester county; R. C. Watts, Judge.

Action by John R. Page against Benjamin P. Cranford and Nanno J. McGuckin on a promissory note, and to foreclose a mortgage on land. Judgment was rendered for plaintiff, and defendant Nanno J. McGuckin appeals. Judgment modified and affirmed.

Hart & Hart, for appellant. J. K. Henry, for respondent.

POPE, J. The plaintiff began his action for foreclosure of a mortgage on the undivided half interest in a tract of land containing 178 acres, situated in Chester county, in this state, executed to him in July, 1892, by the defendant Nanno J. McGuckin, and he included in his action, as a party defendant, Benjamin P. Cranford, as claiming some interest in the land. The action was commenced in February, 1893. The defendant Nanno J. McGuckin alone answered. In her answer, she alleged that the debt sued upon was not hers, nor did it pertain to her separate estate; that she was a married woman when she executed the mortgage, and that she now is a married woman; that said mortgage was executed by her in the absence of her husband, and while she was in fear and under duress; that the undivided interest in the tract of land mortgaged by her was her own property, freed from any claim or interest therein by her codefendant, her brother Benjamin P. Cranford. The action came for trial before his honor, Judge Watts. The defendants were both absent at the trial. Their attorneys had notified them of the same, and the time thereof. The judge ordered the trial to proceed; whereupon the following facts, among others, were developed by the testimony offered before the judge, sitting in chancery: That, in 1889, Benjamin P. Cranford had executed a deed to his sister Nanno J. McGuckin for his undivided one-half interest in the tract of land referred to in plaintiff's mortgage, and that the consideration moving him to execute this deed to his sister was the payment by her of some indebtedness of his, but that said indebtedness had been repaid to his sister by the said Benjamin P. Cranford, and she had neglected to reconvey his share of the land to him; that, in 1892, Benjamin P. Cranford had traded, for value, a mule to the plaintiff, without disclosing to him that the same was incumbered by a chattel mortgage, and that, shortly after such trade, the mule was taken from the plaintiff by the mortgagee or under said chattel mortgage; that demand was made by the plaintiff upon Cranford to make good his money, under a threat of legal pro-



ceedings if he failed to do so; that, upon the neglect of the said Cranford to promptly repair the wrong he had done the plaintiff in the mule trade, the plaintiff applied to Trial Justice Brawley for a warrant against the said Cranford, and, when the constable charged with its execution went to the house of Mrs. McGuckin for the purpose of arresting Cranford, he conferred with his sister, whereupon she wrote out a mortgage upon the land to secure the value of the mule (\$105), but when Page, the plaintiff, carried said instrument to Mr. McFadden, as clerk of court and register of mesne conveyance for Chester county, Mr. McFadden told him it was worthless, and, at Page's request, he prepared the mortgage now sued upon; that the next day it was carried to Mrs. McGuckin, and at first she declined to sign it, but after conferring with her brother Cranford, and in his presence, she did sign it; that the constable was present on both occasions at Mrs. McGuckin's house, with the warrant to arrest Cranford in case a satisfactory settlement could not be had. Judge Watts filed his decree April 9, 1894, wherein he fully sustained the plaintiff's right to the judgment of foreclosure prayed for. From this decree, the defendant Mrs. McGuckin has appealed, on the following grounds: (1) Error in finding that "Cranford conveyed his one-half interest in the premises of the complaint to his sister, to secure her until reimbursed for some small claim she had paid for him, with the understanding that, when she was reimbursed, she would reconvey his interest." (2) Error in finding that, "previous to the execution of the note and mortgage, Cranford had settled the claim held by his sister, but his interest had not been reconveyed." (3) Error in finding that "Cranford had his sister to execute the note and mortgage to the plaintiff," and error to find that she executed the note and mortgage voluntarily. (4) Error in the face of the proof, and despite the fact that the case was tried in the absence of both defendants, in finding that there was no evidence of threats, violence, or duress, when the plaintiff, on cross-examination, admitted that the mortgage was only obtained from Mrs. Nanno J. McGuckin (a married woman) by his carrying a constable to her residence, with a warrant to arrest her brother. (5) Error in holding that Mrs. Nanno J. McGuckin held the title to one-half of the land in trust for her brother, despite the fact that the mortgage to the plaintiff recited that the half interest in the land that B. P. Cranford conveyed to his sister Mrs. Nanno J. McGuckin was the separate estate of the said Nanno J. McGuckin, a married woman. (6) In not holding that the duress was abundantly established out of the mouth of the plaintiff and his witnesses, even in the absence of the defendants; and error in adjudging that the

mortgage be foreclosed, and in not adjudging that it was null and void, and that the consideration was illegal, and in not directing that it be delivered up and canceled pursuant to the prayer of the answer of Nanno J. McGuckin, defendant. (7) Error in finding that the mortgage was the contract of Benjamin P. Cranford, executed through his sister; and error in finding that she executed it at his request. (8) Error in holding that the property covered by the mortgage was the property of Benjamin P. Cranford, in the face of the recitals in the mortgage to foreclose which plaintiff brought this action; the finding being contrary to the assessment of the very instrument upon which the plaintiff bases his action.

This is an action on the equity side of the court of common pleas. The very object of equity is to lay bare the truth, and if it is necessary, to do this, to upset instruments of writing that do not tell the whole truth, it will be done. Here Benjamin P. Cranford and his codefendant, Mrs. Nanno J. McGuckin, admit, in the presence of witnesses, that his (Cranford's) deed, made in 1839, to his said sister, Mrs. McGuckin, though absolute on its face, was only intended to secure a debt that she had kindly paid for him; that he had fully repaid to her this debt, but no deed of release to him of the premises had been made by his said sister. In the mortgage of Mrs. McGuckin to the plaintiff she expressly limits it to the undivided one-half of the tract of land conveyed by her to her said brother, Cranford. The debt to the plaintiff was his debt. What better use could his property, held in trust for him by his sister, be applied to by her, as his trustee, than to reimburse (at Cranford's request) the plaintiff for the loss of a mule caused by his disregard of plaintiff's rights? The circuit judge has taken the proper view of the matter, in the light of the testimony; but he should have limited the responsibility of Mrs. McGuckin simply to having half interest in the tract of land, which she derived through the deed of her brother Benjamin P. Cranford, and which she held in trust for him, taken under his judgment therefor, and have the same sold to pay plaintiff's debt. Mrs. McGuckin should have no liability to the plaintiff beyond this placed upon her. This conclusion is the logical sequence of the very just judgment of the circuit judge. There is abundant evidence in the case to sustain every finding reached by him, and his conclusions of law are equally tenable. It is the judgment of this court that the judgment of the circuit court be affirmed, but that such judgment shall not be extended to include any liability to the plaintiff as the part of Mrs. Nanno McGuckin beyond the undivided half of the tract of land mortgaged to plaintiff, and costs.

(43 S. C. 105)

## STATE v. FREEMAN.

(Supreme Court of South Carolina. Feb. 15, 1895.)

TRIAL JUSTICE—REPORT OF TESTIMONY—DEFENDANT AS WITNESS — FOUNDATION FOR IMPEACHMENT—FALSE REPRESENTATIONS — EVIDENCE IN REPLY.

1. A trial justice cannot supplement the testimony of a witness as taken down, after it is signed by the witness, by appending a statement as to the testimony.

2. Where defendant in a criminal case testifies in his own behalf, and denies having made certain admissions or declarations, he may be contradicted without his attention having been called to the time, place, and person involved in the proposed contradiction.

3. On a prosecution for misrepresenting the amount due on a note in selling it, defendant testified that certain produce delivered to him by the maker was intended as a loan, and that its value was not to be credited on the note. *Held*, that evidence of a statement made by him, when asked by such maker if he had given credit on the note for the value of such produce, that he would do so, was admissible in reply.

Appeal from general sessions circuit court of Oconee county; Ernest Gary, Judge.

John F. Freeman was convicted before a trial justice of obtaining property by false pretenses, and from a judgment of the court of sessions, affirming the judgment of the trial justice, appeals. Affirmed.

R. T. Jaynes, for appellant. M. F. Ansel, for respondent.

McIVER, C. J. In this case the defendant was carried before a trial justice under a warrant charging that the defendant did represent to the prosecutor "that one A. J. Frady has due him on a certain note eleven dollars, when in fact there was not such a sum due, and thereby obtained of deponent a horse of the value of ten dollars, and the said Freeman knew said representations to be false at the time." Upon this charge defendant was tried before the trial justice and a jury, and a verdict of guilty having been rendered, and the defendant having been sentenced, he appealed to the court of sessions, where the judgment of the trial justice was affirmed. This appeal is now taken from the judgment of the circuit court, affirming the judgment of the trial justice upon the several grounds set out in the record, which need not be stated here, as we propose to state the questions presented by such grounds after first making a brief statement of the case. It seems from the evidence, which is set out in the case, that the defendant, desiring to purchase a horse from the prosecutor, Benjamin Rutledge, offered him a note, which defendant held on one A. J. Frady, for \$15, representing that only \$4 had been paid thereon, leaving a balance of \$11 due. Frady testified that more than \$4 had been paid on the note, a part of which was in corn and cotton seed. Defendant, while admitting that he had received the corn and cotton seed, for which he still owed Frady, claimed in his testimony that he had received the

corn and cotton seed as a loan, which was not to be credited on the note, but to be returned in kind. In reply, Riley Hughes was offered as a witness, who, after testifying that he saw Freeman and Frady together at Harbin's Mill, was asked the following question: "State what occurred there,"—which was objected to, and the objection being overruled, the witness answered: "Jack [meaning Frady, as we understand it] asked Freeman if he had given him credit for the corn and cotton seed; said he had not done it, but would do it." The trial justice, in making his report of the case, in which the testimony signed by the witnesses was incorporated, appended thereto the following statement, signed by the trial justice: "The defendant, Freeman, on his cross-examination, stated that he had no conversation at Harbin's Mill with reference to any credits on the note. Note by the Court." Nothing of the kind appears in the testimony of Freeman, as set forth in the report and signed by him.

The only two questions raised by the grounds of appeal are (1) as to the propriety of incorporating in the report of the case the "note by the court," set out above; (2) as to whether the objection to the testimony of Riley Hughes was properly overruled.

While we think it was highly improper (to use no harsher terms) for the trial justice to undertake to supplement the testimony of a witness, as taken down by a trial justice and signed by the witness, by appending such a note, yet, under the view which we take of the case, this was an entirely harmless error, and therefore insufficient to justify a judgment reversal. It seems to us that section 68 of the Criminal Code (2 Rev. St., at page 282) plainly implies that the only testimony upon which an appeal from a trial justice can be heard is that which was taken in writing at the trial, and signed by the witnesses; and that it would be dangerous to intrust a trial justice with the power to supplement such testimony by an additional statement of his own as to what a witness testified to at the trial, when such additional statement is not verified by the signature of the witness. We have deemed it necessary to make these remarks solely for the purpose of correcting what might become a dangerous practice; for, as we have said, we do not think the error in this respect material to this case. The manifest object of this "note of the court" was to meet the objection made that Freeman, while on the stand as a witness, was not advised of the purpose to contradict him, by calling his attention to the contrary statement which it is proposed to prove, by asking "as to the time, place, and person involved in the supposed contradiction." But, while this is undoubtedly necessary when it is proposed to contradict a disinterested witness, we do not think the same rule applies where the party charged goes upon the stand as a witness in his own be-

if; for it is undoubtedly true that the prosecution may make out its case by proving declarations, admissions, or confessions of the accused, under certain limitations not necessary to be stated here, even where he is not go on the stand as a witness, and, so, we see no reason why he should be added of the purpose to prove any statements declarations he may have made, when he testifies in his own behalf. This distinction is plainly recognized in the very case cited by appellant's counsel (*State v. White*, S. C. 381); for in that case, at page 391, find the following language: "There is, never, one view under which the testimony of Campbell might be admissible. It being the party accused, it would be inequitable to prove any statement or declaration previously made by him relative to the matters in issue, subject, of course, to the rules regulating evidence of confessions or admissions, and subject to the rule as to competence in reply, even if when on the stand he had been asked nothing about such previous statements or declarations, or if he had been put on the stand at all." It seems, therefore, that the "note by the court" is wholly unnecessary, and may be entirely disregarded.

As we have seen, the objection to the money of Riley Hughes, upon the ground that Freeman, while on the stand as a witness, was not advised of the purpose to offer money as to what he had said in referring to crediting the corn and cotton seed to the note of Frady, is unfounded, the only pending inquiry is whether such testimony is objectionable as not in reply. It will be observed that the main issue in the case was whether the defendant had misrepresented to the prosecutor the real balance which was upon the note. The defendant, in his money, while admitting that certain payments had been made upon the note, when asked about the corn and cotton seed had lied that they were received as a loan, were not to be credited on the note; and seems to us that the testimony of Riley Hughes that defendant told Frady, in his presence, that he had not credited the corn and cotton seed on the note, but would do so, directly in reply. We do not see that the testimony of Hughes was amenable to either of the objections taken. The judgment of the court is that the judgment of the circuit court be affirmed.

3. One is not justified in using force to expel a mere trespasser on his land.

Appeal from general sessions circuit court of Barnwell county; D. A. Townsend, Judge.

M. M. Lightsey and M. S. Lightsey were convicted of aggravated assault, and appeal. Affirmed.

Davis & Holman, for appellants. Solicitor Bellinger, for the State.

GARY, J. The above-named defendants were indicted for an assault with intent to kill. They were tried at the summer term (1894) of the court of general sessions for Barnwell county, before his honor, Judge D. A. Townsend. Under the charge of the presiding judge, the jury found them guilty of an assault of a high and aggravated nature on the second count in the indictment, and they were sentenced to pay a fine or be imprisoned in the state penitentiary. The testimony is not set out in the case, nor is there any statement of the facts upon which they were convicted. The charge of his honor, the presiding judge, cannot properly be construed except in the light of the testimony in the case, or upon an agreed statement of the facts. Where neither the testimony nor an agreed statement of the facts appears in the case, the exceptions only present abstract questions of law. But, waiving such objection, the exceptions cannot be sustained.

The first exception is as follows: "Because his honor erred in charging the jury that an assault may be committed by simply pointing a gun at another." The charge of the presiding judge on this point was as follows: "A simple assault is an attempt to do bodily harm, but fails,—falls short of doing the harm, touching the body, doing the battery. For instance, the example usually used is striking at another within striking distance, but not striking him; pointing a gun at another within shooting distance, but not shooting. These are the examples usually used to illustrate what an assault is, but assaults may be committed, however, in a great many other ways. For instance, striking with a stick without hitting, within striking distance; pointing a gun within shooting distance. Those are the examples usually used, but I say an assault may be committed in a great many other ways." In this we see no error.

The second exception is as follows: "Because his honor erred in charging the jury that, before any one can excuse himself from murder, he must be able to show beyond a reasonable doubt that he did it from necessity." His honor recalled the jury, and corrected that part of his charge referred to in this exception. This exception cannot therefore be sustained.

The third exception is as follows: "Because his honor erred in recalling the jury from their room after they had retired to deliberate upon the case, and recharging them as to the law of the case, there being no request for such action on the part of the jury." The

C. 114)

STATE v. LIGHTSEY et al.

Supreme Court of South Carolina. Feb. 16, 1895.)

AULT—WHAT CONSTITUTES—INSTRUCTIONS.

Pointing a gun at another within shooting distance may constitute an assault.

Error in a charge is cured by recalling jury and correcting the defect.

principle governing such cases is found in the case of *Hopt v. People*, 7 Sup. Ct. 614, in which the court says: "But, independently of this consideration, as to the admissibility of the evidence, if it was erroneously admitted, its subsequent withdrawal from the case, with the accompanying instructions, cured the error. It is true in some instances there may be such strong impressions made upon the minds of a jury by illegal and improper testimony that its subsequent withdrawal will not remove the effect caused by the admission; and in that case the original objection may avail on appeal or writ of error. But such instances are exceptional. The trial of a cause is not to be suspended, the jury discharged, a new one summoned, and the evidence retaken, when an error in the admission of testimony can be corrected by its withdrawal, with proper instructions from the court to disregard it. We think the present case one of that kind. *State v. May*, 4 Dev. 330; *Goodnow v. Hill*, 125 Mass. 589; *Smith v. Whitman*, 6 Allen, 562; *Hawes v. Gustin*, 2 Allen, 402; *Dillin v. People*, 8 Mich. 369; *Specht v. Howard*, 16 Wall. 564." The third exception is overruled.

The fourth exception is as follows: "Because his honor erred in charging the jury that a man has not the same right to repel force by force out on his lands away from his castle that he has in his home." His honor charged the jury that "out on the land, away from his castle, he has not the same right there that he has in his home. \* \* \* If a man warns another off his place, and that man comes on it, he is guilty of a crime, —a misdemeanor; and for that misdemeanor he may be tried in court. Of course, the law prescribes the same in regard to his home, but he has an additional right to put him out; and use sufficient force and put him out, but the force must not be disproportionate." In this there was no error.

The fifth exception is as follows: "Because his honor erred in charging the jury that M. M. Lightsey had no right to carry his gun on his own premises." After his honor had charged the jury as stated, in reviewing the fourth exception he added: "But I charge you, a man has no right to take his gun and run a man off his place. That is simply taking the law into his own hands." In this there was no error.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(42 S. C. 117)

#### KUKER v. MCINTYRE.

(Supreme Court of South Carolina. Feb. 18, 1895.)

#### MORTGAGE BY MARRIED WOMAN — SECURITY FOR HUSBAND—APPLICATION OF PAYMENT.

1. Under the power to contract in relation to her separate property as if unmarried (Gen. St. § 2037), a married woman may mortgage her land.

2. In an action to foreclose a married woman's mortgage, the indorsements by the mortgagee, on the note and bills of sale previously given by the mortgagor's husband, "Satisfied the within by mortgage," bearing the same date as the mortgage in suit, justify the finding that the mortgage was given to secure a debt of the husband.

3. Where the amount of a married woman's mortgage includes a debt of her husband, as to which the mortgage is void, a general partial payment by the wife must be applied to her portion of the debt secured thereby.

Appeal from common pleas circuit court, Florence county; J. J. Norton, Judge.

Action by John Kuker against Ella McIntyre to foreclose a mortgage on land. From the decree rendered, plaintiff appeals. Affirmed.

Johnsons, De Jough & Hanckel, for appellant. W. F. Clayton, for respondent.

POPE, J. The appellant, as plaintiff, sought to foreclose a mortgage upon a tract of land containing 260 acres, and situated in Florence county, in this state. His action therefor against the defendant (respondent here) alleged that she executed such mortgage to him on the 15th December, 1883, to secure her bond of even date with the mortgage, in the penal sum of \$2,000, conditioned that she would pay the plaintiff \$1,000 12 months thereafter, with interest at 10 per cent. per annum until paid. The answer admitted that she had executed the bond and mortgage, but alleged that at that time she was and now is the wife of Richard H. McIntyre; that the debt evidenced by the bond, and secured by the mortgage, was not her debt, but that of her said husband, and in no wise concerned her separate estate. The answer also alleged payment of any debt due by the defendant to the plaintiff. All the issues of law and fact were, by consent, referred to J. P. McNeill, as special referee, who took the testimony on both sides. By his report he sustained the contention of the defendant that at least \$600 of the debt secured by the mortgage was that of the husband, Richard H. McIntyre, to the plaintiff, beginning in 1890, and ending prior to December 15, 1883; but he held that the plaintiff had advanced \$300 in cash to the defendant on the 15th December, 1883, which the mortgage was intended to secure, and that, after all proper credits were allowed the defendant, she was still indebted to the plaintiff in the sum of \$100.66, and he recommended a foreclosure of the mortgage and sale of the land to pay this last-named sum. To this report both parties to the action duly excepted. The cause came on for trial before his honor, Judge Norton, who on the 7th day of July, 1894, decreed that all findings of facts and conclusions of law of the special referee should be sustained, except that he reversed that finding of the special referee wherein the defendant was said to owe the plaintiff \$100.66, and that plaintiff was entitled to a foreclosure of the mortgage to pay

it sum. On the contrary, he decreed that the defendant had fully paid the plaintiff all he owed him, and therefore the complaint could be dismissed. From this judgment the plaintiff now appeals upon five grounds, as follows: "First. Because his honor erred in sustaining the exceptions of the plaintiff, in not holding that the whole consideration of the bond and mortgage was for purchases made by the defendant from the plaintiff, and for goods purchased by her from the plaintiff, and for money received by her from the plaintiff on the day the bond and mortgage were given, and that it all was for the benefit of the plaintiff's separate estate. Second. Because his honor erred in not holding definitely that the plaintiff received at least four hundred dollars in money and goods on the day the bond and mortgage were given, and that the separate estate was chargeable with the same. Third. Because his honor erred in statement in giving the defendant credit for the \$149.75, when she got credit for the same on the bond on the 14th October, 1884, and went to reduce the balance on the 15th November, 1886, to \$871.54. Fourth. Because his honor erred in applying payments entirely to the extinguishment of either the \$300 or \$400 found by his honor, when they were given generally on the bond, without any direction as to how they should be applied. Fifth. Because his honor erred in concluding that any portion of the bond and mortgage was given to extinguish any indebtedness of the plaintiff." McIntyre.

The defendant gave notice that, in case the court should be unable to sustain the argument below on the grounds therein enumerated, she would ask that the power of a married woman to execute a mortgage be denied. We may remark, in the outset, that we are unable to agree with the defendant that a married woman has no power to execute a valid mortgage. If a married woman has full power "to contract and be contracted with, as to her separate property, in the same way as if she were unmarried," it follows to us that it logically follows that she may pledge the same, or any part thereof, to secure her contract in regard to such separate property.

The appellant's fifth ground of appeal against the circuit decree for finding that any portion of the bond and mortgage in question were given to extinguish any indebtedness of the husband, Richard H. McIntyre, the plaintiff, John Kuker. All parties agree that on the 15th day of December, 1886, the defendant was the wife of said Richard H. McIntyre, and that the plaintiff owned that tract of land belonging to the separate estate of the wife; that Richard H. McIntyre had been for years prior to 15th December, 1883, purchasing merchandise from the plaintiff on a credit, and that from time

to time such purchases were being secured by mortgages of a horse or two, a mule or two, cattle, wagon and buggy, as well as by agricultural liens, and that, on the 15th December, 1883, such indebtedness amounted to \$600 or \$700. John Kuker, at that last date, had determined to make a change as to that indebtedness, and just here it is that the parties collide. The plaintiff contends that on that date Richard H. McIntyre surrendered to him the property he had mortgaged to plaintiff, in full payment of all his indebtedness, and that, the same day, he sold all such mortgaged personal property to Mrs. Ella McIntyre at about the price of \$600, on a credit of 12 months; and that Mrs. McIntyre, in order to secure that debt, as well as \$300 in cash and \$100 in goods, aggregating \$1,000, executed the bond and mortgage now in controversy. On the other hand, the defendant contends that she was persuaded by her husband to assume the payment of his debt to the plaintiff, and is not very positive as to how the other portion of the \$1,000 was made up. No bill of sale of the personal property was made by the plaintiff to the defendant. At the trial, some 11 years afterwards, witnesses attempt to tell what the personal property consisted of. John Kuker says: "I had bills of sale and liens for 1883 at the time of execution of mortgages [by defendant]. Mrs. McIntyre bought the stock and buggies and wagons, and in fact everything I had, under bill of sale." Now, the bill of sale referred to was as follows: That of 22d May, 1882, covered one bay mare mule about seven years old, and four head of cattle; that of 17th September, 1883, one black mare about eight years old; that of 26th November, 1880, covered one two-horse Lowry wagon, one new top buggy, one bay mare eight years old, and one bay swapped for grey horse; and that of 2d March, 1882, one black horse mule nine years old, and one two-horse wagon. But his witness J. De Jough says: "I think there were three or four horses advanced to her. There were two fine horses, valued at \$350, as he paid that price in Charleston. The other two were common horses, worth about \$125 each. The wagon was worth \$25 or \$30. Buggy was worth about \$85." Aggregate these amounts, and the property turned over, by this witness' estimate, was \$710 or \$715. Thus, John Kuker has it that he sold to the defendant three horses, two mules, four head of cattle, one buggy, and one wagon. Richard H. McIntyre states in his testimony that he had only two horses at the date of his wife's mortgage, but that no property was sold to defendant. The witness De Jough says Richard H. McIntyre turned over the mortgaged property to plaintiff before the date of the wife's mortgage, and the plaintiff sold the same to defendant on the date of her mortgage. The defendant denies that she bought any horses from plaintiff, but that she assumed the payment

of her husband's debt, while the husband swears that no sale was made, but that his wife gave the bond and mortgage to save him from a forced sale of his property. Now, here is presented a strange spectacle: plaintiff and his witness swearing to one state of facts; defendant and her witness swearing to another state of facts. There is, however, a very significant written statement, at least five times repeated, by John Kuker, the plaintiff here, dated the 15th December, 1883, which is as follows: "Satisfied the within by mortgage and bond. Dated December 15, 1883. John Kuker." This statement appears on the back of R. H. McIntyre's note to him for \$140.75; also on the back of R. H. McIntyre's bill of sale dated May 22, 1882; also on the back of R. H. McIntyre's bill of sale dated January 15, 1883; also on the back of the bill of sale of R. H. McIntyre dated September 19, 1883; and also on the back of the bill of sale of R. H. McIntyre dated March 2, 1882. May not this memorandum signed by the plaintiff at the time of the transaction, when everything was fresh in his mind, solve the difficulty? The special referee so finds. The circuit judge concurs in such finding. Under our established rule, we will not disturb the finding of fact by them separately made; especially, as, under the law, the burden was on the plaintiff to establish the debt as one against the separate estate of the married woman. Hence the fifth exception is overruled.

As to the first exception, complaining, as it does, of the circuit decree for failing to find the whole consideration of the bond and mortgage sued on here to be for purchases, and also for money loaned, we have but little trouble in disposing of it, in the light of our decision just announced of the question raised by the fifth exception; for we have held that, instead of the defendant purchasing the property mortgaged by her husband to the plaintiff, she assumed the payment of his indebtedness to Kuker. The circuit judge did hold that a part of the mortgaged debt was for borrowed money.

The second exception, in the light of the circuit decree, is untenable. The circuit judge did hold that, even if he conceded that \$400 was borrowed, the testimony showed it had been paid. In this he was correct, for the plaintiff admits the payment of \$149.75 on 15th October, 1884; the further sum of \$257.75 after the 15th December, 1886; and, as we shall hereafter show, plaintiff has further admitted payment of \$278.71 prior to 15th December, 1886.

As to the third exception, it seems that the circuit judge did fail to properly locate the credit of \$149.75; but this was a harmless error, as is very evident when the testimony

is made the basis for a calculation. Take this statement of the matter:

|  |            |
|--|------------|
| Amount in cash borrowed on 15th December, 1883 .....   | \$300 00   |
| Int. on same to 15th October, 1884 (10 months), 10 per ct.....   | 25 00      |
|  | <hr/>      |
|  | \$325 00   |
| Deduct amt. paid on that day, say....  | 149 75     |
|  | <hr/>      |
|  | \$175 25   |
| Allow int. on \$175.25 at 10 per cent. from 15th October, 1884, to 15th December, 1886 .....   | 37 94      |
|  | <hr/>      |
|  | \$213 19   |
| Place, as a credit upon this amount, due, as we have seen, on 15th December, 1886, the sum of.....   | 278 71     |
|  | <hr/>      |
| And we find that the defendant has overpaid the \$300 by.....  | \$ 65 52   |
| We will explain how this \$278.71 is obtained as a credit. The plaintiff admits that the defendant owed on 15th December, 1886, as the balance for both principal and interest of the bond, the sum of \$871.54. This result could only occur by giving the defendant credit for \$149.75, and \$278.71 as an additional payment. Thus it may be seen: |            |
| Bond for \$1,000, with int. at 10 per cent. up to 15th December, 1886 (three years) .....  | \$1,300 00 |
| Deduct the admitted payment of 15th October, 1884 .....  | 149 75     |
|  | <hr/>      |
|  | \$1,150 25 |
| From \$1,150.25 deduct the amt. admitted by plaintiff to be due 15th December, 1886 .....  | 371 54     |
|  | <hr/>      |
|  | \$ 778 71  |

And three years will determine that credits other than \$149.75 were.. \$ 278 71

It is thus manifest that the error of the circuit judge was a harmless error.

Lastly, the fourth exception will be considered. There can be no doubt that if the defendant had actually owed the sum of \$1,000, and that although that amount was secured by a bond, but was made up of two or more matters of indebtedness, that could be distinguished from each other, and the obligor may have made a payment upon the bond generally, and afterwards the obligor would desire the obligee to apply the general payment to one of the two or more matters of indebtedness covered by the bond, under certain circumstances the obligee could successfully deny the right of the obligor to change the application of the partial payment of the bond. This rule can have no application to a bond made up, as in this case, of \$600, due by the husband and void as to the defendant, and \$400 that she actually owed for money or goods she herself bought. The payments here made by the defendant must be applied to the only debt she owed. It is the judgment of this court that the judgment of the circuit court be affirmed.

C. 221)

## CARTIN v. SOUTH BOUND R. CO.

reme Court of South Carolina. Feb. 23, 1895.)

## EQUITY IN COMPLAINT—ELECTION AS BETWEEN CAUSES OF ACTION—EFFECT OF JUDGMENT.

1. When the allegations of the complaint appropriate to either of two causes of action, a judgment may be required, on motion of defendant, to elect upon which cause he will proceed to trial.

2. Where the allegations of the complaint appropriate to either of two causes of action, and defendant does not move that plaintiff be required to elect upon which cause he will proceed, and a judgment for defendant is rendered on one cause, plaintiff cannot thereafter sue on the other cause, and sue on the one upon which there was no adjudication.

Appeal from common pleas circuit court of Marion county; W. O. Benet, Judge.

Plaintiff by Mrs. Jane A. C. Cartin against South Bound Railroad Company to recover damages by reason of the location and operation of defendant's road within 400 feet of her dwelling. From an order dismissing the complaint, plaintiff appeals. Affirmed.

For plaintiff, Efford and Izlar, Glaze & Herbert, for defendant. Lyles & Muller, for respondent.

THE PLAINTIFF, J. The plaintiff executed to the defendant a deed by which she conveyed to defendant a right of way 300 feet over her lands, "for the purpose of building a railroad over the same; such right of way over said lands in such shape and dimensions as the said railroad company, its successors or assigns, may select, but so as not to interfere with my dwelling, barn, or any outbuilding, and not nearer than 400 feet to my dwelling. But, if said railroad company should find it necessary to run its road nearer my dwelling than first above provided, it may do so on paying such damages, as I may sustain thereby, as may be determined by three disinterested parties, one by me, one by it, and the third by the court." The complaint sets forth this deed and alleges that the defendant did construct its road and is operating the same within 400 yards to plaintiff's dwelling; thereafter plaintiff offered to arbitrate with the defendant the question of damages, but the defendant failed, neglected, and refused to comply with her request; that the plaintiff has sustained damages, by reason of the location and operation of defendant's road within 400 yards of her dwelling, to the amount of \$1,000, which is the price the defendant company agreed to pay for said right of way.

The defendant in its answer admitted the existence of the deed, and admitted the location and delivery of the deed, and denied the other allegation in said complaint, and for a second defense set up that the case had been res adjudicata. The case came up for trial before his honor, Judge Benet, who rendered judgment in favor of the plaintiff, but, before any testimony was taken, the defendant's counsel moved to dismiss the complaint, on the ground that the issues raised by the pleadings herein were res adjudicata. The motion was heard by consent, and the record in the former action, consisting principally of the original complaint, order sustaining oral demurrer to same, order for leave to amend, amended complaint, and order of nonsuit, was presented to the court. The motion was granted, and the complaint dismissed; his honor, Judge Benet, holding that the order of nonsuit was "a bar to this action, and that plaintiff's only remedy was to proceed under the statute." The order of his honor, Judge Witherspoon, is as follows: "A motion having been made in the above-entitled action for a nonsuit, after hearing arguments by Joseph W. Muller in support of the motion, and C. M. Efford contra, and upon inspection of the deed from the plaintiff to the defendant, as set forth in the complaint, I find, as a matter of law, under the authorities cited by defendant's counsel, to wit, *Hammond v. Railroad Co.*, 15 S. C. 33, and *Hale v. Finch*, 104 U. S. 261, that there is no agreement in said deed, on the part of the defendant, the South Bound Railroad Company, to submit the question of damages to arbitration. It is therefore ordered that the motion be granted, and the complaint herein dismissed, with costs." Plaintiff excepts to the order of his honor, Judge Benet, and contends that he should have held (1) that the deed was a valid contract between the two parties, and took the case out of the statute; (2) that the deed was not rendered void by the provisions as to arbitration having been decided not binding upon the defendant, but that its other provisions remained unimpaired, making it so far a valid contract between the parties, and that the plaintiff could enforce her right under it in the courts.

The so-called "nonsuit" was not granted simply because there was a failure of evidence, but because, from a construction of the deed, plaintiff did not have a cause of action. To this extent the order of Judge Witherspoon must be construed as an adjudication upon the merits of the case. His construction of the deed was binding upon the parties to said action. There can be no question that if the cause of action herein was set forth in plaintiff's amended complaint when his honor, Judge Witherspoon, construed the deed, such construction is binding on the plaintiff, and is res adjudicata.

It is argued by the appellant that the plaintiff had two causes of action,—one for the alleged wrong on the part of the defendant in constructing its roadbed nearer than 400 yards to plaintiff's dwelling house, and also for the alleged wrong in refusing to arbitrate the question of damages caused thereby. Even admitting that plaintiff had two such causes of action, we do not think the circuit judge was in error. The first complaint, the amended complaint, and the complaint here-

The defendant in its answer admitted the existence of the deed, and admitted the location and delivery of the deed, and denied the other allegation in said complaint, and for a second defense set up that the case had been res adjudicata. The case came up for trial before his honor, Judge Benet, who rendered judgment in favor of the plaintiff, but, before any testimony was taken, the defendant's counsel moved to dismiss the complaint, on the ground that the issues raised by the pleadings herein were res adjudicata. The motion was heard by consent, and the record in the former action, consisting principally of the original complaint, order sustaining oral demurrer to same, order for leave to amend, amended complaint, and order of nonsuit, was presented to the court. The motion was granted, and the complaint dismissed; his honor, Judge Benet, holding that the order of nonsuit was "a bar to this action, and that plaintiff's only remedy was to proceed under the statute." The order of his honor, Judge Witherspoon, is as follows: "A motion having been made in the above-entitled action for a nonsuit, after hearing arguments by Joseph W. Muller in support of the motion, and C. M. Efford contra, and upon inspection of the deed from the plaintiff to the defendant, as set forth in the complaint, I find, as a matter of law, under the authorities cited by defendant's counsel, to wit, *Hammond v. Railroad Co.*, 15 S. C. 33, and *Hale v. Finch*, 104 U. S. 261, that there is no agreement in said deed, on the part of the defendant, the South Bound Railroad Company, to submit the question of damages to arbitration. It is therefore ordered that the motion be granted, and the complaint herein dismissed, with costs." Plaintiff excepts to the order of his honor, Judge Benet, and contends that he should have held (1) that the deed was a valid contract between the two parties, and took the case out of the statute; (2) that the deed was not rendered void by the provisions as to arbitration having been decided not binding upon the defendant, but that its other provisions remained unimpaired, making it so far a valid contract between the parties, and that the plaintiff could enforce her right under it in the courts.

The so-called "nonsuit" was not granted simply because there was a failure of evidence, but because, from a construction of the deed, plaintiff did not have a cause of action. To this extent the order of Judge Witherspoon must be construed as an adjudication upon the merits of the case. His construction of the deed was binding upon the parties to said action. There can be no question that if the cause of action herein was set forth in plaintiff's amended complaint when his honor, Judge Witherspoon, construed the deed, such construction is binding on the plaintiff, and is res adjudicata.

In, all set forth the facts, both as to the alleged wrongful act on the part of the defendant, in constructing its roadbed nearer than 400 yards to plaintiff's dwelling, and also its wrongful act in refusing to arbitrate the question of damages caused thereby. If two causes of action were set forth in the complaint without being separately stated, the defendant, it is true, had the right to make a motion that the complaint be made more definite and certain, or, if allegations were made which were unnecessary to sustain the cause of action stated in the complaint, to make a motion to strike out such allegations as irrelevant and as surplusage. Pom. Rem. §§ 447, 451. If the defendant waived said objections to make such motions, then the plaintiff had the right to the relief which all the allegations showed he was entitled to. The plaintiff, where the allegations of the complaint are appropriate to either of two causes of action, may be required, upon motion of the defendant, to make his election as to the cause of action upon which he will proceed to trial. *Westlake v. Farrow*, 34 S. C. 270, 13 S. E. 460; *Hammond v. Railroad*, 15 S. C. 10; *Hellams v. Switzer*, 24 S. C. 30. If the defendant fails to take such steps, the plaintiff is estopped afterwards from separating the cause of action, and bringing separate suits thereon. Having had the benefit of such allegation in the first complaint, he cannot be allowed to bring them in review a second time, by alleging a separate cause of action. It is the judgment of this court that the order of the circuit court be affirmed.

(43 S. C. 176)

Ex parte PERRY STOVE CO.  
 PHILLIPS & BUTTORFF MANUF'G CO. v.  
 RAY et al.  
 (Supreme Court of South Carolina. Feb. 18, 1895.)

**DISSOLUTION OF ATTACHMENT—EFFECT OF APPEARANCE—JURISDICTION.**

1. Under Code, § 263, providing that in all cases the defendant, or any person who establishes a right to the property attached, may move to discharge the attachment, a creditor attaching his debtor's property, but not claiming it except under the attachment, cannot question the regularity of another attachment against the same.

2. The voluntary appearance of defendants in attachment, to vacate the proceedings, gives the court jurisdiction over them.

3. The court of common pleas has jurisdiction of an attachment proceeding in an action upon a note given and payable by the defendants in another state, for goods sold and delivered there.

Appeal from common pleas circuit court of Spartanburg county; Ernest Gary, Judge.

Action by Phillips & Buttorff Manufacturing Company against J. F. Ray and W. P. Wray in attachment. There was a judgment for plaintiff. Motion by the Perry Stove Company, a junior attachment and judgment creditor of defendants, to set aside the serv-

ice of the summons and the warrant of attachment issued in said action, and to vacate said judgment. Motion denied, and the movant appeals. Affirmed.

The following are the statement of facts, the orders in the court below, and the assignment of errors:

**"Case.**

"This appeal comes up from the order of Judge Gary, hereinafter appearing, which order was made by him upon the following agreed statement of facts, to wit: The motion is made upon the record, papers filed, and proceedings had in this case, and in the case in this court of the Perry Stove Company against James F. Ray and W. P. Wray, and upon the facts hereinafter stated, which, for the purpose of this motion, wherever competent, are admitted to be true as stated. On February 15, 1892, the plaintiff herein, which is a corporation chartered by the laws of Tennessee, and located and doing business therein, issued the summons herein, and, upon the complaint and affidavit and bond, obtained a warrant of attachment against the property of the defendants, which, when issued, was in the usual form, except that the amount of the plaintiff's demand was not stated in it, nor was it stated in the copy filed in the office of the R. M. C. for Spartanburg county. The amount of the plaintiff's demand was not stated in either, until the warrant and copy were amended, under the order of Judge Wallace herein, which order was as follows:

"Two motions are heard together,—one to set aside an attachment granted by the clerk of this court, and the other to amend the warrant of attachment. The motion to set aside the attachment is made upon the following grounds, to wit: First, that the attachment was improvidently granted; second, that the attachment was irregularly granted; third, that it appears from the face of the papers that the clerk had no right to issue the writ of attachment. The preamble to the writ issued by the clerk recites that it was made to appear by affidavit that a cause of action existed against defendants in favor of plaintiff, and that the affidavits specified the amount of the claim and the grounds thereof, and that the defendants are nonresidents of this state, and are disposing of their property to defraud creditors, and the plaintiff having given the undertaking required by law. Upon an examination of the record, these recitals are found as stated therein, save the recital that an undertaking had been given. It is stated in the argument that no undertaking is among the papers, but that plaintiff's attorney says there was one given at the time of the application. The clerk also recites that an undertaking was given. On this state of proof I must infer that the undertaking was given. The plaintiff having shown by affidavit a cause of action and the grounds and amount thereof, and that defendants are nonresidents of this



state, and are disposing of their property to defraud creditors, and having given the undertaking required by law,—all being done in a pending action,—has brought itself within the strictest construction of the attachment law of this state. Code, §§ 248-250. It follows, therefore, that the plaintiff was entitled to a writ of attachment, and it was not improvident, irregular, or beyond the power of the clerk of the court to issue it. The clerk, therefore, properly granted the writ. The real ground to the defendants' motion, however, is that in the preamble to the writ the amount of the claim is not stated, as required by statute. Code, § 252. The plaintiff moves to amend the writ by the insertion of the amount of the claim, and also by attaching the seal of the court to the clerk's name where it is signed to the copy of the writ. The question therefore is, is the writ void or voidable, and can it be amended? The rule is firmly established that the conditions upon which a writ of attachment may issue, as provided by statute, must be made to appear by affidavit at the time of the application, and that the statement of such condition is not amendable. *Phosphate Co. v. Rosenberg*, 31 S. C. 307, 9 S. E. 969; *Ketchin v. Landecker*, 32 S. C. 157, 10 S. E. 936; and many other cases therein referred to. As seen above, these requirements have been met in this case, and the clerk properly granted the writ. The writ, therefore, is process issuing out of this court under its seal, and in a proceeding within its jurisdiction. It cannot be void for the omission of a recital of a fact in its preamble, and which is no part of its mandate. The plaintiff has done all required of it to entitle it to the writ. The writ itself was the act of the clerk, the officer of this court, and the court cannot allow parties to be prejudiced by the inadvertent omission of its officer to insert a statement of fact in the preamble to process in a proceeding in its jurisdiction. In the language of the supreme court of this state in the case of *Clark v. Melton*, 19 S. C. 509: "• • • The omission here was a mere irregularity in a matter not vital to the judgment [writ], but simply directory to the clerk, and may be corrected at any time." See 4 *Walt, Prac.* 648, where the following language occurs: "The want of statutory requirement in any process or proceeding in an action may be supplied by amendment, for the provision in respect to amendments makes no distinction between statutory requirements and any other." It is therefore ordered and adjudged that the motion to vacate and set aside the writ of attachment be denied. It is further ordered and adjudged that plaintiff have leave to amend the warrant and the copy thereof by inserting therein the amount claimed, to wit, one hundred and fifty-six and seventy one-hundredths dollars, and by attaching the seal of the court to the clerk's name where it is signed in said copy. 5th September, 1893.

"The plaintiff's cause of action was several notes given in North Carolina, for merchandise sold and delivered to the defendants in North Carolina, and were payable in North Carolina. The complaint alleged the execution of the notes sued on by the defendants; that they were due and unpaid, but did not state the consideration of them. The affidavits upon which the warrant was obtained, the order for publication, and the affidavit or proof of publication are correctly set out in Judge Gary's order. The original summons, and the copy published, stated that a copy of the complaint had been filed in the office of the clerk of the court. There was no affidavit of the mailing of copy summons to the defendants. On November 7, 1893, plaintiff entered up a personal judgment against both the defendants for \$173.55, and \$59.50 costs, and issued execution therefor. No personal service of the summons herein was ever made upon either of the defendants, and the judgment recites that the summons was served by publication. No entry was made in the books kept for that purpose in the office of the R. M. C. for Spartanburg county of the name of parties, the date of the warrant, the sum demanded, and the officer's return thereon, and the copy of the warrant in the judgment roll is the only copy ever filed in said office. On February 29, 1892, the Perry Stove Company, a corporation chartered by the laws of the state of New York and located and doing business in said state, began suit in the common pleas in Spartanburg county against the defendants. Its cause of action also arose in North Carolina. The summons in its case was served personally on both of the defendants in the state of South Carolina. Upon the verified complaint, affidavit, and bond, a warrant of attachment was obtained against the property of the defendants. On November 18, 1892, the Perry Stove Company obtained judgment against the defendants for \$925.20, and \$44.25 costs. Execution was duly issued thereon, November 18, 1892, and lodged with the sheriff, February 28, 1893. The property levied on and sold was a tract of land in Spartanburg county owned by James F. Ray. It was sold salesday in December, 1893, and brought \$450, the sale being made under the executions in the two cases above mentioned. A motion was made prior thereto by the defendant J. F. Ray, through his attorneys, Duncan & Sanders, to dissolve the attachment; but the motion was refused by Judge Wallace, who granted the order hereinbefore contained. (The bond which was then missing was subsequently found in the clerk's office.) The matters above set forth, as facts admitted, are to be considered as admitted only in the event that it would have been competent to prove them upon this motion. The motion heard by Judge Gary was to vacate and set aside the summons herein, and the service thereof, the warrant of attachment, and the alleged levy and lien thereof,

and the judgment herein entered on the 7th day of November, 1892, in so far as the same affect the rights of the Perry Stove Company as an attachment and judgment creditor of the defendants. The motion was upon the grounds which now constitute the first nine grounds of this appeal."

His honor, Judge Gary, after argument of counsel, rendered the following decree:

"This is a motion on the part of the Perry Stove Company to vacate and set aside the summons, warrant of attachment, and judgment entered in the case of Phillips & Buttorff Manufacturing Company against James F. Ray and W. P. Wray. The facts are that Phillips & Buttorff Manufacturing Company sued the defendants, James F. Ray and W. P. Wray, on the 15th of February, 1892, in the court of common pleas for Spartanburg county, for the amount due on their promissory notes, which are described and set out in the complaint, on the 13th of February, 1892, upon the affidavit of Stanyarne Wilson, as attorney for plaintiff, stating 'that this is an action upon four notes executed by defendants to plaintiff, of date November 12, 1891, each being in the sum of one hundred and twelve dollars and fifty cents, with interest from date at six per cent. per annum, and due, respectively, thirty, sixty, ninety, and one hundred and twenty days thereafter, no part of which has been paid, except the sum of three hundred dollars paid (by note) February 1st, 1892; that the defendants are nonresidents of the aforesaid state, and after due diligence could not be found therein, but that they reside in the town of Shelby, N. C.; that the defendant James F. Ray, as appears upon the record in the office of R. M. O. of said county of Spartanburg, is seised and possessed of real estate therein.' On the 12th day of February, 1892, Robert T. Hopkins also made an affidavit similar to the one of Mr. Wilson. The affidavits are both before me as part of the record in the case just alluded to. On the 15th day of February, 1892, the clerk of the court for Spartanburg county issued a warrant of attachment to the sheriff of that county, and the sheriff duly levied the same on a tract of land belonging to the defendant James F. Ray, on the 17th of February, 1892. This warrant of attachment was based upon the verified complaint in the cause and the affidavits above referred to. The clerk of court also issued an order 'that the summons in this case be published once a week for six consecutive weeks in the Carolina Spartan, and that copies thereof be forwarded by mail at once (postage prepaid) to the defendants at Shelby, N. C.' The record also contains an affidavit of Charles Petty, editor of the Carolina Spartan, stating that the summons in this cause, with the notice appended, were published in said paper once in each week for six successive weeks; the first publication being on Wednesday, the 17th day of February, 1892, and the last on the 23d day

of March, 1892. On the 7th day of November, 1893, judgment by default was entered in favor of said plaintiff against the defendants for \$173.55, and costs amounting to \$59.60. On the same day execution was entered and lodged, and the land seized under the warrant of attachment was levied upon under this execution on the same day. Some time subsequent the defendants, through their attorneys, made a motion before his honor, Judge Wallace, to vacate and set aside the attachment proceedings, and in connection with this motion the plaintiff made a motion to amend the attachment proceedings. Judge Wallace declined to vacate the attachment in a well-prepared opinion, and granted plaintiff's motion to amend the same. The judge held that the plaintiff had strictly complied with the attachment law of this state, and was entitled to the writ. From Judge Wallace's decree there was no appeal. On the 29th day of February, 1892, the Perry Stove Company filed their complaint against the said W. P. Wray and James F. Ray, and procured a warrant of attachment from the clerk of court directed to the sheriff of Spartanburg county; and on the 29th day of February, 1892, this attachment was also levied on the same land; and on the 18th day of November, 1892, judgment by default was entered in favor of the Perry Stove Company against the defendants, W. P. Wray and James F. Ray. The Perry Stove Company, as junior judgment creditor, makes this motion. Under the very recent case of Gibson v. Everett (S. C.) 19 S. E. 286, I do not think the order for publication of the summons was irregular. Mr. Justice Pope, as the organ of the court, says: 'It is contended by the defendant that there was error in the decision of the circuit judge when he overruled the motion to set aside the order for publication of the summons, etc., on the ground that the affidavit did not show facts sufficient to authorize the said order. This court has held in *Yates v. Gridley*, 16 S. C. 500, that section 158 of our Code, regulating the matter of service of summons by publication, only requires that it be made to appear to the official who passes the order therefor (1) that the defendant has property in the state; (2) that he cannot be found in the state after due diligence; (3) that a cause of action exists against him; (4) that if defendant's post office is known, or can be reasonably ascertained, the order must direct that the party be served at his residence, through the post office, and that these facts must appear to such official by affidavit to his satisfaction.' This is within the discretion of the officer, and where he is satisfied, in the absence of fraud and collusion, his discretion is final,—citing *Bank v. Stelling*, 31 S. C. 367, 9 S. E. 1028. It appears to me that the affidavits of Mr. Wilson and Mr. Hopkins fully come up to this requirement. Besides, the decree of Judge Wallace is the law of the case till it has been

reversed. He decided that the statute has been fully complied with. From the foregoing, I fail to see any valid objection to the order of publication. Even, however, conceding that the attachment proceedings are irregular, it would not avail the plaintiff or mover in this motion. They, as junior judgment creditors, have no such equity as would enable them to take advantage of any such irregularity as they allege. They do not allege fraud, and, in the absence of fraud, they cannot be heard. After the decree of Judge Wallace, the defendants could not even move in the matter. The regularity of the attachment proceedings is *res adjudicata*. So the issue is narrowed down to the single inquiry, can a junior judgment creditor move to set aside a senior judgment upon the ground of illegality or irregularity in the proceedings in which the judgment was obtained? I hold that he cannot. This very point has been ruled upon by the supreme court of this state in the case of *Darby v. Shannon*, 19 S. C. 526, where Mr. Justice McGowan, speaking for the court, says: "This privilege is not so extended as to allow a subsequent attaching creditor to move to vacate the prior attachment on the ground that it was irregularly issued." And Mr. Chief Justice McIver, in concurring in the result, says: "It seems to me that the judgment in favor of Cole & Co. was not open to the attack of the plaintiffs, inasmuch as the only person who could take advantage of the alleged insufficient service of the summons was the defendant Shannon. In the absence of any objection from him, the court will presume that everything necessary to perfect the service was done, or that he, by voluntary appearance or otherwise, waived the necessity for service." The defendants, having failed in their motion to vacate the attachment proceedings, thereby cured any irregularity that might have existed. The matters complained of are *res adjudicata* by Judge Wallace's decree, and the Perry Stove Company cannot again open them. The motion is therefore refused. 14th May, 1894."

From this decree the Perry Stove Company gave due notice of its intention to appeal, and does now appeal, to the supreme court, and ask a reversal on the following grounds:

"Because his honor erred in refusing the motion to vacate and set aside the warrant of attachment and judgment herein, in so far as the same affects the rights of the Perry Stove Company: (1) Because the order for the publication of the summons herein was made without authority of law, in that the court did not have jurisdiction of the subject of the action. (2) Because said order, and the attempted service made thereunder, are both fatally defective, in that the order does not direct a copy of the summons to be forthwith deposited in the post office, directed to the person to be served at his place of residence. (3) Because there is no such proof as is required by law either that the sum-

mons was published for the length of time required by law, or that a copy thereof was forthwith deposited in the post office after the granting of said order, directed to the person to be served at his place of residence. (4) Because neither the original summons nor the summons as published stated where the complaint was or would be filed. (5) Because neither the original warrant of attachment, nor the copy filed in the office of the clerk of the circuit court and register of mesne conveyance for Spartanburg county, had the amount of the plaintiff's demand stated therein, in conformity with the complaint. (6) Because said warrant and copy were altered by the plaintiff after the levy of the warrant of attachment of the Perry Stove Company against the property of James F. Ray, and after the entry of the judgment of the Perry Stove Company against said Ray, upon whose property the warrant of attachment of the plaintiff herein had been levied, said alteration being in prejudice of the rights of the Perry Stove Company, whose attachment and judgment constituted a lien upon said property. (7) Because no entry was made, in the book required by law to be kept in said office, of the names of the parties, the date of the warrant of attachment, the sum demanded, and the officer's return thereon, and, as such entry could not have been made from the copy filed, no lien was acquired. (8) Because it did not appear by affidavit that a cause of action existed in favor of the plaintiff against the defendants, or either of them, in which the amount of the claim and the grounds thereof were specified. (9) Because the entry of a personal judgment against the defendants was wholly unauthorized. (10) Because the presiding judge erred in holding that the order of Judge Wallace was the law of the case, and that the Perry Stove Company was conducted by it. (11) Because the presiding judge erred in holding that, in the absence of an allegation of fraud, the Perry Stove Company could not be heard. (12) Because the presiding judge erred in holding that, because the defendant James F. Ray had failed in his motion to vacate the attachment, all defects in the proceedings were thereby cured, and the matter was *res adjudicata* as to the Perry Stove Company."

Carlisle & Hydrick, for appellant. Stan-  
yarne Wilson, for respondents.

GARY, J. The agreed statement of facts set forth in the "case," including the order of his honor, Judge Wallace, upon which his honor, Judge Gary, heard the case on circuit, the order of Judge Gary, and appellant's exceptions, will be incorporated in the report of the case.

The first question we will consider is, did the appellant have the right to make the motion to set aside the summons issued by the plaintiff herein, the service thereof, the warrant of attachment, the levy and lien

thereof, and the judgment therein entered on the 7th of November, 1893, in so far as the same affect the rights of the Perry Stove Company as an attachment and judgment creditor, on account of the irregularities alleged by the appellants? Prior to the amendment of the Code, in 1882, the appellant had no such right, as shown by the case of *Copeland v. Insurance Co.*, 17 S. C. 116, in which the court uses this language: "Under the former attachment acts of force before the adoption of the Code, in March, 1870, it had been repeatedly decided that no one but the defendant in the attachment could question the regularity of the proceeding, or move to dissolve it on that ground, not even the garnishee, although served with process." In *Foster v. Jones*, 1 McCord, 116, it is said: "A garnishee has no right to question the regularity of the proceeding against an absent debtor." In *Kincaid v. Neall*, 3 McCord, 201, the court held "that a person, though a judgment creditor, cannot set aside the lien of the attachment on account of irregularities." In *Camberford v. Hall*, Id. 345, it was decided that no one but the debtor himself could take advantage of errors in the judgment rendered against him; that a garnishee could not object to errors or irregularities in the attachment proceedings. In *McBride v. Floyd*, 2 Bailey, 214, Judge O'Neill said: "It has been often decided that neither a garnishee, a creditor of the debtor, nor any person other than the debtor himself, can question the regularity of the proceedings in attachment." See, also *Chambers v. McKee*, 1 Hill (S. C.) 229; *Harper v. Scuddy*, 1 McMul. 265. These cases would be conclusive, under the old law, as to irregularities. Has this been changed under the new? Our present attachment act is found in Code, pt. 11, tit. 7, c. 4. In section 263 there is a provision that defendants may move to discharge attachments, but this privilege does not extend beyond defendants. There is nothing said as to others. This section seems to be a legislative declaration of the law as it formerly stood. As Blakey is not a defendant, he cannot come in under any provisions of the act, and he is excluded under the decisions above referred to from questioning these attachments for irregularity. In the case of *Metts v. Insurance Co.*, 17 S. C. 120, it is held that a third party has no right to intervene, and move to set aside an attachment, upon the ground that the attached property belongs to him, and not to the defendant. In 1882, section 263 of the Code was amended so that the portion referred to in the case of *Copeland v. Insurance Co.*, supra, now reads as follows: "And in all cases the defendant or any person who establishes a right to the property attached, may move to discharge the attachment, as in the case

of other provisional remedies." (Italics ours.) This amendment was adopted for the purpose of enabling third parties, as in the case of *Metts v. Insurance Co.*, supra, to move to set aside the attachment proceedings for irregularity, where they claimed to be owners of the property, or to have a right to the possession thereof, but not for third parties generally to attack such proceedings, as in the case at bar. We are therefore of the opinion that the appellant did not have the right to move to set aside said proceedings for the alleged irregularities.

If the said attachment proceedings, and the judgment entered therein by the plaintiff, were absolutely null and void, and not merely voidable, then the appellant had the right to have them so declared. The next question we will, therefore, consider, is, were said attachment proceedings, and the judgment entered therein, absolutely null and void? The case of *Turner v. Malone*, 24 S. C. 398, shows that the judgment is not void where the court had jurisdiction of the subject-matter in controversy and the parties to the judgment. The voluntary appearance of the defendants in the case, where they made a motion before his honor, Judge Wallace, to vacate and set aside the attachment proceedings, gave the court jurisdiction of them. It is, however, claimed by the appellant that the court did not have jurisdiction of the subject of the action. We suppose this objection is made because it is stated in the case that the plaintiff's cause of action was several notes given in North Carolina for merchandise sold and delivered to the defendants in North Carolina, and were payable in North Carolina. This question is settled by the case of *Gibson v. Everett* (S. C.) 19 S. E. 286, holding that the court has jurisdiction in the cases similar to the one at bar. See, also, *Campbell v. Insurance Co.*, 1 S. C. 158. But, even if this was not so, the appellant is not in a position to make such objection. Its cause of action also arose in North Carolina, and, in the absence of testimony showing that the contract was to be performed elsewhere, the place of the making of such contract is presumably the place of its performance. There is no such testimony in this case. *Tillinghast v. Lumber Co.* (S. C.) 18 S. E. 120. It is true the appellant served the judgment debtors personally within this state with a copy of the summons, but the judgment debtors subjected themselves to the jurisdiction of the court in the case brought against them by the plaintiff by voluntarily appearing in the case for the purpose hereinbefore mentioned. *Black, Judgm. § 227*. These views render it unnecessary to consider specifically the appellant's exceptions. It is the judgment of this court that the order of the circuit court be affirmed.

(13 S. C. 173)

**ADKINS v. MOORE et al.**

(Supreme Court of South Carolina. Feb. 18, 1895.)

**JUSTICE'S SUMMONS—SUFFICIENCY—JURISDICTION.**

Code, § 88, subd. 16, as amended by Act Dec. 22, 1891, provides that when \$25 or more is demanded the complaint shall be served on defendant not less than 20 days before the day therein fixed for trial. *Hdd.*, that a justice's summons which required defendant to appear "on the twentieth day from service of this summons, exclusive of the day of service, at 10 o'clock a. m.," was insufficient to give the justice jurisdiction to render a judgment at the time fixed in the summons.

Appeal from common pleas circuit court of Greenville county; I. D. Witherspoon, Judge.

Action by G. R. Adkins against H. P. and W. C. Moore, partners as H. P. Moore & Co., to recover damages for the unlawful seizing of a cow, property of plaintiff. There was a judgment by default before a trial justice for plaintiff, and from a judgment of the circuit court reversing an order of the trial justice granting defendants a new trial defendants appeal. Reversed.

Haynsworth & Parker, for appellants. Jos. A. McCullough, for respondent.

GARY, J. On the 20th of December, 1893, the following summons was served upon the defendants: "By F. B. McBee, Esq. To H. P. Moore and W. C. Moore, partners under firm name of H. P. Moore & Co.: Complaint having been made unto me by G. R. Adkins that you are indebted to him in the sum of sixty dollars, on account of damages he has sustained by reason of your unlawfully seizing and taking away from him, on or about the 5th day of August, 1892, one dark-red heifer cow, with white streak down back and belly, which cow was property of this plaintiff, this is therefore to require you to appear before me, in my office in Greenville, S. C., on the twentieth day from service of this summons, exclusive of the day of service, at 10 o'clock a. m., to answer the said complaint, or judgment will be given against you by default. Dated Greenville, S. C., Dec. 18, A. D. 1893. F. B. McBee, Trial Justice. [Seal.] J. A. McCullough, Plff.'s Atty." On January 9, 1894, the plaintiff appeared before F. B. McBee, trial justice; and, after hearing his testimony, the trial justice indorsed upon the said summons the following: "I find for the plaintiff, against the defendants, H. P. Moore & Co., the sum of sixty dollars, this 9th day of January, 1894, F. B. McBee, T. J." There was no affidavit made or filed in behalf of the plaintiff showing that the defendants had not served any answer or demurrer. On January 10, 1894, the defendants appeared before said trial justice, and made an affidavit, which, among other things, alleged that, when the summons was served upon them, they, in the presence of the constable, made a calculation as to the time of trial, and, by some mistake or in-

advertence, estimated that it would be on January 10, 1894; and on said day they appeared for trial, but found that judgment had been entered against them. Thereupon the trial justice, the plaintiff's attorney being present, made an order that the judgment by default be set aside, and a new trial awarded. Plaintiff appealed to the circuit court, on the ground that said trial justice had no authority of law to set aside said judgment, which appeal was sustained. Defendants appealed to this court from the order of the circuit judge.

There is a jurisdictional defect apparent upon the face of the proceedings herein which renders it unnecessary to decide the other questions herein. This jurisdictional defect may be objected to at any time, as shown by the case of Lowry v. Thompson, 25 S. C. 416, where the objection was raised for the first time in the case by the supreme court. Subdivision 16 of section 88 of the Code, as amended by the act of December 22, 1891, reads as follows: "When twenty-five or more dollars is demanded, the complaint shall be served on the defendant not less than twenty days; and where less than that sum is demanded, not less than five days before the day therein fixed for trial," etc. Subdivision 12 of section 71 of the Code, which was construed in the case of Simmons v. Cochran, 29 S. C. 31, 6 S. E. 859, among other things, provides: "And the said trial justice shall at the same time issue a summons, with a copy of the undertaking, directed to the defendant, and requiring him to appear before the said trial justice at a time and place to be therein specified, and not more than twenty days from the date thereof, to answer the complaint of said plaintiff." Subdivision 16 of section 88 provides for the service of the summons not less than 20 days before the day therein fixed for the trial; while subdivision 12 of section 71 of the Code provides that the summons shall be directed to the defendant requiring him to appear at a time and place to be therein specified, and not more than 20 days from the date thereof; but the principle is the same in both cases. In the case of Simmons v. Cochran, *supra*, the court says: "Did the trial justice have jurisdiction? Is the first question. The Code provides in such cases that the trial justice shall issue a summons directed to the defendant requiring him to appear and answer at a time and place to be therein specified, and not more than 20 days from the date thereof. It appears that both of the trial justices failed to observe this provision of the Code. The time fixed in the summons of each was beyond twenty days from the date of issue. This appears on the face of the proceedings. Why the general assembly thought proper to enact such an unqualified requirement in such cases is not for this court to consider. It is so written in the statute book, and the language seems imperative,—not more than

twenty days.' The summons is the paper which gives jurisdiction to the court over the person of the party brought in; and where the law has provided a special mode or character of said summons, either as to service, form, or otherwise, involuntary jurisdiction cannot be acquired without a compliance with said law. And especially is this so in all statutory proceedings and remedies. If a trial justice had the right to disregard the act as to the fixed time in the summons, for a day, or for three days, as in the summons here, why could he not also for a month or a year? Who could interfere with his discretion? True, this seems a small matter in the case before us; but it is important that the powers of law and requirements of the statutes in reference to the administration of the law should be observed. This is best for all in the long run, although hardships may sometimes occur by a strict adherence to such requirements." The defendants were entitled to full 20 days from the time of service of the complaint till the day therein fixed for trial; and, as they were required to appear on the twentieth day from the service thereof, the time was shorter than that required by law. The appearance of the defendants was not a waiver of this jurisdictional defect, as they did not appear until after the plaintiff had recovered judgment. The judgment of this court is that the order of the circuit court be reversed, and that the proceedings herein be dismissed for want of jurisdiction, without prejudice as to the merits of the claim.

(43 S. C. 200)

#### STATE v. RICE.

(Supreme Court of South Carolina. Feb. 20, 1895.)

#### REMOVAL OF MORTGAGED PROPERTY—EVIDENCE— WAIVER OF OBJECTIONS.

1. In a prosecution for disposing of mortgaged property it is error, in the absence of other evidence, to hold that a paper reciting that defendant, in consideration of certain money "advanced," has bargained and sold to M. certain property, to be delivered on demand, is a mortgage.

2. Error in admitting a paper as a mortgage against defendant's objection is not waived by a subsequent request by defendant for an instruction based on the theory that the paper was a mortgage.

3. Under Cr. St. § 277 (2 Rev. St. 1893, p. 356), prohibiting the disposal of mortgaged property, the mere act of taking the property beyond the limits of the state, irrespective of the intent with which the act was done, does not constitute a disposal of the property.

Appeal from general sessions circuit court of Barnwell county; D. A. Townsend, Judge.

H. W. Rice, convicted of selling personal property covered by a lien, appeals. Reversed.

Patterson & Holman, for appellant. Mr. Bellinger, for the State.

McIVER, C. J. Under an indictment for selling and disposing of certain personal

property, covered by an alleged lien, in violation of section 277 of the Criminal Statutes of South Carolina (2 Rev. St. 1893, p. 356), the defendant was convicted; and from the judgment rendered he appealed to this court, upon the several grounds which will be hereinafter noticed. The paper claimed to constitute the lien above referred to is in the following form: "The State of South Carolina, County of Barnwell. Know all men by these presents, that I, H. W. Rice, of the said county, in consideration of the sum of two hundred and fifty dollars to me advanced in cash by H. J. Moody, of Barnwell county, said state, have bargained and sold unto the said H. J. Moody the following personal property: One gray mare, named Maud; one large gray horse, named Paul, \* \* \*—now in my possession, and which I promise to deliver, on demand, to H. J. Moody." When this paper was offered in evidence by the prosecution, claiming it to be a mortgage, the defendant objected on the ground that the paper was not a mortgage or other lien contemplated by the statute under which defendant was indicted, but was an absolute bill of sale. The circuit judge overruled the objection, holding the paper to be a mortgage, to which ruling the defendant duly excepted.

The defendant's grounds of appeal are as follows: (1) Because of error in admitting the paper claimed to be a mortgage in evidence, and in holding the same to be a mortgage. (2) Because of error in refusing to charge defendant's first request, which was as follows: "The jury are instructed that, if the property mentioned in the indictment was sold or disposed of in the state of Georgia, then the defendant must be acquitted, as the crime contemplated by our statute was not committed in this state." (3) Because of error in refusing to charge defendant's second request, which was as follows: "The jury are instructed that the payment on the bill of sale herein waived the forfeiture, and the defendant must be acquitted, the same having effect to discharge the lien." (4) Because of error in charging the jury "that if the defendant put the said property out of the reach of the said Moody by carrying the same out of the state, or otherwise, that then the offense would be complete; such act not necessarily being a sale or disposition, as mentioned in the statute." In reference to this last ground of appeal, the circuit judge, in settling the case, makes these remarks: "I notice nothing wrong, except the last sentence of the fourth and last ground of appeal. The objectionable words are these: 'Such act not necessarily being a sale or disposition, as mentioned in the statute.' This would convey just the opposite of what I did say. I charged the jury that if he (Rice) put the said property out of the reach of Moody by carrying the same out of the state, or otherwise, the offense would be complete;

that would be a disposition such as was mentioned in the statute."

The first exception presents what we regard as the controlling question in the case, —whether there was error in holding the paper above copied to be a mortgage, and receiving it in evidence as such. This exception is well taken. The paper in question presents all the features of an absolute bill of sale, not those of a mortgage. It purports, by its terms, to be an absolute transfer of the property specified, at a price named, to be delivered whenever called for. The only word used in the paper which would ever tend to convey the idea that the property transferred was intended as a security is the term "advanced," and that is simply not sufficient, of itself, to convert an absolute transfer of property into a mere security, as that word may well be construed to mean an acknowledgment of the payment in cash of the price of the property sold, in conformity with the other terms of the paper. It is true that in a proper proceeding, and under proper proofs, before an appropriate jurisdiction, such a paper might be adjudged to be a mortgage, but the court of sessions is certainly not the appropriate jurisdiction for that purpose. Besides, it does not appear that any evidence was introduced, or even offered, tending to show that the paper, though in form an absolute bill of sale, was really intended as a mere security, even if such evidence would have been competent before the court of sessions.

The position taken by the solicitor, that the appellant has, by the terms of his third exception, conceded the paper in question to be a lien, and is now estopped from disputing the same, cannot be sustained. The third exception was taken after the ruling was made by the circuit judge that such paper was a mortgage, and, as such, competent evidence in the case, and was manifestly designed to meet such ruling, in case it should be sustained; and it cannot, therefore, operate to the prejudice of appellant. The first exception must therefore be sustained; and, though this would be conclusive of the case, we will not decline to consider the other exceptions.

The second and fourth exceptions both relate to the same subject, and may therefore be considered together. The mere fact that the property in question was carried by the defendant out of the state, and sold and disposed of in the state of Georgia, would not necessarily show that the offense was committed beyond the jurisdiction of this state. The statute forbids, not only the sale, but also the disposal, of property covered by a lien; and therefore, while a sale in the state of Georgia would not constitute an offense of which the courts of this state could take jurisdiction, yet the carrying of such property beyond the limits of the state might or might not, according to circumstances, constitute such a disposition of the property as

would render one amenable to the provisions of the statute. For example, if a citizen of this state simply rides or drives a horse covered by a mortgage across the state line, that, of itself, would certainly not subject him to the penalties of the statute; but, if he takes such horse out of the state for the purpose of putting the animal beyond the reach of the mortgagee, then, clearly, he would be liable to indictment under the statute. And possibly, if, without any such purpose, the effect of his taking the mortgaged property beyond the jurisdiction should prove a defeat of the lien, he might still be liable. It is true that this court has held in the case of *State v. Reeder*, 36 S. C. 497, 15 S. E. 544, that, where a person makes a sale of property covered by a lien, the motive or intent of such sale is an immaterial inquiry, for there the act itself is sufficient to evince an intention to place the property beyond the reach of the lienor; but, where the act charged is a disposition of mortgaged property by taking it beyond the limits of the state, then it seems to us that such act does not necessarily evince an intention to place the property beyond the reach of the lienor, and hence an inquiry into the purpose and effect of such act does become pertinent.

The only remaining exception is the third, which, under the view we have taken of the first exception, presents no material question, and would not be further noticed, except for the purpose of correcting a misapprehension which seems to have arisen in regard to the effect of a former decision of this court, in the case of *Summer v. Kelly*, 38 S. C. 507, 17 S. E. 364. That case does not decide that, where a partial payment on a mortgage debt is accepted by the mortgagee, it operates as a waiver of the forfeiture (as it is incorrectly termed), for no such question was there presented; but the question there presented is thus distinctly stated by the justice who prepared the opinion in that case: "Second. If payments of money arising from sale of mortgaged property by mortgagor be made to mortgagee, after a breach of the condition of the mortgage, will such payment, *if in full payment of debt secured by mortgage* [italics mine], cancel such debt, and revert the title of mortgaged property in the mortgagors?" That was the question presented by the evidence, and by the concurrent finding of the referee and the circuit judge, for they both found, as matter of fact, that the whole amount of the mortgage debt had been paid in full; and hence no question as to the effect of a partial payment of the mortgage debt, after condition broken, did arise, or could have arisen, in that case. There is therefore no warrant for supposing that the case of *Summers v. Kelly* decided that where the mortgagee of personal property accepted a partial payment on the mortgage debt, after condition broken, such acceptance operated as a waiver of the forfeiture (as it is called), and reverted the title

to the mortgaged property in the mortgagor. All that the case can properly be regarded as having decided is that where the mortgage debt has been fully paid and satisfied, even after condition broken, the legal title to the mortgaged property is thereby re-vested in the mortgagor. It is true that some of the language contained in the quotation made in that case from Hermann on Chattel Mortgages would seem to countenance the idea that the same effect would follow from a partial payment accepted by the mortgagee after condition broken, but the language italicized in that quotation manifestly shows that such authority was cited for the purpose only of showing the effect of a payment in full. The judgment of this court is that the judgment of the circuit be reversed, and the case remanded to that court for a new trial.

(43 S. C. 123)

STATE v. JOHNSON et al.

(Supreme Court of South Carolina. Feb. 18, 1895.)

CRIMINAL LAW—WAIVER OF OBJECTIONS—APPEAL—AGGRAVATED ASSAULT—SECRET SOCIETIES—EVIDENCE OF.

1. An objection that a criminal case was tried in the absence of the stenographer, the trial judge taking the notes, cannot be raised for the first time on appeal.

2. On trial of several persons charged with riot and assault and battery, the assault consisting of taking the prosecuting witness to a woods and whipping him, the state may show that defendants were members of a secret society.

3. Statements of a prosecuting attorney, not objected to on the trial, will not be considered on appeal.

4. The prosecuting attorney asked a witness for the state whether he had seen the defendant and the prosecuting witness together at a certain time, and had heard a conversation between them. He answered, "Yes," and that he had heard the prosecuting witness persuading defendant to go to a certain place. The prosecuting attorney then asked leave to lead the witness, as he was an unwilling witness, and was allowed to ask him whether he did not go into his (prosecuting attorney's) office, and state that he heard defendant beg the prosecuting witness to go to the place testified to, and the witness answered that that was the fact. *Held*, that defendant was not prejudiced by the leading question.

Appeal from general sessions circuit court of Barnwell county; D. A. Townsend, Judge.

Alexander Johnson and six others, convicted of riot and assault and battery, appeal. Affirmed.

James E. Davis, for appellants. Mr. Bellinger, for the State.

POPE, J. The seven appellants were tried in the court of general sessions for Barnwell county, in this state, before his honor, Judge Townsend, and a jury, at the July term, 1894, on the charge of riot, and assault and battery of a high and aggravated nature. The verdict was guilty, and, after judgment pronounced thereon, they appealed on the following grounds: (1) Because it was error to

order the case for trial in the absence of the stenographer. (2) Because it was error to allow the prosecuting witness to testify that defendants belong to a secret society, and to the name of the same. (3) Because it was error to allow the solicitor to state in the presence of the jury that Percy Williams, a witness for the state, had deceived and misled him, and that he (the solicitor) wished to cross-examine him as to contradicting statements. (4) Because the court erred in allowing the solicitor to lead the said witness, and in allowing said witness to answer over defendants' objections. (5) In allowing the state to introduce evidence as to defendants' connection with and concealing a certain buggy, and in allowing the testimony as to who held mortgages over the same.

We will pass upon these exceptions in their order.

The first exception suggests error in the circuit judge "in ordering on the trial in the absence of the stenographer." The "case" discloses the fact that the absence of the stenographer was owing to the sickness of that official, and that "the trial began and terminated without objection as to the absence of the stenographer, the presiding judge taking notes." Thus it is made clear that the defendants made no request of the circuit judge, and that the circuit judge made no order, touching the absence of the stenographer. Such being the case, especially in view of the fact that all this was done without any objection from the defendants, we do not feel justified in interfering, and this exception must be overruled.

The second exception raises the question as to the competency of the testimony offered by the prosecuting witness that the defendants were members of a secret society, giving the name of such society. We are not inclined to regard this testimony as incompetent in this case. The defendants were being tried for riot as well as aggravated assault and battery. In the light of the very definition of "riot," importing, as it does, a combination or "consent of three or more persons to mutually assist each other, against any one who shall oppose them, in some enterprise of a private nature, with force and violence, against the peace, \* \* \* whether the act even, of itself, be lawful or unlawful, provided they proceeded to execute the thing intended" (State v. Cole, 2 McCord, 119), the testimony complained of was competent. The facts developed at the trial were these: One Nimmons, with the defendants, were members of a secret society. For some cause Nimmons was expelled from the membership. A member in good standing, we are to presume, of the society, bought a buggy from one Price partly on a credit, and to secure the credit portion mortgaged the buggy to Price; but this member who purchased the buggy borrowed \$20 from the secret society, leaving the buggy in the hands of defendant Wroton, as president, in pledge. Wroton,



knowing of the mortgage to Price, secreted the buggy, its owner having absconded. Price paid Nimmons \$5 to tell where the buggy was secreted, and, acting upon this information, recovered the buggy. Wroton then said the secret society would pay \$20 to learn who had informed Price. He got the information that Nimmons was the informant. Shortly after getting the information, Wroton induced Nimmons to go with him at night to a meeting of the society, and while going to the meeting, in passing through the woods, they were met by the other defendants, who tied Nimmons to a tree, and severely whipped him. This exception must be overruled.

The third exception complains that the solicitor was allowed to make a statement before the jury as therein set forth. In the "case" we do not find that the defendants objected to the statement made by the solicitor. The only objection made by them in this connection was when the solicitor proceeded to cross-examine his own witness. Such being the facts, no error was committed by the circuit judge that we can review. While, therefore, we overrule this objection, we apprehend that the object of the defendants will be fully met when we consider the fourth exception.

The fourth exception presents the only serious question involved in the appeal. It seems that, when the solicitor was examining one Percy Williams as a state witness, such witness gave an answer to his question that was unexpected, because in its effect it was totally at variance with the information voluntarily given by such witness to the solicitor before the trial. The witness was asked by the solicitor if he saw Richmond Wroton and Nimmons together the night the latter was so cruelly beaten, and he answered, "Yes." He was then asked if he heard any conversation between them. His reply was: "Yes; I heard *Nimmons persuading Wroton to go with him to the Debating Club.*" (Italics ours.) It was at this junction the solicitor asked the judge "to allow him to lead the witness, as he was an unwilling witness." To this the judge replied that the witness did not appear to be an unwilling witness. But afterwards, upon the solicitor explaining to the court that this witness had voluntarily given him information at variance with his answer to his last question, the court decided that the witness was a hostile witness. From this, then, there is no appeal. The solicitor then asked the witness: "Did you not voluntarily come into my office, and in the presence of Thomas Nimmons yesterday tell me that you heard Wroton begging Nimmons to go to the Debating Club with him?" To this question the defendants objected. There is no doubt that the rule in this state is that when a witness is offered by a plaintiff or defendant, as the case may be, it is not allowed to the party so offering such witness to impeach his credibility either by testimony as to his general character, or that he made

statements inconsistent with those made by him on the stand. *Banskett v. Keitt*, 22 S. C. 199, and cases there cited. But we do not think this exception relates to a matter so serious. This really was an effort on the part of the state's attorney to allow a witness to correct an honest mistake. No doubt the witness had, from "stage fright," changed the name of Nimmons for Wroton, and vice versa. In other words, he meant to say that he had heard Wroton begging Nimmons to go with him that night to the Debating Club, for, as soon the solicitor called his attention to what he had voluntarily told him the day before, the witness admitted it. While we sustain the exception in this instance for the reasons given, we desire to state that we still adhere to the rule laid down in *Banskett v. Keitt*, supra, and the cases there cited.

So far as the fifth exception is concerned, it is disposed of adversely to the appellants by what we have held in overruling the second exception herein. It is the judgment of this court that the judgment of the circuit court be affirmed.

(43 S. C. 127)

#### STATE v. CORLEY.

(Supreme Court of South Carolina. Feb. 18, 1895.)

#### CHALLENGE TO JUROR—HOMICIDE—ADMISSIONS—SELF-DEFENSE.

1. The state may exercise its right of peremptory challenge at any time before the prisoner's acceptance of the juror.

2. The defendant in a murder case confessed to a state's witness, who afterwards denied all knowledge of the crime. On the trial the witness testified to defendant's admissions, and explained that he said nothing about them because defendant had requested him not to do so, and when on the stand defendant virtually admitted such request. *Held*, that defendant was not prejudiced by the explanation of the witness.

3. Where deceased was driving in a deep cut, when defendant, who was upon one of the banks above, fired upon him, as he claimed, in self-defense, it was proper to refuse a request to charge as to self-defense which omitted the element of necessity to take the deceased's life.

Appeal from general sessions circuit court of Aiken county; J. J. Norton, Judge.

Jesse Corley, convicted of murder, appeals. Affirmed.

Henderson Bros. and John R. Cloy, for appellant. G. Duncan Bellinger and O. C. Jordan, for the State.

POPE, J. The defendant came on to be tried before his honor, Judge Norton, and a jury, at the April term, 1894, of the court of general sessions for Aiken county, in this state, for the crime of murder. The verdict was guilty, with recommendation to the mercy of the court. Thereafter judgment was duly entered. He now appeals to this court on four grounds, which will now be considered in their order.

"(1) That his honor erred, it is submitted, in permitting the state's objection to the jury-

man W. H. Baker, after he had been examined on his *voir dire*, and presented to the prisoner for acceptance or rejection, and in ruling that it is law that the state can exercise its right of peremptory challenge at any time, whereas it is submitted that it is the practice and the law that the state must exercise its right of peremptory challenge before the juryman is presented to the prisoner." The case discloses that, before the prisoner signified by his answer either an acceptance or rejection of the juror, the solicitor objected to such juror. The practice and the law governing this particular question were fully considered by this court in the case of *State v. Haines*, 36 S. C. 509, 15 S. E. 555; and it was then decided: "In the practice as it obtains at the bar in this state, the state's attorney is allowed time to speak until the prisoner has spoken." Thus, it is manifest that the first ground of appeal herein is untenable.

"(2) That his honor erred, it is submitted, in permitting the witness Morgan Holly, a witness produced on the part of the state, after testifying what the prisoner told him concerning the homicide, to state that he did not state that conversation with the defendant to others, and further permitting him to give his reasons why he did not state said conversation to others, in that it is submitted that it was illegal to permit said witness to give his reasons which controlled him, as the same amounted to an opinion on the conduct of the prisoner, and had a tendency to mislead the jury." The case discloses that the witness John Morgan Holly was informed by the prisoner, a short time after he had fired the fatal shot, of what he had done, but at the same time had requested the witness not to divulge what he had told him; that the witness, in the same evening, in the presence of the defendant, deliberately denied the truth when questioned as to who had been shot, by stating that he did not know, and, in addition, he preserved this dreadful secret for some time thereafter. Also, the case discloses that, when the defendant was placed upon the stand as a witness, he admitted firing upon his brother, and that he, on the same evening, disclosed to the witness Morgan Holly all he had done in the matter of the shooting, and virtually admitted that he had requested such witness to keep his secret. Under these circumstances, we cannot see what possible effect injurious to the prisoner would result from Morgan Holly testifying that the reason he did not tell the truth at first was that the defendant had requested him not to do so, when the defendant admitted he had made such request. But defendant's counsel very ingeniously suggests that, when the witness Holly suggests that he might also have been influenced by some doubt as to his own safety if he did not tell what defendant told him as a secret, such conduct of the prisoner put him in fear, and such an opinion might mislead the jury. As to this

suggestion, we can see no reason why the witness should not be allowed to explain his conduct. See *State v. Pulley*, 63 N. C. 8. And in this instance, if it was error in the circuit judge to admit the testimony, it was harmless error. This exception must be overruled.

We will next consider the third and fourth exceptions together, as they treat of the fourth request to charge submitted by the defendant: "(3) That his honor erred, it is submitted, in refusing to charge the defendant's fourth request to charge, which was as follows: 'That if the jury believe from the evidence that the meeting of the deceased and the defendant was not premeditated by the defendant, but an unexpected meeting, and they further believe the deceased was armed and made violent threats towards the defendant, known to him, then the jury is charged that the defendant was not bound to retreat and run away, but had the right to stand his ground and protect himself,'—in that it is submitted that the said request to charge is a correct proposition of law. (4) That, it is submitted, his honor erred in remarking to the jury concerning the aforesaid request to charge, as follows: 'I charge you that, if he had any other probable means of escape than that of taking the life of his brother, he was bound to adopt that means. The law does not permit of the taking of human life except from necessity, and it does require the retreating of a man under all circumstances before the taking the life of an assailant, unless it be in his own house, and unless, by retreating, he has no probable means of escape,'—whereas it is submitted that such is not the law." The right of self-defense is founded in nature, and in applying the principle of law to ascertain, in cases of homicide, whether such defense may be successfully invoked, the nicest care must be taken. On the one hand, it will not do to relax these rules, lest society be placed at the mercy of the violent and bloody-minded. Then, on the other hand, too harsh requirements must not be laid down, lest this defense shall be practically denied the citizen. We have read the charge of the presiding judge, and candor compels us to say that he has fairly, clearly, and faithfully expounded the law on this subject. The defendant had the right to have the circuit judge pass upon the proprieties of the law he submitted to him in this fourth request to charge. The circuit judge has responded, directly saying he would not charge the request, in the form proposed, as sound law, and he pointed out what, in his judgment, was needed to make it good law. Let us, then, consider this grave matter. We say grave matter, because it is the last chance for a new trial left to the defendant by the case. It appears that Henry Corley and Jesse Corley were brothers. They owned farms near each other. Their lives were not clean. On at least three occasions they had serious difficulties, the

(43 S. C. 187)

## McLAURIN v. HODGES et al.

(Supreme Court of South Carolina. Feb. 19, 1895.)

## MORTGAGE FORECLOSURE — DEFENSE OF USURY — RIGHT TO JURY TRIAL — INTERLOCUTORY ORDER — APPEAL.

1. In a suit to foreclose a mortgage, where defendant set up usury and a counterclaim for usurious interest, an order refusing a reference, and requiring the issues of usury and counterclaim to be tried by a jury, though interlocutory, is appealable.

2. In an action to foreclose a mortgage, where defendant alleges usury, and sets up a counterclaim for usurious interest, the issue is not one "of fact in an action for the recovery of money only," within the meaning of Code Civ. Proc. § 274, providing that such an issue must be tried by a jury.

3. A defense to an equitable action, to give the defendant the right to a jury trial, must exist separately from plaintiff's cause of action.

Appeal from common pleas circuit court of Marlboro county; J. J. Norton, Judge.

Action by Lauchlin B. McLaurin against Charlotte I. Hodges and John L. Hodges to foreclose a mortgage. Counterclaim by defendants for usurious interest. From an order denying a motion for a reference to a referee, and one placing the cause on calendar for trial by jury, plaintiff appeals. Reversed.

Hudson & Covington, for appellant. Newton & Shipp, for respondents.

one with the other. Twice Henry cut with a knife and shot with a pistol his brother Jesse. The cause of the deadly feud between them is involved in some doubt. A suggestion of a deadly insult and injury done to the honor of Henry by his brother Jesse was made at the trial. Nothing short of this could account for the dreadful conduct of Henry to Jesse. This would seem to explain the seeming want of spirit in Jesse, for "conscience makes cowards of us all." There can be no doubt but that both Henry and Jesse had each uttered dreadful threats towards each other, and that each had notice of the threats of each other. On Saturday, the 16th day of September, 1893, Henry Corley and a Mr. Weathersbee, in the morning, went to the city of Augusta, Ga., and, after spending the day in that city, returned late in the afternoon in the direction of their homes, in Aiken county; and, when about 1½ miles from Augusta, Jesse Corley fired upon them from a bank, about 12 or 14 feet higher than the roadway, mortally wounding Henry Corley, and wounding Mr. Weathersbee, while the two were quietly riding together in the latter's buggy. Just here the state and the defendant separate. The state contends that Jesse Corley waylaid his brother, and fired from behind a screen made by bushes, thus taking his life; in other words, that he cowardly assassinated his brother. And defendant contends that unexpectedly he met his brother, and, when he saw his brother Henry reach down for what he supposed was a pistol, remembering his dreadful threats and former violence, he fired upon him, and took his life, in self-defense. There was no denial that the gun was fired by Jesse while Henry and Mr. Weathersbee were in a deep cut. Hence the defendant's request. An analysis of that request to charge by the defendant shows that it is wanting in the element of necessity to take life in the conduct of Jesse. Was this not fatal error? We think it was. This court, in the case of *State v. Trammell*, 40 S. C. 333, 18 S. E. 940, held: "Clearly, one of the foundation rocks upon which the plea of self-defense must be bottomed is that it was necessary for the accused to take the life of his fellow man to protect his own, or to protect him from serious bodily harm. *State v. Wyse*, 33 S. C. 594, 12 S. E. 556; *State v. Merriman*, 84 S. C. 40, 12 S. E. 619." Again, in the same case, it was said: "The circuit judge was right in stating that, under the laws of this state, if it was necessary to retreat, to avoid shedding human blood, retreat should be made." Such being the case, the exceptions must be overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed, and that the case be remanded to the court of general sessions for Aiken county, in order that a new day may be assigned for the execution of the sentence heretofore imposed. Let the remittitur in this case be sent down by the clerk of this court forthwith.

POPE, J. On 1st December, 1881, the defendant Charlotte I. Hodges made and delivered her bond, of that date, in the penalty of \$6,000, conditioned to pay \$3,000, 12 months thereafter, with interest from date until fully paid, and payable annually, to the plaintiff; and at the same time, in order to secure the payment of said bond, she executed to him a mortgage of a tract of land in Marlboro county, in this state, said to contain 200 acres, more or less. By law, said \$3,000 bore 7 per cent. interest. On the 27th February, 1884, we suppose in consideration of further time upon said bond, said defendant agreed in writing to pay interest thereon from the 1st day of December, 1883, at 10 per cent. per annum. Interest was fully paid until and up to 1st December, 1883. On the 19th February, 1885, \$100 was paid; on the 2d March, 1885, \$200 was paid; on the 5th February, 1887, \$330 was paid; on the 2d February, 1888, \$340 was paid; on the 17th February, 1890, \$300 was paid; on the 22d of April, 1891, \$300 was paid; on the 31st May, 1892, \$300 was paid; and on the 15th March, 1893, \$300 was paid; and no other or further payments were made thereon. The plaintiff, at some time prior to 28th September, 1894, began this action against the said Charlotte I. Hodges and John L. Hodges, as defendants. His complaint recites the foregoing facts; alleges a breach of the conditions, the amount due on the bond, that John L. Hodges is in possession of the land as agent of his codefendant; and seeks a foreclosure of the

mortgage. To this complaint the defendant Charlotte I. Hodges alone makes answer. While she admits the execution of the bond and mortgage, as well as the payment due thereon, she sets up two defenses. In the first, she alleges that the contract was tainted with usury, in this: That, although \$3,000 is nominated in the condition of the bond, yet that on the 1st December, 1881, she only received \$2,910 in money; and that when she paid \$210 on 1st December, 1882, and the interest, which was 7 per cent. on the \$3,000, yet, in fact, by the payment of the \$90 on 1st December, 1881, and the \$210 paid on 1st December, 1882, she actually paid 10 per cent. interest, when the law only allowed 7 per cent.; and that, by reason of usury, the plaintiff is only, under the law, entitled to recover the principal loaned,—\$2,910,—without any interest thereon. As her second defense, she alleges that the plaintiff is indebted to her, as by a counterclaim, in the sum of \$5,540; that, last amount being double the whole interest, to wit, \$2,770, she had paid the plaintiff as usurious interest.

The action was placed upon calendar 2, and on being called for a hearing before his honor, Judge Norton, the plaintiff asked for the usual order of reference in a cause on the equity side of the court. To this, however, the defendant objected, insisting that the action should be placed upon calendar 1, where her defenses of usury and counterclaim could be tried by a jury, urging this both as a matter of discretion in the presiding judge and as a matter of right demandable by the defendant. After argument, the presiding judge passed the following order: "This action is one in usual form to foreclose a mortgage upon real estate, and the case was called for a hearing on calendar 2, upon which it had been duly docketed. The jurors for the term had been discharged. After reading of the pleadings, counsel moved for an order of reference in the form hereto appended. This motion was resisted by counsel for the defendant, who claimed that the pleadings raise an issue of fact for trial by jury, demandable as a matter of right. Counsel for the plaintiff contended that the action presents a case in equity, triable by the court, and should be referred to a referee, as is usual in such cases. The defense is usury and to recover double the amount of the usurious interest. I regard this as a statutory action by defendant against the plaintiff for the recovery of money only, and that the defendant Charlotte I. Hodges has a right to demand that this counterclaim and plea of usury be tried by a jury. Had I the discretion to grant or refuse the application for a trial by jury, I would refuse it, and sign the order of reference—First, because the defendants, by counsel, had not conformed to rule 28 of the circuit court; and, secondly, because, as a matter of discretion, I would prefer to have the issue tried by the court upon the report of a referee, as a case

in equity. The motion for a reference is therefore refused, and the case is ordered to be placed on calendar 1, for trial by jury of the pleas of usury and counterclaim." From this order the plaintiff has appealed, upon these grounds: (1) Because it is respectfully submitted that his honor erred in holding that the defenses of usury and counterclaim interposed to the plaintiff's action of foreclosure by the defendant Charlotte I. Hodges raise issues which she has a right to have tried by a jury, against the protest of plaintiff, and that trial by jury of the defenses of usury and counterclaim in this action is demandable as a matter of right. (2) Because it is respectfully submitted that the action is one on the equity side of the court, the relief demanded is equitable, and the issues of fact raised in the answer are properly triable by the court, which has jurisdiction either to try the issues in open court or to order a reference, or to ask the aid of a jury, according to the discretion of the presiding judge, as in all cases in equity in which issues of fact may arise. (3) Because it was discretionary in the presiding judge to order a reference, and he erred in holding that he had no such discretion, and in ordering a trial by jury, as being demandable as a matter of right.

We will now consider the questions suggested by the appellant, and we do not know a simpler form in which these questions may be stated than that suggested by the appellant, namely: (1) Is the order of Judge Norton appealable? (2) Has the defendant the right to have a jury trial of her defenses?

We find no difficulty in reaching the conclusion that the order of Judge Norton, from which this appeal is taken, was of such a nature as warranted an appeal therefrom, although it was an interlocutory order. As was said in *Capell v. Moses*, 36 S. C. 562, 13 S. E. 711: "This [appeal from an interlocutory order] is not usual, and yet in some exceptional cases it is admitted. The distinction seems to arise in those matters in which the circuit judge commits some error of law that will prejudice the appellant in his trial, and which error goes to the rest of the matter." *Sease v. Dobson*, 34 S. C. 353, 13 S. E. 530; *Bank v. Stelling*, 32 S. C. 102, 10 S. E. 766. Certainly, if the appellant was entitled to have the trial here heard by a circuit judge sitting as a chancellor, it was serious error to order a part of the issues tried by a jury on the demand of right by the defendant.

The second question is not free from difficulty, and has given us occasion for serious reflection. Our Code of Civil Procedure, at section 274, provides: " \* \* \* An issue of fact in an action for the recovery of money only, or of specific real or personal property, must be tried by a jury, unless a jury trial be waived as provided in section 288, or a reference be ordered." No waiver of a jury trial occurred here, nor was a reference or-

dered, so that we are face to face with the question: "Is this an issue of fact in an action for the recovery of money only?" Prior to 1877, contracts between parties as to lending money, and providing what interest should accrue thereon, were entirely in the hands of the parties; but in 1877 (16 St. at Large, 325) this law was changed, so that 7 per cent. alone could be recovered as interest, and, if more than this was contracted for, the whole interest was forfeited. However, in 1882 (18 St. at Large, 35), the law was again changed, allowing parties to contract for interest up to 10 per cent., provided it was reduced to writing; and, by this change in the law so made, not only was the interest to be forfeited, but it went further, and provided that, if more than the legal interest was collected, the payer of such excess of interest beyond the legal rate could recover in an action therefor, or by way of counterclaim to an action to recover the principal sum, twice the amount of such interest paid over and above the legal rate. All these matters were carefully considered and expounded in the opinion of this court in *Hardin v. Trimmer*, 27 S. C. 110, 3 S. E. 46, when the present chief justice pointed out the marked changes in our law on this subject under the act of 1882 (18 St. at Large, 35). This act has now become section 1390 of the Revised Statutes of this state. In the case cited above, the chief justice established, by a chain of reasoning irrefutable: First, that it was illegal to charge more than the rate of interest allowed by our statutes, and the mere agreement to charge such excess rendered the agreement illegal, and all that the lender could recover under such contract was the principal loaned, but without any interest; and, secondly, if more than legal interest was received by the lender, at that moment the excess of such interest over and beyond the legal rate was recoverable by him who paid such excess to twice its amount, either in an action therefor or by a counterclaim. Now, in the case at bar the plaintiff seeks to recover, by a foreclosure of his mortgage upon land, his debt and interest. The plaintiff cannot recover anything from such foreclosure except the principal of his debt, and no interest if usurious; and he cannot recover this principal if the amount of excess over the legal rate of interest which has already been paid to him by the defendant, when multiplied by two, equals the principal of plaintiff's debt. It seems to us that these two defenses of the defendant are so interwoven in the plaintiff's mortgage, which is but a security to the debt, and cannot exist without such debt, that, if they subsist, they make up a part of the very entity of the action. That questions of fact arise in equity causes, and have to be decided there, is notorious. And we cannot see why the defendant can demand, as a legal right, to have them tried apart from the plaintiff's action, which is clearly equitable in its value.

v.20s.E.no.25—63

In the case of *Capell v. Moses*, supra, this court recognized the right of the defendant, Moses, to have his question of title tried before a jury, because it was no part of plaintiff's cause of action. If Moses had title, Capell had no equitable cause of action whatever. Not so, however, in the case at bar; the defenses set up by the defendant enter into the plaintiff's equitable cause of action as part of the very transaction. In *Hughes v. Kirkpatrick*, 37 S. C. 169, 15 S. E. 912, Chief Justice McIVER remarked: "So that it is apparent that a trial by jury of any question of fact that arises in the progress of any proceeding cannot be demanded as a matter of right, but only where an issue of fact for the recovery of money only, or of specific real or personal property, arises." The principle which must enter into a defense to an equitable cause of action to give the defendant the right to demand a trial before a jury is that it exists as a separate and distinct matter from plaintiff's equitable cause of action. If it is not separate and distinct therefrom, it must for its trial be subject to the same forum in which the plaintiff's cause of action is triable. The circuit judge in this case failed to draw this distinction. He was in error, and his order must be reversed. It is the judgment of this court that the order made by the circuit judge be reversed, and the cause be remanded to the circuit court, for the trial of the whole cause in the court on its equity side.

(43 S. C. 132)

#### STATE v. PETSCH.

(Supreme Court of South Carolina. Feb. 18, 1895.)

#### HOMICIDE—DYING DECLARATIONS—EVIDENCE—INSTRUCTIONS—SELF-DEFENSE.

1. A sworn dying declaration, after stating that deceased was shot by defendant, recited that "I will state the cause and occurrence of the shooting," and then gave an account of the circumstances. *Held*, that it was not error, after striking out a statement of circumstances leading up to the difficulty, to refuse to strike out the clause, "I will state the cause and occurrence of the shooting," as irrelevant.

2. Error in admitting evidence will not be reviewed, where no exception was taken thereto.

3. The state may ask a witness who has testified if she is the wife of defendant.

4. Where, in a prosecution for murder, defendant testified as to what occurred between himself and his wife when he left his house, immediately before the homicide, the state may question the wife in regard to what then occurred.

5. Defendant, on refusing to pay a bill which deceased had several times before sent to him, sent deceased a very insulting message, which was evidently the cause of the difficulty resulting in the homicide. *Held*, that it was proper to exclude evidence as to the reason why defendant refused to pay the bill.

6. It is not reversible error to refuse to permit a witness to testify as to a matter the substance of which he has already testified to.

7. It is not error to refuse to give an in-

struction in the words of the request, providing the proposition of law is correctly given.

8. It is not error to refuse an instruction which has no bearing on the case.

9. It is not error to refuse an instruction which has already been substantially given.

10. It is not error to instruct the jury that in arriving at their verdict they are not to be influenced by any feeling of sentiment, but should apply the law as given by the court to the facts; that, if the court has erred, defendant can have the error corrected.

11. To entitle defendant to defend on the ground of self-defense, he must show that he was without fault in bringing about the difficulty, and that the circumstances led him honestly to believe that he was in imminent danger of losing his life or of sustaining great bodily injury.

Appeal from general sessions circuit court of Charleston county; I. D. Witherspoon, Judge.

Henry W. C. Petsch, convicted of manslaughter, appeals. Affirmed.

The court charged as follows:

"The prisoner at the bar, Henry W. C. Petsch, is charged by the state with the crime of murder. The state charges that he, the prisoner, Petsch, fired a pistol shot, and wounded one John F. Rickles, Jr., in this city, on the night of the 9th of April of this year, and that at the time he fired that pistol he was instigated and prompted by malice, either express or implied. The first question of fact for you to pass upon, the first issue made by this indictment between the state and the citizen, and upon which the state must establish the fact beyond a reasonable doubt, is that John F. Rickles, Jr., came to his death from a wound of a pistol fired in the hands of the prisoner at the bar. If you are satisfied on that point, then the question arises, and you are to determine from the testimony you have heard on the stand, whether the prisoner at the bar be guilty of the crime of which he stands charged or not guilty. Now, if it appeared here in evidence that the deceased came to his death by reason of a pistol-shot wound inflicted by the prisoner, and nothing more appeared, then the law would presume malice from the killing and the use of the deadly weapon. This presumption rests upon the further presumption that every sane person intends the probable consequences of his act; but whereas, in this case, the facts and circumstances attending the killing have been developed upon a judicial inquiry, then I charge you that there is no presumption of guilt in law resting upon the prisoner. On the contrary, the law presumes that he is innocent, and that presumption rests with him until it is overcome by the testimony introduced by the state on the stand, and satisfies you as triers of the fact that he is guilty as charged, beyond a reasonable, substantial doubt arising from a consideration of the testimony. I have been requested to charge you as to this reasonable doubt. The defendant's counsel ask me to charge, and I so charge you, as it is laid down in the books as authority, 'that reasonable doubt is

that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in such a condition that they are unable to say that they feel an abiding conviction, to a moral certainty, to the guilt of the accused.' Now, Mr. Foreman, the law says that this doubt, to which every prisoner is entitled when charged with a crime, must be a reasonable doubt. It must be a doubt arising from the consideration of the testimony for which the juror can conscientiously give himself a reason why he cannot sign the verdict of guilty. If, after a fair and impartial consideration of all the testimony in the case, you have such a doubt, then the state has failed to establish the guilt of the party, and your verdict should be not guilty. It must be a substantial doubt, arising from the consideration of the testimony, as distinguished from a speculative or imaginary doubt; and I can charge you safely that it must not be a doubt influenced by your sympathy for the accused, or by your prejudice against him; because the law contemplates that in the trial of this cause you, so far as you can, will divest yourselves of all feeling of human sympathy as certainly of all prejudice, and that you will be guided in reaching your verdict, whatever it may be, by your honest conviction, derived from a consideration of the testimony. Now, Mr. Foreman, killing is either unlawful, or it is justifiable, or it may be excusable. It is unnecessary for me to instruct you as to the circumstances under which the taking of human life would be justifiable. I will confine myself to instructing you as to what is unlawful killing and excusable killing. The unlawful taking of human life is either murder or manslaughter, and, Mr. Foreman, under an indictment charging a party with murder, if the evidence is sufficient to justify either of such verdicts, you can find a verdict of guilty either of murder or manslaughter. 'Murder' is the malicious taking of human life; it is nothing more or less than the evil, wicked intent to take human life. This evil, wicked intent to take human life, which is necessary to constitute the crime of murder, can be either expressed or implied. It may be expressed by the evil expression of the human lips, indicating this intent on the part of the human heart, or it may be implied where the killing takes place under such circumstances as indicate that it must have been prompted by a wicked, evil, depraved heart, devoid of social duty, and fatally bent on mischief. This evil intent must be a premeditated intent to take human life, but, whilst it is necessary for the state to show that the evil intent controlled the act of killing, it is not necessary for the state to show that that evil, malicious intent existed for any given time before the killing. But it must be there; it must prompt, actuate; it must spring from this wicked heart, and must prompt the act of killing, at the time of the killing. And

as malice is a question of intent, it is of the utmost importance that the jurors should calmly and dispassionately consider all the testimony bearing upon the fatal act, in order to discover and determine what motive prompted the act of killing at the time. Was the motive this evil intent to take human life? If so, and you are so satisfied; if you are satisfied that the deceased came to his death at the hands of the prisoner at the bar by shooting with a pistol, and that the prisoner at the bar was at the time of the shooting actuated and prompted by this evil, malicious intent to take human life,—he is in law guilty of murder, and your verdict should so find. But if you conclude that the state has failed to establish his guilt of murder beyond a reasonable doubt, then you are to go a step further, and under this indictment you are to consider and determine whether or not the state has established his guilt of manslaughter beyond a reasonable doubt. Now, what is manslaughter? Manslaughter is where the act of killing is not prompted by this evil, wicked intent to take human life, as in the case of murder, but it is distinguished from murder by the absence of malice. It is where the killing takes place under the impulse of sudden heat and passion, aroused by a lawful provocation, and under circumstances that the law will not excuse the act of killing. It is my duty to say to you, as a matter of law, and I could not say less consistent with my duty, that no words of provocation, however insulting, will justify in law the party to whom they are addressed or applied taking the law in his own hands, and committing an assault and battery; much less would it excuse the resort to a deadly weapon. I take it that it is unnecessary to say to an intelligent jury that we are not here in the administration of public justice to be actuated by feelings of sentiment. That may do very well outside of this courthouse. But we are here to see that the law which is laid down as a rule of conduct for all citizens is enforced. Whenever a party is charged with violation of law, it is my duty to give you the law. It is your duty to apply the facts to the law; and, if the state has established the guilt of the party accused beyond a reasonable doubt, you should find a verdict of guilty, and you cannot allow your judgments, according to your oaths, to be influenced by sentiment or anything of that kind.

“Mr. Foreman and gentlemen, you will regard the law as given you by the court. It is your duty to do so. If this court errs in giving you the law, the defendant is not without remedy. He has the right and privilege of having it corrected. Therefore, whenever jurors take the law otherwise than from the court, justice is not carried out according to law, and we might as well close up this courthouse as the temple of justice. Now, Mr. Foreman, has the prisoner at the bar been proven guilty beyond a reasonable doubt?

You are to consider the testimony and apply the law as I have given it to you; and, Mr. Foreman, in deciding whether or not the prisoner is guilty of murder or manslaughter, or whether or not his plea of self-defense, to which I shall refer in a moment, can avail him in this case, you are to go back to the scene as it occurred on the streets of this city on the night of the 9th of April last, and say what then and there took place. If these parties—the deceased and the accused—met, it is for you to decide under what circumstances they met. It is for you to say what motive actuated the defendant in going to where he met the deceased. It is for you to say what motive prompted the deceased to go from this store to where he met the accused. You will see the importance of weighing well all the testimony in the case, in order to ascertain the motive which prompted the person at the bar to take the life of the deceased, if you conclude that he did take the life of the deceased. I have been requested to charge you by the defendant counsel in reference to threats. I have been requested to charge you, and I do so charge you ‘that if you believe from the evidence that the deceased, Rickles, had made threats to kill the defendant, or to do him great bodily harm, and that these threats were communicated to the defendant, such threats entitled the accused to be more watchful, and to interpret the acts of the deceased more harshly, than he otherwise would have interpreted them, and these are facts for your consideration, independent of who brought on the difficulty, and whether or not the defendant had reason to apprehend danger to his life or great bodily harm.’ I so charge you, but I charge you, in connection with that request, that, if you believe that the deceased made threats against the prisoner at the bar, that would not authorize or justify in law the defendant shooting him on account of his having made threats. Whilst it is well calculated to make the party against whom the threats are made more vigilant for his own safety and security on meeting the party who made the threats, the party against whom the threats are made must wait until there has been some overt act or demonstration on the part of the party making the threats before he can resort to a deadly weapon. There must be some act or demonstration on the part of the deceased manifesting an intention to carry out the threats, before the prisoner at the bar would be justified in law in resorting to a deadly weapon. It is not for me to say what is to be the character of this demonstration; you are to judge of that, in connection with the threats and the conduct of the deceased at the time of the conflict between the parties. I have been requested to charge you with reference to the physical power of the deceased, and I do charge you, as requested, ‘that the relative size and strength of the deceased and the accused should be considered by you in deter-

mining the question whether or not the defendant had reasonable grounds to apprehend death or great bodily harm at the hands of the deceased.' I so charge you. You are to take this request in connection with all the other testimony and charge that I have given you. I have been requested to charge you as to the defendant's good character. The question of fact as to whether he has satisfied you from the evidence that he has established a good character is for you to determine. I have been requested to charge you 'that, should the jury conclude from the evidence that the defendant has borne a reputation for peaceableness, they should require a greater degree of certainty in the proof of the maliciousness attributed to him than would be requisite if the contrary were shown.' I so charge you. Every party charged with crime has a right to introduce and make proffer of his good character, that character having reference to the nature of the charge made against him, and if he does so the jurors are required to take that testimony, in connection with all the other facts of the case, in determining whether the guilt of the party has been established beyond a reasonable doubt. Whenever a party has been injured,—shot, for instance,—and he is in extremis, if he manifests an apprehension of impending death, if he expresses a consciousness that he will soon appear at the bar of his Maker, that he will soon die, then the law allows that person to make a statement of the circumstances under which he received his wound, and that is known in law as a 'dying declaration.' Why is that allowed? It is upon the presumption in law that a man who is conscious that he is soon to face his God is under the same sanction and obligation to speak the truth that a witness would be upon the stand under oath; and hence, under those circumstances, that dying declaration is competent and admissible as evidence, although it is an ex parte expression on the part of the dying man. As to the effect of it, that is a question entirely for you. I have held that a portion of this paper purporting to be the dying declaration of the deceased is admissible; it is for you to say what weight you will attach to it. As I have already indicated to you, the state assumed the burden of establishing the guilt of a party charged with crime beyond a reasonable doubt, and any man who is charged with crime in this court can fold his arms and sit still and mute, and rely upon his presumed innocence; or, if he sees proper, he can interpose what is called an affirmative defense; self-defense is an affirmative defense. The prisoner has interposed that plea in this case. Self-defense is based upon the law of necessity; it is a deference which the law makes to the instincts of self-preservation. Whenever a party comes into court, and interposes a plea of self-defense, as the defendant in this case has done, then the law says he must make out that plea; he must satisfy the jury of the truth of his

claim, not beyond a reasonable doubt, as the state is required to do upon the whole case, but he assumes the burden of establishing his plea by the preponderance or greater weight of the testimony. Now, when can a plea of self-defense avail a party? The party who interposes that plea must satisfy you, by the preponderance of the evidence, that he was without fault in bringing about the difficulty resulting in the death of the party killed. That, if the prisoner at the bar either challenged or accepted a challenge from the deceased to fight, or if he provoked the encounter which resulted in the killing of the deceased, then I charge you that the plea of self-defense cannot avail him, because the law says that in order to avail him he must be without fault in bringing about the necessary circumstances of which he complains. Not only so, he must satisfy you that he was not the aggressor in the difficulty, but that the deceased, Rickles, assaulted him, he being without any fault in provoking him, and that the nature and character of that assault upon him by Rickles was such as to lead him honestly to the conviction that he was placed in imminent peril of losing his life or of sustaining great bodily harm by such assault.

"Now, Mr. Foreman, the law does not allow any man who interposes a plea of self-defense here to say under what circumstances he will fire his pistol and take human life. As I have told you, he must be without fault in bringing about the difficulty. Then, again, the assault made upon him by the deceased must be of such a character as to lead him honestly to believe that he was in imminent peril of his life or of great bodily harm. He must not only honestly believe this, but you are to determine whether a man of ordinary reason and firmness, situated as the defendant was situated, would have been led to the same conclusion under the same circumstances. If he would have been, then the plea has been made out, and should avail the defendant. If not, then the plea has not been made out. Now, I charge you further, in reference to this plea of self-defense, that where a party is assaulted, and the party upon whom the assault is committed is without fault in bringing on the difficulty, he is not compelled to run, but he must avoid the necessity of the killing, if he can reasonably and safely do so, because the law is jealous of human life. But if the appearances to him at the time were such that he could not reasonably and safely avoid taking human life, and a man of ordinary reason and firmness would have arrived at the same conclusion, then it was not necessary for him to go any further; and I wish you to understand me on that point, that it is only incumbent on the defendant to avoid the necessity of taking human life when he can do so with safety to himself. In judging as to what motive prompted or actuated the prisoner at the bar, the



law says you must go in the light of the testimony as best you can, back to the scene where this thing occurred, and you are to judge of the motive which prompted him, and his conduct on that occasion, by the circumstances as they presented themselves to him on that occasion, and in that light it is for you to say whether or not he fired and took the life of the deceased in the exercise of the right of self-defense. If he did, and you are satisfied that he has made out his plea, then it is a good plea, and should avail him; if he has failed to make it out, then it would not avail him. The form of your verdict will be either guilty,—which will mean guilty of murder,—guilty of manslaughter, or not guilty. If you conclude that the state has not established murder, you will inquire whether he is guilty of manslaughter. If the state has failed to establish the guilt of the prisoner, either of the crime of murder or manslaughter, or if the prisoner has made out his plea of self-defense by the preponderance of the evidence, and in your judgment, under the instructions I have given you, his plea should avail him, then your verdict should be not guilty. Whatever verdict you find, sign your name as foreman."

Defendant's exceptions to the court's refusals to charge and to the charge as given were as follows:

"First. Because his honor, the presiding judge, erred in refusing the defendant's fourth request to charge, as follows: '(4) That malice imports an evil, depraved, and wicked spirit, such as is found in a heart totally devoid of social duty and fatally bent upon mischief. It also imports wickedness of intention, excluding every just cause of excuse. It gives character to the act. Without it, no killing is murder; and, if the evidence does not warrant the conclusion of malice, the jury, uninfluenced by any presumptions from the naked facts of the killing, should find the prisoner not guilty of the crime charged.' Second. Because his honor, the presiding judge, erred in refusing the defendant's sixth request to charge, as follows: '(6) That if the jury conclude from the evidence that the accused had reason to believe his antagonist ready to execute harmful intentions, to take his life, or to do him great bodily harm, he was not called upon to wait until actually struck before employing means of self-defense; nor is he now required to show that there was no other possible means of escape than to kill his assailant, but only to satisfy the jury that he acted in a manner such as any person of ordinary reason and firmness would have done under similar circumstances.' Third. Because his honor, the presiding judge, erred in refusing the defendant's seventh request to charge, as follows: '(7) That if the evidence shows that the deceased was a person of violent habits, revengeful, or notoriously a dangerous man, and that these characteristics were known to the defendant, such evidence bears directly

on the intent or motive to be ascribed to the conduct of the accused, and calls for a less degree of certainty in the proofs of necessity to take life than would be requisite if it had been shown that the deceased was a man of opposite traits of character. Of such effect also is the good character of the accused for peaceableness.' Fourth. Because his honor, the presiding judge, erred in refusing the defendant's eighth request to charge, as follows: '(8) That there is no distinction between evidence of facts and evidence of character. The latter is quite as relevant to the question of guilt or innocence as the former, and that the object of introducing such evidence is to induce the jury to believe from the improbability that a person of good character would have conducted himself as alleged; that there is some mistake or misrepresentation in the evidence on the part of the prosecution, and such evidence is as strictly evidence, and is as worthy of the jury's attention, as is the testimony on any other fact in the case.' Fifth. Because his honor, the presiding judge, refused the defendant's ninth request to charge, as follows: '(9) Where one, who is without fault himself, is attacked by another in such a manner and under such circumstances as to furnish reasonable grounds for apprehending a design for taking away his life, or to do him some bodily harm, and there is reasonable grounds for believing the danger imminent, or that such design will be accomplished, he may safely act upon appearances, and kill the assailant, if that be necessary to avoid the apprehended danger, and the killing will be excusable, although it may afterwards turn out that the appearances were false, and there was, in fact, neither design to do him serious injury, nor danger that it would be done.' Sixth. Because his honor, the presiding judge, erred in refusing the defendant's tenth request to charge, as follows: '(10) That while the burden of proof is on the defendant to establish his plea of self-defense, yet he is not required to prove this beyond a reasonable doubt, but it is sufficient if this is shown by the preponderance of the evidence; and on the whole case the jury must be satisfied, beyond a reasonable doubt, of the guilt of the accused, otherwise they must acquit.' Seventh. Because his honor, the presiding judge, erred in refusing the defendant's thirteenth request to charge, as follows: '(13) If you believe that the deceased made threats against the defendant to kill or to do him great bodily harm, which threats were not communicated to the defendant, yet these threats are to be considered by you in determining with what purpose the deceased approached the defendant, what his intention was when he went out of his store to meet the defendant, and who was the aggressor.' Eighth. Because his honor, the presiding judge, erred in refusing the defendant's fourteenth request to charge, as follows: '(14) That in this case the question as to who com

menced the difficulty is a material inquiry; it is therefore necessary that the jury should be satisfied, beyond a reasonable doubt, that the accused was the aggressor, before they convict him of the crime charged.' Ninth. Because his honor, the presiding judge, erred in refusing the defendant's sixteenth request to charge, as follows: '(16) That if the evidence shows that the deceased was a person of violent habits, revengeful, or notoriously a bad man, the law presumes that these characteristics were known to the defendant.' Tenth. Because his honor, the presiding judge, erred in charging the jury on the facts, as follows: 'It is my duty to say to you as a matter of law, and I could not say less consistent with my duty, that no words of provocation, however insulting, will justify in law the party to whom they are addressed or applied taking the law in his own hands, and committing an assault and battery; much less would it excuse the resort to a deadly weapon. I take it that it is unnecessary to say to an intelligent jury that we are not here in the administration of public justice to be actuated by feelings of sentiment; that may do very well outside of this courthouse, but we are here to see that the law, which is laid down as a rule of conduct for all citizens, is enforced. Whenever a party is charged with violation of law, it is my duty to give you the law; it is your duty to apply the facts to the law, and, if the state has established the guilt of the party accused beyond a reasonable doubt, you should find a verdict of guilty; and you cannot allow your judgments, according to your oaths, to be influenced by sentiment or anything of that kind. Mr. Foreman and gentlemen, you will regard the law as given you by the court. It is your duty to do so. If this court errs in giving you the law, the defendant is not without remedy. He has the right and privilege of having it corrected. Therefore, whenever jurors take the law otherwise than from the court, justice is not carried out according to law, and we might as well close up this courthouse as the temple of justice.' Eleventh. Because his honor, the presiding judge, erred in charging the jury as follows: 'If the prisoner at the bar either challenged or accepted a challenge from the deceased to fight, or if he provoked the encounter which resulted in the killing of the deceased, then I charge you that the plea of self-defense cannot avail you; because the law says that, in order to aid him, he must be without fault in bringing about the necessitous circumstances of which he complains. Not only so, he must satisfy you he was not the aggressor in the difficulty, but that the deceased, Rickles, assaulted him, he being without any fault in provoking him, and that the nature and character of that assault upon him by Rickles was such as to lead him honestly to the conviction that he was placed in imminent peril of losing his life, or of sustaining great bodily harm, by such assault.' Twelfth. Because

his honor, the presiding judge, erred in this, after charging the law of self-defense, that he qualified his charge thereon, as follows: 'And I wish you to understand me on that point, that it is only incumbent on the defendant to avoid the necessity of taking human life when he can do so with safety to himself,'—thus excluding the defense of apparent danger, and limiting the defense to actual danger."

Bulst & Bulst, Murphy & Farrow, and M. Rutledge Rivers, for appellant. Wm. St. Julien Jervey and George W. Legare, for the State.

McIVER, C. J. Under an indictment for the murder of J. H. Rickles, Jr., the defendant was tried, and convicted of manslaughter, and, from the judgment rendered, appeals, upon numerous exceptions. The circumstances immediately attending the homicide may be thus briefly stated: On the evening when the deceased was shot, he had sent by a servant a bill against the prisoner, for collection, which was returned unpaid, with an exceedingly offensive and dirty message from the prisoner to the deceased. When this was delivered the deceased said: "All right. Then I will see him in the morning or to-night." Shortly afterwards the prisoner left his house, and while walking on the sidewalk, on his side of the street, he was approached by the deceased, coming from his place, on the other side of the street; and when he got within about 14 feet of the prisoner the deceased was shot by the prisoner, inflicting the fatal wound, from which death ensued in a very few days. None of the other witnesses heard any words pass between the parties, but the prisoner, in his testimony, said: "The first and only words I heard were, 'What in the hell!'" and before the sentence was concluded the pistol was fired. The prisoner also testified that the deceased, when he approached him, "was walking tolerably rapidly, with his hand in this position (indicates with hand at right hip pocket)."

The exceptions are 20 in number, but as the first, twelfth, thirteenth, and fourteenth were very properly abandoned at the hearing, they need not be further noticed. The remaining exceptions may be divided into two general classes: First, those which impute error to the circuit judge in his rulings as to the admissibility of testimony; second, those imputing errors of omission and commission in his charge to the jury.

The fifteenth exception alleges error "in refusing to strike out of the alleged dying declaration all after the word 'die,' and before the word 'it,' and further erred in striking out all after the word 'shooting,' up to the word 'it'; thus changing the whole tenor of the declaration, and misleading the jury." For a proper understanding of this exception, it will be necessary to set out the declaration,

which was in writing, as it read when first offered in evidence, as well as to state what occurred in the court below when the declaration was first offered. The following is a copy of the paper referred to: "Dying Declaration of the Deceased, J. H. Rickles, Jr. Personally appeared before me J. H. Rickles, Jr., who, being told that he was in a dying condition, and realizing the same, makes the following statement, to wit: My name is J. H. Rickles, Jr. I am twenty-seven years of age. I was shot yesterday afternoon, about 8 o'clock, by a man by the name of Petsch, who works for Cohen and Triest. I know that my condition is hopeless, and am fully aware that my time is short, and, realizing that I am about to die, (I will state the cause and occurrence of the shooting. [Petsch owed me a bill in the sum of \$5.24. I presented the bill to him two weeks ago. He sent me word that I must send the bill in nine days' time. Last night I sent the bill to him. I received the answer from him that I must take the bill, and stick it up my God-damn ass. I hate to repeat such words, but that is the message I received from him. I said I would see him about it.]) I walked to the door of my grocery store, and saw Mr. Petsch coming along the opposite side of the street. I stepped out of my store, and went across the street. I stepped upon the sidewalk about fifteen feet in front of him, and before I could say one word to him he drew his pistol and shot me. I was in my shirt sleeves, and had no weapon of any kind upon me. As soon as I was shot in my chest, I turned and walked over to my store. After shooting, Petsch turned, and ran towards his house. I made no attempt to strike him. I was not near enough to strike him, if I had wished to. Neither of us said a word. I did not have a chance to say anything to him, for he shot me as soon as he spied me."

The following colloquy passed between the court and counsel when this dying declaration was offered in evidence: Counsel for prisoner moved to strike out of the dying declaration all after the words "I am about to die," down to the word "it." The court held that the declaration is relevant, to the word "shooting," and all after that word, down to the word "it," is inadmissible, and, following the word "it," is admissible; and to that extent the motion to strike out was sustained. To make this more plain, we have inclosed the words which counsel moved to strike out in parentheses, and have inclosed in brackets the words which the court held should be stricken out. Upon the announcement of the ruling of the court, counsel for the prisoner excepted, and also objected to that portion indicated by the court being stricken out, as he had made no motion to that effect. The court then said: "If the defendant counsel desires any portion of this declaration held by the court as inadmissible, or withdraws his objection to it, it will be admitted; and, the objection not having

been withdrawn, the portion indicated as irrelevant will be stricken out." Thereupon, counsel for prisoner said: "My position is that, leaving it in the shape my friend desires it, it is misleading. I don't want to be placed in a position that, by saying so, I can get in a lot of irrelevant testimony." The solicitor then offered "to exclude any part of the testimony which is irrelevant, or leave it all in, as counsel for the defense prefers." No response to this offer having been made, the court, after cautioning the jury not to allow defendant's case to be prejudiced by anything that had been said, directed the dying declaration to be read, omitting such portion thereof as had been stricken out as irrelevant. It will thus be seen that the question presented by this exception is not whether any portion of the declaration should have been stricken out, for the offer of the solicitor to allow it all to go in was not excepted to, but the question is whether the circuit judge erred in refusing to strike out all of the words mentioned in defendant's motion, and in holding that some of those words, to wit, "I will state the cause and occurrence of the shooting," should not be stricken out. It seems to us that there was no error on the part of the circuit judge in refusing to strike out those words, for they are just such words as are appropriate to a dying declaration. Indeed, if there was any error on the part of the circuit judge at all, we are inclined to think that it was in striking out any portion of the declaration, as it is at least doubtful, under the case of *State v. Terrell*, 12 Rich. Law, 321, recognized and followed in the case of *State v. Belton*, 24 S. C. 189, whether the whole declaration was not competent; for the words which defendant's counsel moved to strike out, as well as those which were stricken out, related to the circumstances immediately preceding the homicide, and were doubtless the immediate cause of the fatal difficulty. In addition to this, we may add that under the case of *State v. Workman*, 15 S. C., at page 545, recognized and followed in *State v. Dodson*, 16 S. C., at page 460, it may well be questioned whether a motion to strike out of a dying declaration such portions thereof as may be supposed to be objectionable is proper, and whether the better practice is not to move the circuit judge to instruct the jury to disregard such portions as may for any cause be deemed objectionable. The case of *State v. Talbert* (S. C.) 19 S. E. 852, cited by counsel for appellant, is not in conflict with this view; for there no motion to strike out was made, and the court was not called upon to decide, and did not decide, anything upon the subject. It was simply stated that in that case no objection to the dying declaration, on account of its contents, was made when it was offered, and that "there was no motion to suppress or strike out" that portion of the declaration which referred to a difficulty which had occurred between the parties about six

months previous to the homicide. But in this case no such question is presented, and is not to be regarded as decided; for the only question here is whether the circuit court erred in refusing to strike out of the dying declaration all those words which defendant's counsel moved to strike out. The fifteenth exception must be overruled.

The sixteenth exception imputes error to the circuit judge in admitting the testimony of Laura Petsch that she is the wife of defendant, because the same was irrelevant, and not in reply. In the first place, the case does not show that any objection was made to this testimony when it was offered, and that is sufficient to dispose of this exception. Besides, there is nothing more common than to ask a witness, when offered, either in chief or in reply, what relation he bears to the party for or against whom he is offered as a witness, and we conceive of no valid objection to such a question, even if taken in time. This exception must also be overruled.

The seventeenth and eighteenth exceptions may be considered together, as they both impute error to the circuit judge in permitting the witness Laura Petsch to testify in reply as to what passed between her and the defendant when he left his house, immediately before the homicide occurred, upon the ground that such testimony was irrelevant, and not in reply. Inasmuch as the defendant, when on the stand as a witness, had given his version of what occurred between himself and this witness just before he left his house, it is difficult to conceive of any good reason why this witness was not competent, in reply, to give her version. These exceptions must be overruled.

The nineteenth exception imputes error to the circuit judge in refusing to permit the defendant, while on the stand, to answer the question why he did not pay the bill when it was presented to him, on the evening of the homicide, by the witness Brown. In the first place, the case does not show that the circuit judge made any such ruling; for, while it does show that the question was objected to, it does not show that any ruling was made in response to the objection, as the counsel examining defendant proceeded at once to propound another question. But waiving this, and assuming that the answer to the question was ruled out, we see no error in such ruling. What was defendant's reason for failing or refusing to pay the bill was wholly immaterial to the case. It is very manifest that it had nothing to do with bringing about the difficulty which resulted in the death of the deceased, for the defendant had just testified that the bill had been several times before presented, and no trouble had arisen. It is equally manifest that the real cause of the trouble was the very rude and offensive message sent by the defendant to the deceased just before the homicide occurred. This exception must also be overruled.

The twentieth exception complains of error

on the part of the circuit judge in refusing to allow the witness Ellen Bennett to reply to the following: "Did he (Rickles) offer Willie Brown anything to watch for Mr. Petsch?" It being claimed that such testimony was relevant for two reasons: (1) For the purpose of impeaching the testimony of the witness Brown; (2) for the purpose of showing the animus of deceased on leaving his store, just prior to the homicide. Here, again, the case fails to show that the judge refused to allow the witness to answer the question. Besides this, it is quite manifest from a brief extract taken from the testimony of the witness Ellen Bennett, as set out in the case, to which no objection was interposed, that both of these objects were attained. This witness, having testified that she was in the store of the deceased when Willie Brown brought the offensive message from the defendant, proceeded as follows: "Did Mr. Rickles say anything to Willie Brown? A. He told him to see when Mr. Petsch passed, and to call him; and he said, if Mr. Petsch owned those words he had sent to him, he would beat him. Q. Did he offer Willie Brown anything to watch for Mr. Petsch? (Objected to.) Q. Did Mr. Rickles say anything more? A. I did not hear him say anything more." Now, as Willie Brown had testified that he was not told to watch for Petsch, this testimony, received without objection, served the purpose of contradicting Brown just as well as, if not better than, if Ellen Bennett had answered the only one of these questions objected to, especially as she also testified that she did not hear Rickles say anything more; and as she also testified that she heard Rickles express his intention to beat Petsch, "if he owned those words he had sent him," this was quite sufficient to show the purpose with which deceased went to meet the defendant. So that, in any view of the matter, this exception cannot be sustained.

We proceed next to the consideration of the several exceptions to the judge's charge to the jury. It will be well to state first certain propositions in reference to this matter which are so well settled as to need no citation of authority to support them: First, the charge must be considered as a whole, and not by extracts isolated from the context. Second, the fact that the jury are not charged in the language of the request constitutes no objection to the charge, provided the proposition of law contained in the request, if correct and applicable, is given to the jury in language chosen by the judge. Third, if any request contains both good and bad law, the request may properly be refused, as it is not the duty of the judge to separate the good from the bad. It seems to us that the charge of his honor, Judge Witherspoon (which should be incorporated in the report of the case), looked at in the light of these well-settled propositions, is so wholly unexceptionable as to furnish its own vindication from the errors imputed to it.

Taking up these exceptions in detail, the second exception complains of error in refusing to charge defendant's sixth request (which should be incorporated in the report of the case), as well as all the other exceptions to refusals of requests to charge, as they are too long to be inserted here. The point of this exception seems to be that the prisoner was not called upon to wait until actually struck, and that he was not required to show that there was no other possible means of escape, except to kill his assailant. It seems to us that both of these points were fully met when the jury were instructed that the accused had only to wait until his assailant made some overt act or demonstration,—made some assault,—which necessarily implied that he was not bound to wait until actually struck; and when the jury were also told that where a party assaulted, and the party upon whom the assault is committed is without fault in bringing on the difficulty, he is not compelled to run, but he must avoid the necessity of killing his assailant, if he can reasonably and safely do so, which necessarily implied that he was not bound to show that there was no other possible means of escape except to kill his adversary. Indeed, this exception, like all of the others imputing errors in refusing to charge as requested, is based really upon the ground that the judge did not use the language of the requests, but saw fit to use his own language in instructing the jury as to the points of law to which his attention was called by the requests to charge.

The third exception imputes error in refusing to charge as set forth in defendant's seventh request. This request could not properly have been complied with, for the reason that the judge would, by adopting the language of that request, have expressed his opinion as to the effect of the testimony as to the violent character of the deceased. If the request had been simply that the testimony as to the violent character of the deceased should be considered by the jury, and given such weight as seemed to the jury proper, the request would probably have been complied with.

The fourth exception imputes error in the refusal of defendant's eighth request to charge. That request is also amenable to the same objection. In addition to this, the jury were instructed (though not in the language of the request, which could not properly be adopted) that a person accused of crime had a right to offer evidence of his good character, which, with all the other facts in the case, the jury were required to take into consideration in determining whether the guilt of the accused had been established beyond a reasonable doubt. What more could properly have been required, we are at a loss to conceive.

The fifth exception complains of error in refusing defendant's ninth request to charge.

The gravamen of this complaint seems to be that there was error in failing to instruct the jury that the accused might safely act upon the "appearances" as they were presented to him at the time, although it might turn out afterwards that such appearances were deceptive, and that in fact there was no real danger. In view of the fact that the jury were distinctly instructed as follows: "But if the appearances to him at the time were such that he could not reasonably and safely avoid taking human life, and a man of ordinary reason and firmness would have arrived at the same conclusion, then it was not necessary for him to go any further,"—we see no foundation for the complaint made by this exception.

The sixth exception assigns error in refusing a request of the defendant. This request called upon the circuit judge to instruct the jury that while the defendant was not bound to establish his plea of self-defense beyond a reasonable doubt, but only by the preponderance of the evidence, yet, on the whole case, the jury must be satisfied beyond a reasonable doubt of the guilt of the accused, otherwise they must acquit. And in this connection the eighth exception, based upon an alleged refusal to charge defendant's fourteenth request, may also be considered, as they both complain of error in failing to instruct the jury as to the necessity for the state to prove its case beyond all reasonable doubt. In view of the fact that the circuit judge, throughout his charge, time and again instructed the jury that it was incumbent upon the state to prove the guilt of the accused beyond all reasonable doubt, and that it was not incumbent upon the accused to establish his plea of self-defense beyond all reasonable doubt, but only by the preponderance of the evidence, we are unable to perceive any possible ground for either of these exceptions.

The seventh exception imputes error in refusing defendant's thirteenth request, which relates to uncommunicated threats. Inasmuch as the most, if not all, of the threats made by the deceased against the prisoner were shown to have been communicated to the prisoner, and he himself testified that he shot at the time he did because of the threats he had heard, it is difficult to conceive what bearing the uncommunicated threats, if there were any, could have upon the case.

The ninth exception complains of error in refusing to charge defendant's sixteenth request, to the effect that if the deceased was shown to be "a person of violent habits, revengeful, or notoriously a bad man," the law presumes that his character was known to defendant. Whether the proposition, as presented in that request, could be sustained, without some further qualification, may admit of question; but we need not consider that now, for, in view of the fact that the prisoner had testified that the violent char-

acter of the deceased was known to him, there was no necessity or room for any presumption.

The tenth exception imputes error to the circuit judge in charging on the facts, in the passage extracted from the charge, and made the basis of this exception, which should be incorporated in the report of the case. A careful examination of this passage fails to show that the circuit judge expressed, or even intimated, any opinion whatever as to a single fact in the case. On the contrary, it was nothing more than a very common and very proper admonition to the jury, that they were not to be actuated by any feeling of sentiment, but their duty was simply to apply the facts as found by them to the law as laid down by the court, and in this there was no error.

The eleventh exception complains of error in that portion of the charge copied in that exception, which should appear in the report of the case. It seems to us that the passage then quoted from the charge lays down the law applicable to the plea of self-defense correctly, and is fully sustained by the following cases: *State v. Beckham*, 24 S. C. 283; *State v. Wyse*, 33 S. C. 582, 12 S. E. 556; and other cases which might be cited. As was said in the case last cited: "The plea of self-defense rests upon the idea of necessity,—a legal necessity; that is, such a necessity as, in the eye of the law, will excuse one for so grave an act as the taking of human life. Hence, it must be a necessity which is not brought about by the fault of the accused."

After having thus gone over the exceptions, we again carefully examined the charge of the circuit judge as a whole; and we must say that we think the law applicable to the case was fully, fairly, and correctly laid down to the jury, and hence none of the exceptions to the charge can be sustained. The judgment of this court is that the judgment of the circuit court be affirmed.

(43 S. C. 154)

**COLUMBIA WATER-POWER CO. v. COLUMBIA ELECTRIC STREET-RAILWAY, LIGHT & POWER CO.**

(Supreme Court of South Carolina. Feb. 18, 1895.)

**LEASE BY STATE—RESCISSIION—NECESSARY PARTIES  
—LEASE OF WATER POWER—VALIDITY  
—RIGHTS OF LESSEE.**

1. Where, in a suit for an injunction, it appears that the state is an indispensable party, the court has no jurisdiction of the suit, on refusal of the state to appear.

2. The state conveyed to plaintiff's grantor a canal and all appurtenances, reserving to itself the right to a certain amount of water power therefrom, and subsequently leased to defendant the right to the use of such power. Part of the consideration of the lease was that defendant should deliver for the use of the penitentiary a portion of the power. *Held* that, in a suit by plaintiff against defendant to avoid the lease and to enjoin the maintenance of cer-

tain buildings necessary to the application of the power, the state was an indispensable party.

3. Where, in an action at law for injuries to plaintiff's land, defendant defends under authority of a lease from the state, the state is not an indispensable party, so as to deprive the court of jurisdiction, on refusal of the state to become a party.

4. The state conveyed by legislative act to plaintiff's grantor a canal and appurtenances, reserving to itself the right to the use of a certain amount of water power, which the act declared should be "absolute." Subsequently the legislature affirmed a lease by the state of its water right. *Held*, that such right was a right of profit a prendre, independent of any interest in land, and was therefore leaseable.

5. The lessee of the right to the use of a certain amount of water power from a canal may erect, on the banks of the canal, in addition to the water plant necessary to make use of the power, a steam plant essential to the use of the water plant.

Appeal from common pleas circuit court of Richland county; J. H. Hudson, Judge.

Action by the Columbia Water-Power Company against the Columbia Electric Street-Railway, Light & Power Company to enjoin defendant from using buildings erected upon the land claimed by plaintiff, to require it to remove the buildings from it, and to recover damages for the unlawful use of this land. From a decree dismissing the complaint, plaintiff appeals. Affirmed.

The suggestion, decree, and exceptions referred to in the opinion were as follows:

**Suggestion.**

"And now comes the attorney general of the state of South Carolina, and suggests to the court, and gives it to understand and be informed (appearing only for the purpose of this motion), that the state of South Carolina is not a party to this action, and declines to become a party, or to submit herself in any way to the jurisdiction of her own court. And the said attorney general doth further suggest and bring to the attention of this honorable court that the defendant aforesaid is in possession of the strip of land described in the complaint, by lease or license from the state of South Carolina, under agreement made between said defendant and the board of directors of the South Carolina Penitentiary, on the 26th day of May, 1892, herewith exhibited to the court, and approved and ratified by an act of the legislature of said state entitled 'An act to ratify and confirm the contract made and entered into by and between the directors of the South Carolina Penitentiary and the Columbia Electric Street-Railway, Light & Power Company,' etc., approved December 24, 1892; that the said strip of land was purchased for the use of said penitentiary on October 18, 1866, from Thomas J. Rawls, and confirmed to the uses of said state penitentiary by an act entitled 'An act to devote certain public lands to the use of the board of directors of the state penitentiary,' approved February 9, 1882; that the power-generating works of the defendant corporation are built upon said

strip of land, and are being now used in part in supplying power to said state penitentiary for operating necessary machinery within its walls, under the agreement aforesaid. And the said attorney general doth further suggest and show to this court that, if the injunction prayed for in the complaint be granted, the defendant will be prevented from carrying out its said agreement with the state of South Carolina, and the said state, without a hearing in the cause, will be deprived of the water power she is entitled to, in the manner she has contracted for, and of the revenue she has secured, by and under the said agreement, for the period of thirty years. Wherefore, without submitting the rights of the government of the state of South Carolina to the jurisdiction of the court, but respectfully insisting that the court has no jurisdiction of the subject in controversy, he asks that the said complaint be set aside, and all other proceedings in the cause stayed and dismissed. D. A. Townsend, Attorney General South Carolina, per Buchanan."

#### Decree.

"This cause came on to be heard before me at the present term of the court, and has been fully argued. As to the question raised that the court has no jurisdiction, because that the state is an indispensable party, this plea is overruled. The court has jurisdiction. The defendant is a lessee of the water power reserved by the state, and the court can construe a contract made between the defendant and the state, whereby it is claimed that the rights of the plaintiff have been affected. The door is not shut to plaintiff because of the contract with the state. The state has a right to come in if she so wishes; but she declares that she will not come in, and the cause can be heard without her presence. As to the Rawls deed, that deed conveys the property to the state; but subsequently the state conveyed the canal property to the plaintiff, and thereby conveyed in fee all of the property known as the 'Canal Property,' including its banks, as it existed at the time of the conveyance; and at the time of the act of 1887, and of the conveyance made thereunder, the canal property covered the land upon which the defendant's works are erected. Plaintiff acquired its rights under the act of 1887. It is not the grantor of anything to the state, but the state has reserved out of its grant five hundred horse power of water power, and that much plaintiff did not purchase. The whole question turns on the reserved right of the state. The defendant holds a lease from the state, and the contract made by defendant with the board of directors of the state penitentiary, approved and ratified by the state, has given to the defendant all of the rights which the state had in that five hundred horse power. In the act of 1887 there is a distinct reservation of an absolute right to the state of five hundred horse power of wa-

ter power. Call it an easement, or what you will, it is absolute. Now, can the state dispose of it? Unquestionably she can. She can develop it. She can erect the necessary buildings for its utilization, and can utilize it. She may do it in any way she pleases. She may use old wheels, or she may use new and improved methods, and may resort to electricity, which is now generally regarded as an improved method of transmitting water power. Therefore there is no objection to the electric plant erected by the defendant under its contract with the state. Now, can the state lease its power, and permit the lessee to use it, and supply the state at the cost of the lessee? I think it can. The state is not always ready for carrying on such work. Therefore she could lease it; and, in this particular case, the state gets, or may get, one hundred horse power, and the lessee the balance. This being a consideration moving to the lessee, the lessee can devote that consideration to its own use. Therefore, under the act, the defendant, as lessee of the state, has the unquestionable right to put the electric plant on the banks of the canal of the penitentiary, and to carry out the contract which has been made between it and the state of South Carolina. Now, has the defendant the supplementary right to put in a steam plant? Prudence and foresight justify its erection on the banks of a canal along a river where freshets come, and, where time is important, there might be serious interruption to the industries of the defendant company, and thus of the penitentiary. Therefore the defendant has a right to use so much steam plant as is necessary to supplement its water power, at such times as the water power is unavailable by reason of freshets or necessary repairs to the canal or other causes. The dam may break, rains may swell the river, and there might be a long interruption to the use of the water power, and it would be necessary to resort to the steam plant to carry on the work. It is common to use steam as an adjunct to water-power plants. The defendant cannot erect any more steam plant than is necessary for it to use as a supplement to the water power which it has received from the state. I therefore hold that there has been no violation of the state's contract with the plaintiff. That reservation of the state's water power is a part of the contract made with the plaintiff, and that reservation is absolute. Therefore I hold that the complaint must be dismissed. It is therefore ordered and adjudged that the complaint be dismissed. November 11, 1903. J. H. Hudson, Presiding Judge."

#### Exceptions.

"Plaintiff excepts because his honor, the presiding judge, erred in holding: (1) That there is a valid lease of the water power reserved by the state. (2) That a valid contract was made between the defendant and the state. (3) That all of plaintiff's rights



were acquired under the act of 1887. (4) That defendant is the lessee of a valid lease from the state. (5) That the contract made by defendant with the board of directors of the state penitentiary, approved and ratified by the general assembly, has given to the defendant all of the rights which the state had in the five hundred horse power of water power. (6) That in the act of 1887 there is a distinct reservation to the state of a right of five hundred horse power of water power,—call it an "easement" or what you will,—absolute in the sense and with the force and effect in which that term is apprehended in the decision. (7) That the state can dispose of its right to the five hundred horse power of water power in any way the state pleases. (8) That there is no objection to the electric plant erected by the defendant, and the reasons given for this conclusion. (9) That the state can lease its power, and permit the lessee to use it, and supply the state at the cost of the lessee, and the reasons given for this conclusion. (10) That the lessee can devote what is styled the consideration moving to the lessee, to wit, the balance of the horse power after what of it the state gets, to its own use, and the conclusion drawn therefrom that defendant, as lessee of the state, has the unquestionable right to put the electric plant on the banks of the canal at the penitentiary, and to carry out the contract which had been made between it and the state, as if it were a valid contract. (11) That the defendant has a supplementary right to put in a steam plant on the plaintiff's canal property. (12) That defendant has a right to erect on plaintiff's canal property, and use, so much steam plant as is necessary to supplement defendant's water power, at such times as the water power is for any cause unavailable, and the reasons given for this conclusion. (13) That there has been no violation of the state's contract with the plaintiff. (14) That it is a part of the contract of the state with plaintiff that the reservation of the state's water power is 'absolute,' in the sense and with the force and effect in which that term is apprehended in the decision. (15) That the complaint must be dismissed. (16) That his honor erred in ordering and adjudging that the complaint be dismissed. Excepts because his honor did not decide, (17) in clear and distinct terms, that the plaintiff is the owner in fee of all that strip of land lying between the southern line of Plain street on the south, and the southern line of Blanding street on the north, and between the eastern bank of the Columbia canal and the Congaree river, including the bank of said river, as portion of its canal property. (18) That the plaintiff has the sole and exclusive right, franchise, and privilege to sell and lease water power developed by the Columbia canal. (19) That the plaintiff, on and from the — day of March, 1892, was, and ever since has been, and is, ready to furnish to the state the 500 horse power of water power, in accordance with Assem. Act Dec. 24, 1887, and that the state and the board of directors of the South Carolina Penitentiary have been, since the said — day of March, 1892, informed of and aware of the same. (20) The matters alleged in paragraph 10 of the complaint, as there alleged. Page 9, fol. 33. (21) That Assem. Act Dec. 24, 1892, mentioned in the sixth paragraph of the complaint, is in violation of section 10, art. 1, Const. U. S., declaring that no state shall pass any law impairing the obligation of contracts, in this: that it impairs the contract made by the state in Assem. Act Dec. 24, 1887, as to the rights, franchises, and privileges of the owners of the property known as the 'Columbia Canal,' and the lands held therewith, as owners in fee thereof, and more especially as to the sole and exclusive right, franchise, and privilege to sell and lease the water power developed by said canal. (22) That the defendant should be confined, at most, to such plant and work as were constructed and done in accordance with the specifications and plans submitted by defendant to, and approved by, plaintiff. (23) That the erection of the steam plant, and the entire machinery thereof, by defendant, was in utter violation of the property rights of plaintiff. (24) The matter alleged in paragraph 15 of the complaint as there alleged. Page 14, fol. 55. (25) That the 500 horse power of water power to which the state is entitled, under Assem. Act Dec. 24, 1887, belongs to the state, as state, for the use of the South Carolina Penitentiary, for state public purposes exclusively, is attached to, and not severable from, the state, as state, for the use of the penitentiary, and to be used for said purposes, and said purposes only. (26) That all claims based on any severance, or attempted severance, of the right to said 500 horse power of water power from the state for the use of the penitentiary for said purposes, by the person in whose favor said severance is made, or attempted to be made, are invalid in law. (27) That the canal property, on said severance being made, or attempted to be made, is, as matter of law, released from the servitude or easement imposed on it as the servient tenement by Assem. Act Dec. 24, 1887, or otherwise. (28) That the plaintiff has complied with all the obligations in the premises to which it was subjected by Assem. Act Dec. 24, 1887, or otherwise. (29) That his honor erred in not granting a perpetual injunction, restraining defendant from using, or attempting to use, the 500 horse power of water power for the purposes of generating power to apply to the movements of its cars upon the street railway, for lighting its lamps, or furnishing power motors, or any other private purpose. (30) In not granting an injunction to enjoin and restrain defendant from entering upon and erecting on the lands or property of plaintiff any structures, buildings, works, or machinery,



save as is in accordance with the plans and specifications submitted by defendant and approved by plaintiff. (31) In not requiring defendant to remove from the lands and property of plaintiff all of defendant's structures covering the steam engine, boilers, and coal, and its steam engine, and all machinery and property connected therewith. (32) In not ordering an assessment of the damages done by defendant to plaintiff in the premises, and adjudging plaintiff's right to have said damages. (33) In not retaining the complaint."

Abney & Thomas and Bachman & Youmans, for appellant. John T. Sloan, Jr., R. W. Shand, and Lyles & Muller, for respondent.

GARY, J. The view which the court takes of this case renders it unnecessary to trace the history of the Columbia Canal prior to the year 1887, when the act was passed entitled "An act to incorporate the board of trustees of the Columbia Canal, to transfer to the said board the Columbia Canal, with the lands now held therewith, and its appurtenances, and to develop the same," the first and seventh sections of which are as follows:

"Section 1. That the board of directors of the South Carolina Penitentiary are hereby authorized, empowered, and required to transfer, assign, and release to the board of trustees of the Columbia Canal, herein after created and provided for, the property known as the Columbia Canal, together with the lands now held therewith, acquired under the acts of the general assembly of this state with reference thereto or otherwise, all and singular the rights, members and appurtenances thereto belonging; and upon such transfer, assignment, and release, all the right, title, and interest of the state of South Carolina in and to the said Columbia Canal and the lands now held therewith from its source at Bull's Sluice through its whole length, to the point where it empties into the Congaree river, together with all the appurtenances thereto belonging, shall rest in the said board of trustees for the use and benefit of the city of Columbia, for the purposes herein after in this act mentioned, subject, nevertheless, to the performance of the conditions and limitations prescribed on the part of the said board of trustees and their assigns.

"Sec. 7. That the board of trustees shall, within two years from the ratification of this act, complete the said canal so as to carry a body of water, \* \* \* and furnish to the state, free of charge, on the line of the canal 500 horse power of water power, to Sullivan Fenner or assigns, 500 horse power of water power, under his contract with the canal commission and to furnish the city of Columbia 500 horse power of water power at any point between the source of the canal and Gervais street the city may select; and

shall, as soon as is practicable, complete the canal down to the Congaree river a few yards above the mouth of Rockey Branch: provided, that the right of the state to the free use of the 500 horse power shall be absolute, and any mortgage, assignment, or transfer of the said canal by the said board of trustees or their assigns shall always be subject to this right."

Laws 1887, p. 1090.

In pursuance of said act, the board of directors of the South Carolina Penitentiary, on the 1st day of February, 1888, did transfer, assign, and release unto the said board of trustees of the Columbia Canal, their successors and assigns, all the right, title, and interest of the state of South Carolina in and to the said Columbia Canal and all the lands held therewith, in the terms and words of said act, and upon the conditions therein stated. The board of trustees of the Columbia Canal thereupon took possession of the canal, and the property connected therewith. At the time of the passage of the act of 1887, the state, through the directors of the penitentiary, was in possession of the property, which includes the strip of land upon which the water-power plant and steam plant were erected. In 1890 an act was passed which authorized the board of trustees of the Columbia Canal to sell said property subject to all the duties and liabilities imposed by the act of 1887. The plaintiff holds under a deed made by the board of trustees of the Columbia Canal under the above-mentioned act. On the 26th day of May, 1892, the state, through the directors of the penitentiary, and the defendant, entered into a contract by which the state agreed to allow the defendant the free and uninterrupted use of the said 500 horse power of water power reserved by the state for the use of the penitentiary, saving and excepting the 100 horse power of water power reserved to the penitentiary, as stated in said contract. For the use of said 500 horse power of water power the defendant covenanted and agreed to pay to the state \$2,500 per annum for the time therein specified. In 1892 this contract was ratified by the legislature by an act entitled "An act to ratify and confirm the contract made and entered into by and between the board of directors of the South Carolina Penitentiary and the Columbia Electric Street-Railway, Light & Power Company, for the development of the 500 horse power of water power reserved by the state of South Carolina for the use of the South Carolina Penitentiary along the line of the Columbia Canal." The case came on for a hearing before his honor, J. H. Hudson, presiding judge, at the October, 1898, term of court for Richland county. Upon the pleadings being read, O. W. Buchanan, assistant attorney general of South Carolina, read the suggestion, which will be incorporated in the report of the case, signed by D. A. Townsend, attorney general of South Carolina; articles of agreement be-

tween W. J. Talbert, superintendent of the South Carolina Penitentiary, and the defendant, dated 28th May, 1892; deed of conveyance of realty from T. J. Rawls to the state of South Carolina, dated October 18, 1866; and he further read Acts September 21, 1866 (13 St. at Large, 366), February 9, 1882 (17 St. at Large, 873), and December 24, 1892 (21 St. at Large, 94). The assistant attorney general moved that the suggestion, articles of agreement, and deed from Rawls to the state, above mentioned, be filed. He stated that he appeared for the purpose of this motion only, and refused to move that the state be made a party to the action, or to consent thereto. The presiding judge ordered that the motion to file be granted. Defendant's attorney then objected to the court, on the grounds (1) that the cause could not proceed without the state being made a party; (2) that the state is an indispensable party; (3) that the state cannot be made a party. The presiding judge stated that he would hear further argument on the question of jurisdiction after the testimony was heard, in the general argument of the case, and ordered that the testimony be proceeded with. After the testimony was closed, and argument heard by the presiding judge, he rendered his decree, which, along with plaintiff's exceptions thereto, will be set forth in the report of the case. The defendant, in accordance with the proper practice, gave notice that it would endeavor to support the judgment of the court below upon the two additional grounds: "(1) Because he held that the state of South Carolina was not an indispensable party to said cause, and that the court could proceed to judgment therein without the presence of the state as a party to said cause. (2) Because he held that the state was seised in fee of the land upon which the works were erected by defendant."

The complaint alleges two causes of action,—one for injunction on the equity side of the court; the other alleging title in the plaintiff, and claiming damages for alleged injuries by reason of unlawful entry upon its land, and the erection of a steam plant in connection with the water-power plant. *Heyward v. Mining Co.* (S. C.) 19 S. E. 963.

In the consideration of this case, it must be borne in mind that there is a difference where the action is, in effect, a suit against the state, and where the state is an indispensable party. This distinction is mentioned in the case of *In re Ayers*, 123 U. S., at page 500, 8 Sup. Ct., at page 164, where it is said: "But the very ground on which it was adjudged not to be a suit against the state, and not to be one in which the state was a necessary party, was that the defendants personally and individually were wrongdoers, against whom the complainants had a clear right of action for the recovery of the property taken, or its value, and that therefore it was a case in which no other parties were necessary." Section 143 of this Code shows

who are indispensable parties. It provides that "the court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in." In *Foster's Federal Practice* it is shown that a different rule prevails as to parties in equitable actions and those on the law side of the court. That author, in section 37, p. 76, says: "In actions at law, \* \* \* where an individual is sued as for injuries to persons or property, real or personal, \* \* \* the government does not stand behind him to defend him. If he has the authority of law to sustain him in what he has done, like any other defendant, he must show it to the court, and abide the result. In either case, the state is not bound by the judgment of the court, and generally its rights remain unaffected. It is no answer for the defendant to say, 'I am an officer of the government, and acted under its authority,' unless he shows the sufficiency of that authority. Courts of equity proceed upon different principles as to parties. In accordance with these views, it was held, in the case from which the foregoing extracts are taken, that a suit by a bondholder against the officers of a state and a railroad company whose bonds he held, to have a sale of mortgaged property to the governor of Georgia, claiming to act in his individual capacity, declared void, upon the ground 'that the governor was not authorized to bid in said property for the state, and the state had no constitutional power to make the purchase,' could not be maintained."

One of the objects of the plaintiff's action herein is to have declared null and void the contract between the state and the defendant as to the 500 horse power of water power, on the ground that the state could not lease the same. The case of *Cunningham v. Railroad Co.*, 109 U. S. 446, 3 Sup. Ct. 292, shows that the state is an indispensable party, and, if she refuses to become a party, the action will be dismissed for want of jurisdiction. In that case the court says: "This principle is conceded in all the cases, and whenever it can be clearly seen that the state is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction." Again: "As was said in *Barney v. Baltimore City*, 6 Wall. 280, there are persons who are merely formal parties without real interest, and there are those who have an interest in the suit, but which will not be injured by the relief sought, and there are those whose interest in the subject-matter of the suit renders them indispensable as parties to it. Of this latter class the court said, in the case of *Shields v. Barrow*, 17 How. 130: 'They are persons who not only have an interest in the controversy, but an interest of such a nature that a final

decree cannot be made without affecting that interest, or leaving the controversy in such a condition that its final disposition may be wholly inconsistent with equity and good conscience.' 'In such cases,' says the court in *Barney v. Baltimore City*, 6 Wall. 280, 'the court will refuse to entertain the suit when these parties cannot be subjected to its jurisdiction.'" The complaint and the suggestion filed by the attorney general show that the state has interests which would be affected by granting the relief prayed for in the complaint. To grant such relief would have the effect of clogging the wheels of one of the branches of the state government, to wit, its penitentiary.

In the case of *Hagood v. Southern*, 117 U. S., at page 71, 6 Sup. Ct., at page 608, the court says: "The defendants in the present cases, though officials of the state, are not authorized to enter its appearance to the suits and defend for it in its name. The complainants are not entitled to compel its appearance, for the state cannot be sued without its consent. And the court cannot proceed to the determination of a cause and controversy to which the state is an indispensable party without its presence. \* \* \* The suggestion that it has had the opportunity and the invitation to appear is immaterial, for it has a constitutional right to insist on its immunity from suit." It clearly appears that the state is an indispensable party.

It is urged, however, that the objection is not properly interposed. This objection is jurisdictional in its nature, and in the case of *Lowry v. Thompson*, 25 S. C. 419, 1 S. E. 141, the supreme court, of its own motion, raised such objection, which was sustained. The state being an indispensable party, and refusing to become a party, the cause of action on the equity side of the court cannot be sustained.

We come, now, to a consideration of the cause of action on the law side of the court. The first question to be disposed of is whether or not the state is an indispensable party to this action. In the case of *Lowry v. Thompson*, 25 S. C. 419, 1 S. E. 141, Chief Justice McIver, speaking for the court, in an exceedingly clear opinion, says: "It will be necessary, first, to dispose of the question of jurisdiction; for, if it shall be determined that the court has no jurisdiction, then it would be not only unnecessary, but improper, to undertake to decide any of the other questions in the case. That a state cannot be sued in any of its courts, without its express consent, is a proposition so universally conceded as to render any argument or authority to support it wholly unnecessary. If, however, authority should be asked for, it will be found in almost every case which will be hereinafter cited, where it will be found that the proposition has either been distinctly decided or expressly recognized, and we are not aware of any authority to the contrary. As it is not pretended that

any such consent was given in this case, the first inquiry is whether this is really an action against the state. The fact that the state is not named as a party to the record is not conclusive of this inquiry, though, at one time, it seems to have been so held in the case of *Osborn v. U. S. Bank*, 9 Wheat. 738, followed by *Davis v. Gray*, 16 Wall. 203; but these cases, so far as this particular point is concerned, are entirely inconsistent with the more recent decisions of the supreme court of the United States, where the rule seems to be now well settled that an action, though in form against an officer of a state, if it is in fact a suit against the state itself, cannot be maintained, even though the state is not made a party on the record." *Louisiana v. Jumel*, 107, U. S. 711, 2 Sup. Ct. 128; *Cunningham v. Railroad Co.*, 109 U. S. 446, 3 Sup. Ct. 292, 609; *Hagood v. Southern*, 117 U. S. 52, 6 Sup. Ct. 608. In *Cunningham v. Railroad Co.*, supra, Mr. Justice Miller reviews this whole subject, and admits that it is not an easy matter to reconcile the various decisions of the supreme court of the United States upon the subject; and, while disavowing any attempt to do so, he proceeds to deduce from them certain general principles: (1) It has been held in a class of cases where property of the state, or property in which the state has an interest, comes before the court, and under its control, in the regular course of judicial administration, without being forcibly taken from the possession of the government, the court will proceed to discharge its duty in regard to the property; and the state, if it chooses to come in as plaintiff, as in prize cases, or to intervene in other cases, when she may have a lien or other claim on the property, will be permitted to do so, but subject to the rule that her rights will receive the same consideration as any other party interested in the matter, and be subjected in like manner to the judgment of the court. Of this class are the cases of *The Siren*, 7 Wall. 152, 157; *The Davis*, 10 Wall. 15, 20; and *Clark v. Barnard*, 108 U. S. 436, 2 Sup. Ct. 878. (2) Another class of cases is where an individual is sued in tort for some act injurious to another, in regard to person or property, to which his defense is that he has acted under the orders of the government. In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense, he must show that his authority was sufficient in law to protect him. The somewhat famous case of *U. S. v. Lee*, 106 U. S. 196, 1 Sup. Ct. 240, is cited, as belonging to this class, and to it we may add the subsequent case of *Poin-dexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. 903, 962. (3) A third class, which has given rise to more controversy, is where the law has imposed upon an officer of the govern-

ment a well-defined duty in regard to a specific matter, not affecting the general powers or functions of the government, but in the performance of which one or more individuals have a distinct interest, capable of enforcement by judicial process."

The defendant is sued for damages growing out of alleged injuries to plaintiff's property, and the case falls within the rule laid down under the second head, *supra*; and therefore the state is not an indispensable party. This conclusion is in harmony with the principles enunciated in the case of *Pennoyer v. McConnaught*, 140 U. S. 1, 11 Sup. Ct. 690, in which the leading authorities on this subject are referred to.

Having reached the conclusion that the state is not an indispensable party in determining this cause of action, the next question for consideration is whether or not the contract between the state and the defendant, relative to the 500 horse power of water power, is null and void. This contract received legislative construction when it was ratified by the act of the legislature hereinbefore mentioned, and, although such construction is not binding on this court, still it shows the intention of the state when it reserved the 500 horse power of water power. We think the construction placed upon said contract in 1892 by the legislature, as to the 500 horse power reserved to the state, was in harmony with the terms of said contract; the proviso to section 7 of the act of 1887 being that the right of the state to the free use of the said 500 horse power should be absolute. The use of the word "absolute" was for the purpose of creating a right in the state to this 500 horse power separable and distinct from ownership in other lands, and not dependent upon any particular lands to which it may be appurtenant. This reservation was a right of profit à prendre. *Campbell, C. J.*, in delivering the opinion of the court in *Hall v. City of Ionia*, 38 Mich. 493, says: "There is no foundation for the claim that a right to the perpetual use of water must be dependent upon a particular estate with which it is connected. Some confusion has perhaps been caused by an attempt among writers to create symmetry in the law, by putting all rights connected with land, or springing from them, into classes, and by speaking of these particular rights as easements, which very commonly require both a dominant and servient estate. But every right of property must usually have some peculiar qualities of its own, which must not be destroyed by inappropriate attempts to classify it with different kinds. The old maxim, 'omnis definitio periculosa,' is especially true when things of essentially different qualities are placed together under one head. The value of water as a distinct inheritance, either for creating power or for other purposes of use or consumption, has been recognized in all periods, and its ownership is well established as not dependent on

lands to which it may be appurtenant, but as having a separate and intrinsic importance. There may be an occasional dictum, and possibly some decisions, to the contrary; but most cases where any doubt seems raised on this question will be found to rest on peculiar facts which in no way involved the general doctrine. The facts are often such as to confine the use of water not only to special places, but also to specified purposes. But this limited use is the exception, and not the rule,"—citing a number of authorities. Proceeding, he says: "Experience has shown that in many instances the right to use and dispose of water may not only be more valuable than any land which is occupied for its gathering and disposal, but it is also of special value to be taken to a distance, and parceled out among several users or occupants. Waterworks are only made available by the sale of water to consumers, and valuable water power is frequently distributed among several mills in large and small quantities, and may not be used by the owner at all. The ownership of it cannot be confined to the right in the nature of a license, and is as well recognized a title or interest of a real nature as land itself, without some use of which it could not be made available." *Foster, J.*, in speaking for the court in *Goodrich v. Burbank*, 12 Allen, 459, uses this language: "The water itself may not be the subject of property, but the right to take it, and to have pipes laid in the soil of another for that purpose, and to enter upon the land of another to lay, repair, and renew such pipes, is an interest in the realty, assignable, descendible, and devisable. On this subject the language of Judge Curtis is as follows: 'I know of no rule of the common law which prohibits grants of the incorporeal right to divert water from being made in gross. If I have a spring, I may sell the right to take water from it by the pipes to one who does not own the land across which the pipes are to be carried, and I may either restrict the use to a particular house, or not, as I please. It is true the grantee cannot make the grant useful without acquiring from the owner of the intermediate land the right to lay pipes therein, nor can he use the water in a house until he obtains the right to possess that house. But these may be required afterwards. Incorporeal rights may be inseparably annexed to a particular messuage or tract of land by the grant which creates them, and makes them incapable of separate existence. But they may also be granted in gross, and afterwards, for purposes of enjoyment, be annexed to a messuage or land, and again severed therefrom by a conveyance of the messuage or land without the right, or a conveyance of the right without the land.' *Lonsdale Co. v. Moles*, 21 Law Rep. 664, Fed. Cas. No. 4,896. We are unable to distinguish between the right to take water by a canal from a pond for the purpose of power.

and the right to take it from a spring in a pipe for domestic purposes, the watering of cattle, or to supply an artificial jet or fountain, and to sell it to others for any uses they may desire to make of it." The following authorities will also throw light upon this subject: *Fishing Co. v. Carter*, 61 Pa. St. 39; 19 Am. & Eng. Enc. Law, p. 259; *Gould, Waters*, § 299, p. 562; *Poull v. Mockley*, 33 Wis. 482; *Washb. Easem.* §§ 128, 129; *Ang. Water Courses*, § 143. We are of opinion that the contract between the state and the defendant was not null and void.

It is contended that said contract did not confer upon the defendant the right to erect the steam plant. This depended upon the fact whether it was merely incidental to, and essential to, the enjoyment of the use of the water-power plant. The parties of the action had the right of trial by jury as to the legal issues raised by the pleadings, but neither a demand was made therefor on circuit, nor is there an exception raising such question. The court must assume that the circuit judge properly decided all questions of fact upon which his judgment had necessarily to rest. Even if there was error on his part in his findings of fact, it is not the subject of review by this court in a law case. This court, therefore, cannot review the testimony for the purpose of determining whether or not the steam plant was merely incidental to the water-power plant, and essential to the enjoyment of its use. For the same reason we cannot review his honor's finding of fact, in effect, that the plaintiff is owner in fee of the land described in the complaint, subject to the right of the state to the 500 horse power of water power. These views render it unnecessary to decide specifically the other exceptions herein. It is the judgment of this court that, for the reasons herein set forth, the judgment of the circuit court be affirmed.

(43 S. C. 197)

PARR v. SPARTANBURG, U. & C. R. CO.  
(Supreme Court of South Carolina. Feb. 19, 1895.)

**LEASE OF RAILROAD—NEGLECT OF LESSEE'S RECEIVER.**

A railroad company which has leased its line to another company is liable for injuries caused in the operation of the road, though it is being operated by receivers appointed for the lessee.

Appeal from common pleas circuit court of Fairfield county; Ernest Gary, Judge.

Action by Henry L. Parr against the Spartanburg, Union & Columbia Railroad Company to recover damages for the negligent killing of a mule colt. From an affirmance by the circuit court of a judgment of a trial justice for plaintiff, defendant appeals. Affirmed.

J. S. Cothran and W. D. Douglass, for appellant. Ragsdale & Ragsdale, for respondent.

v.20s.R.no.25—64

POPE, J. The plaintiff brought an action against the defendant before Jos. McMeekin, Esq., a trial justice in and for Fairfield county, in June, 1893, for \$95 damages for the negligent killing of plaintiff's mule colt. The defendant denied any liability for the tort, on the ground that it had leased its railroad to the Richmond & Danville Railroad Company, which latter company had, under the order of the United States circuit court, been put into the hands of receivers, who were operating such leased road at the time the mule colt was killed. The trial justice overruled the defense, and gave plaintiff his judgment for \$95. Thereupon the defendant appealed to the circuit court upon two grounds: First, that it was not liable for any tort while its property was managed by receivers of its lessee; second, that plaintiff had failed to prove ownership of the mule colt. This appeal came to be heard before the Honorable Ernest Gary, as presiding judge, who overruled both grounds of appeal, and affirmed the judgment of the trial justice. From this judgment the defendant now appeals to this court, upon the single ground that it cannot be held liable for this tort, which occurred while its property was in the hands of receivers of its lessee, under the appointment of the United States circuit court.

We have been very much interested by the clear and able argument of the counsel for appellant. He frankly admits that under the authority of the cases of *National Bank v. Atlanta & C. A. L. Ry. Co.*, 25 S. C. 222, and *Harmon v. Railroad Co.*, 28 S. C. 401, 5 S. E. 835, re-enforced by the case of *Railroad Co. v. Brown*, 17 Wall. 450, he cannot contend that if the defendant railroad were in the hands of its lessee, the Richmond & Danville Railway Company, it would not be liable to the plaintiff for this tort. Yet he contends that, when defendant's property passed into the hands of receivers of its lessee, the defendant ceased to be liable for torts that occurred while such receivers had control of its property, and that the plaintiff must apply to the court, whose servants the receivers are, for his relief. It seems that the defendant was not a party to the suit in the United States circuit court, when receivers were appointed to take charge of and operate lessee's property. The respondent here suggests that this presents a barrier to the assertion by the defendant of its release of responsibility for this tort; that these receivers of the Richmond & Danville Railway Company are in no sense its (defendant's) receivers; therefore that, granting that the Richmond & Danville Railway Company, as a corporation, is not liable for any torts occurring while its property is operated by the court, through the hands of receivers, it does not follow that the defendant, who is not in the hands of a receiver, can invoke this freedom from responsibility for this tort. Upon a full consideration of our cases, it will

be ascertained that the principle underlying the doctrine that a railroad company cannot avoid responsibility for its contracts or delicts by leasing its lien to another is that such leasing is a voluntary act of the chartered railroad, and that such contract for leasing has a valuable consideration, moving the lessor to transfer, for the time, its power to transport passengers and freight for hire to another. See page 221 of *National Bank v. Atlanta & C. A. L. Ry. Co.*, supra, where the present chief justice, in announcing the opinion of the court, says: "When a railroad or other corporation receives its charter from the state, conferring certain franchises, rights, and privileges, it is upon the consideration that such corporation shall perform the duties and fulfill the obligations which it at the same time incurs. The fact that the corporation chooses to perform those duties and fulfill its obligations to the community through another, whether as lessee or otherwise, cannot release it from the obligations which it assumed by the acceptance of its charter." (Italics ours.) So, also, see page 404, 28 S. C., and page 835, 5 S. E., of *Harmon v. Railroad Co.*, supra, where the same learned judge says: "As was said in one of the cases, if it were otherwise a railroad company, by leasing its road to irresponsible persons, might enjoy all the benefits conferred by its charter, and practically leave the public generally, as well as individuals, without any of the protection which the obligations imposed upon the company by the charter, as well as the general law of the state, were designed to afford. Accordingly, we find it laid down by Mr. Justice Davis in the case of *Railroad Co. v. Brown*, 17 Wall. 450, as 'the accepted doctrine of this country, that a railroad company cannot escape the performance of any duty or obligation imposed by its charter or the general laws of the state, by a voluntary surrender of its road into the hands of lessees.'" (Italics ours.) This principle is admitted by the appellant here. A careful consideration of the authorities which restrict this doctrine when a railroad has passed into the hands of receivers appointed by a court will show that such restriction is based upon the fact that where receivers are appointed, and operate a railroad, such a contract is not the voluntary act of such railroad. There is no contract of the road devolving its franchises and property upon the receivers. The surrender to the receivers is an enforced act of the railroad.

It seems to us that this defendant cannot say that the appointment of receivers of the Richmond & Danville Railroad Company alters their status. The only ligament that binds them to these receivers is one of self-interest, viz. the payment of the stipulated price of the lease. If this is not paid by these officers, their property and franchises may be recovered at once. If it is paid, they have no right to complain that the pub-

lic, or private individuals, hold them to the performance of their duties under their charter or the general laws of the state. They suggest that application should be made to the court which appointed and controls the receivers, by the plaintiff here. Why may not the plaintiff reply, "Pay me for the destruction of my property by the agents of your lessees, and then you may apply to the court to be reimbursed from the funds earned by the receivers"? We are satisfied that the circuit judge has committed no error. It is the judgment of this court that the judgment of the circuit court be affirmed.

(43 S. C. 109)

#### STATE v. BOWMAN.

(Supreme Court of South Carolina. Feb. 16, 1895.)

#### FINDING INDICTMENT — NECESSITY OF AFFIDAVIT.

A prosecuting officer may, on his own motion, present a bill to the grand jury without the presentment of an affidavit charging the offense, if he deems it necessary for the public good, and his action in so doing will be disturbed only for abuse of discretion.

Appeal from general sessions circuit court of Beaufort county; I. D. Witherspoon, Judge.

Application by Arthur Bowman for a writ of habeas corpus. From an order denying the application, he appeals. Affirmed.

The agreed statement of facts is as follows:

"The petitioner, Arthur Bowman, was arrested upon a bench warrant issued by the clerk of the court of general sessions for this county. No affidavit charging any offense was made by any person against said petitioner before any committing or examining officer, and no warrant was issued by any officer for the arrest of said Arthur Bowman, but the solicitor of his own motion, upon the request of the prosecutor and his statement, gave out a bill of indictment against said Bowman, charging assault and battery with intent to kill, upon which the grand jury found a 'true bill,' and thereupon petitioner was for the first time arrested upon a bench warrant, as aforesaid. Some ten days or more before the opening of the court of sessions, Trial Justice S. C. Cunningham held an examination into the same charge against said Bowman, in due course of law, upon affidavit made and warrant issued, and after full investigation dismissed the said Bowman, and no further proceedings were had until as above stated by the solicitor."

The order of the court is as follows:

"The grand jury having found a true bill in the above-entitled case, the defendant, Arthur Bowman, was arrested under a bench warrant. Upon an agreed statement of facts, the defendant petitions the court to be discharged from the custody of sheriff. It appears that Trial Justice S. C. Cunningham

held an examination into the same charge against the defendant some ten days before the commencing of the court of general sessions for Beaufort county, and discharged the defendant. At the present term of the court of general sessions for Beaufort county the solicitor felt it to be his duty to present a bill to the grand jury for the same offense, upon which a true bill was found after the examination of witnesses by the grand jury. The counsel for the defendant insists that the defendant should be discharged, as the bill found by the grand jury was not based upon an affidavit charging the defendant with any offense, but that the prosecution in this court was instituted upon the motion of the solicitor. It seems to me that the sections of the constitution and of the General Statutes cited and relied upon by defendant's counsel apply to the rights of a defendant charged with crime when placed upon his trial. I do not find anything in the constitution or laws of this state that prohibits the proceeding under which the defendant was arrested and is now within custody of the sheriff. The defendant has the right to apply for bail before a trial justice, and this, it seems to me, is his proper remedy. It is therefore ordered and adjudged that the defendant's petition for his discharge from custody, upon the ground that he has not been prosecuted according to law, be refused, without prejudice, however, to the defendant's right to apply to a trial justice for bail, if he be so advised. September 14, 1894. L. D. Witherspoon, Presiding Judge."

To this order exceptions were taken on the following grounds:

"(1) Because his honor erred in holding that the solicitor could upon his own motion, and without information, on oath institute, through the medium of the grand jury, the prosecution of a citizen. (2) Because his honor held that a bill of indictment could be given out by the solicitor on his own motion, without there having been any charge preferred on oath as the foundation of such bill of indictment. (3) Because his honor held, in effect, that a citizen could be held to answer to an indictment, he never having been confronted with his accusers, or had the opportunity to cross-examine them. (4) Because to hold a citizen to answer to an indictment found by a grand jury, when such citizen was ignorant of the fact even that a charge had been made against him, and had not been charged on oath with the commission of any offense, and had not been arrested, and had the opportunity of confronting and cross-examining the witnesses against him, was error, and the circuit judge should so have found. (5) Because the circuit judge erred in holding that, there being no provision in the constitution or laws of the state prohibiting such proceeding, such proceeding was therefore lawful. (6) Be-

ging the petitioner, and in not holding that he was illegally arrested and held in custody."

W. J. Verdler and A. M. Boozer, for appellant. G. Duncan Bellinger, for the State.

GARY, J. The agreed statement of facts upon which the case was heard by his honor, Judge Witherspoon, together with the order of Judge Witherspoon and appellant's exceptions, will be set out in the report of the case. His honor, Judge Witherspoon, states in his order that the attorney for the defendant moved for the discharge of the prisoner on the grounds that "the bill found by the grand jury was not based upon an affidavit charging the defendant with any offense, but that the prosecution in this court was instituted upon the motion of the solicitor." The failure of the presiding judge to sustain this objection is made the ground of appeal to this court. In the case of *U. S. v. Kilpatrick*, 16 Fed. 765, the court says: "The district attorney, according to the usual practice, may, on his official responsibility, send a bill to a grand jury without a prior arrest and binding over; but he should exercise this power cautiously, and never so act unless convinced that the exigencies of the occasion or the general public good demand it. If he has any doubts as to the propriety of such action, he should consult the court. 1 Whart. Cr. Law, § 458, and notes. Mr. Justice Field, in an able and well-considered charge to a grand jury in California (5 Am. Law J. 259), very clearly defined his views as to the powers and duties of grand juries in the federal courts. He said, in substance, that their investigations are limited to such offenses as are called to their attention by the court, or submitted to their consideration by the district attorney; or such as may come to their knowledge in the course of their investigations of matter brought before them, or from their own observations; or such as may be disclosed by the members of the body. With the above exceptions, he was of opinion that all criminal prosecutions should be commenced by preliminary examinations before a magistrate, where a person accused of crime may meet his accuser face to face, and have an opportunity for defense, as this method of procedure affords the citizen the greatest security against false accusations from any quarter. He also, in strong terms, directed the grand jurors not to allow private prosecutors to intrude themselves into the grand-jury room, and present accusations." (Italics ours.) In *Thompson & Merriam on Juries* (section 607) it is said: "It is provided by the sixth amendment to the constitution of the United States, among other things, that 'in all criminal prosecutions the accused shall enjoy the right \* \* \* to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses

in his favor, and to have the assistance of counsel for his defense.' Although the settled construction of this provision is that it was not assigned as a limit upon the state governments in reference to their own citizens, but exclusively as a restriction upon federal power, it is believed that a provision of similar import will be found in the constitution of each state. Such a provision does not prohibit other modes of originating criminal charges against offenders than that by a prosecution before a committing magistrate." In section 608 it is said: "The grand jury is not necessarily deterred from finding an indictment, because at the time the charge is presented to them it is undergoing examination before a magistrate. This circumstance has only a persuasive force with the body to postpone action upon the charge. Cases may be readily imagined where it is highly important to proceed by indictment without delay, and the law does not interfere with the exercise of discretion by the grand jury in such emergencies." In section 610 it is said: "In view of the fact that the grand jury have, from time immemorial, possessed the power to present for offenses other than those brought to their attention by bills formally prepared, it is clear that so important a right of the people will not be divested, unless by the positive terms of a statute which will admit of no other construction. The statutes generally provide for the examination of accused persons by committing magistrates, and direct, with considerable detail, how this proceeding shall be conducted. Nevertheless the accused cannot, by virtue of such statutes, show, in abatement of an indictment, that no preliminary examination was had. The examination enjoined is a mere expedient to prevent the suspected person from escaping, or for preserving the evidence, or keeping the witnesses in control. Otherwise it is clear that no case could be brought before a grand jury, unless the defendant were under arrest, and this he might elude until the offense should be condoned by a statute of limitation. Furthermore, the determination of the magistrate to discharge an accused person would be conclusive against the public. He might grossly err, or act from improper motives, and there would be no remedy." In section 611 it is said: "Indictments, however, originate with the grand jury in a variety of ways, which will now be noticed: (1) by the court giving a matter of general notoriety specially in charge; (2) by the exercise of powers ex officio of the prosecuting officer; (3) from the knowledge of the grand jury; (4) by the exercise of general and special inquisitorial powers by that body. The procedure here indicated is not recognized by all courts. Few, if any, courts would deny what is stated in propositions 1 and 2." In section 613 it is said: "Another exception to the general rule is the conceded right of the attorney general, or other prosecuting officer,

to bring to the attention of the grand jury the circumstances of a particular case for their action. In practice, this power should be cautiously exercised,—generally under the direction of the court,—and never unless the public good demands it. It is evident that this emergency includes a limited class of cases; for example, such as where the accused has fled the state, and an indictment found may be required previous to demanding him from a neighboring state, or where a less prompt mode of proceeding might lead to the escape of the offender. When the public officer exercises this power without some pressing and adequate necessity to justify the course, it is the duty of the court to set the officer's act aside. The action of the officer and the court can be made the subject of review by an appellate court only when the abuse of their powers is both manifest and flagrant." There is nothing in the "case" showing that the exercise of this power was abused. It is the judgment of this court that the order of the circuit court be affirmed.

(116 N. C. 30)

**LATHAM v. ELLIS.**

(Supreme Court of North Carolina. Feb. 19, 1895.)

**CUSTODY OF CHILD—RIGHTS OF FATHER.**

As against the claim of a child's maternal grandparents, and in the absence of any deed to them of the custody of the child, its father, who is morally and financially fitted to care for it, is entitled to the custody.

Appeal from superior court, Beaufort county; McIver, Judge.

Petition by B. B. Latham for a writ of habeas corpus to obtain the custody of his child from W. R. Ellis. From a judgment for petitioner, defendant appeals. Affirmed.

J. H. Small and W. B. Rodman, for appellant. Chas. F. Warren and B. B. Nicholson, for appellee.

**MONTGOMERY, J.** In contests between parents in respect to the custody of their children, whether in suits for divorce or in habeas corpus proceedings, where the husband and wife are living in a state of separation without being divorced, the court or judge before whom the suit or proceedings are heard may award the charge and custody of the child or children to either the husband or the wife, as may appear to be for the best interest and welfare of the child or children. Code, §§ 1570, 1661. But in the case before us the contest is not between husband and wife, but it is between the father of the child and her maternal grandparents. Under the common law, the father's claim to the custody of his minor children, under all circumstances, was paramount. The courts of chancery, however, upon assuming jurisdiction over the persons and estates of infants, overruled the common law in this par-



ticular, and have for a long time exercised the right to commit the custody and tuition of infant children to others than the father, in cases where he grossly and recklessly neglects their interests, or is guilty of coarse and brutal treatment of them. Chancellor Kent in 2 Kent, Comm. 205, writes: "The father, and, on his death, the mother, is generally entitled to the custody of the infant children, inasmuch as they are their natural protectors, for maintenance and education. But the courts of justice may, in their sound discretion, and when the morals or safety or interests of the children strongly require it, withdraw the infants from the custody of the father or mother, and place the care and custody of them elsewhere." In North Carolina the father has always been entitled to the custody of his children against the claims of every one except those to whom he may have committed their custody and tuition by deed (Code, § 1562); or unless he is found to be unfitted to keep their charge and custody by reason of his brutal treatment of them, or his reckless neglect of their welfare and interests, when their care will be committed to some proper person, on application to the courts. In our case, the respondent had no written contract or deed from the petitioner father concerning the custody of the child. In the findings of fact by his honor, the father was found to be a young man, moral, temperate, and industrious, and in every way qualified to care for, support, and educate his children, to be possessed of property and in good credit, and of excellent reputation. There is no error in the ruling of the court below, in which the child was remanded to the custody of the father, and the ruling of his honor is affirmed.

(116 N. C. 38)

**FUTRELL et al. v. DEANS et al.**

(Supreme Court of North Carolina. Feb. 19, 1895.)

**REVIEW ON APPEAL—QUESTION OF COSTS ONLY.**

The supreme court will not consider an appeal which involves only a question of costs.

Appeal from superior court, Hertford county; Armfield, Judge.

Action by John Futrell and others against Lucy C. Deans and others. Defendants excepted to so much of the judgment as taxed them with costs, and appealed. Appeal dismissed.

Winborne & Lawrence, for appellants. L. L. Smith, for appellees.

**FAIRCLOTH, C. J.** It appears from the record that the only question was which party should pay the costs. Such questions are not considered in this court. *State v. Richmond & D. R. Co.*, 74 N. C. 287; *Hasty v. Funderburk*, 89 N. C. 93. Appeal dismissed.

(116 N. C. 44, 46)

**CARTER et al. v. LONG.**

(Supreme Court of North Carolina. Feb. 19, 1895.)

**MANDATE AND PROCEEDINGS BELOW — DISMISSAL OF APPEAL—FAILURE TO PRINT RECORD.**

1. When the supreme court on appeal decides that plaintiff is entitled to "the amount demanded in the complaint," and remands the case, a judgment, following the exact words of the prayer, will be affirmed.

2. A mere request by appellant of the clerk of the court to have the record printed, and the bill sent appellant, without further attention by appellant, though he receives no bill, will not justify a reinstatement of his appeal, dismissed for lack of printed record.

Appeal from superior court, Hyde county; R. F. Armfield, Judge.

Action by W. S. Carter and others against S. A. Long, as administrator d. b. n. of Caleb Spencer, deceased. On a former appeal (114 N. C. 187, 19 S. E. 632), the case was remanded, and judgment directed for plaintiffs. From the judgment on the second trial both parties appeal. Judgment affirmed on plaintiffs' appeal. Defendant's appeal dismissed.

Ohas. F. Warren, for plaintiffs. W. B. Rodman, for defendant.

**FURCHES, J.** This case was before this court on the appeal of plaintiffs at February term, 1894, when the court decided that "there should have been judgment for plaintiffs for the sum demanded in the complaint, this being much less than the purchase money paid by Carter to Spencer." 114 N. C. 187, 19 S. E. 632. This opinion was certified to the court below, and at fall term, 1894, the plaintiffs moved for judgment upon the opinion so certified. The court granted this motion, and gave the plaintiffs judgment for "\$750, with interest thereon at 8 per cent. per annum from November 12, 1888, and the further sum of \$8.57, as demanded in the complaint." The plaintiffs, being dissatisfied with this judgment, appealed again to this court, and contend that plaintiffs are entitled to judgment for \$2,500, with interest thereon from April 25, 1882. So there is nothing for the court to decide upon this appeal except as to the amount of the judgment, and this is to be determined by ascertaining "the amount demanded in the complaint." Upon an examination of plaintiff's complaint (paragraph 4), we find the following allegation: "Plaintiffs therein [referring to the action of *Borden v. Carter*] elected to take the unimproved value of the land, which was ascertained by the jury to be \$1,500, which sum was declared to be a lien upon the said tract of 100 acres, of which the tract conveyed by Spencer to Carter formed one-half;" "that by reason of the breach of warranty, and the eviction of defendants under a paramount title, the plaintiffs in this action are entitled to recover of the defendant, S. A. Long, administrator of Caleb Spencer, one-half the amount paid by them under

said judgment, in said suit brought by Henry V. Borden and others, to wit, the sum of \$750, with interest thereon at 8 per cent. from the 12th of November, 1888, and the sum of ——— dollars, one-half of the cost of said action." This statement of plaintiffs' complaint seems to fix the amount to which plaintiffs were entitled to judgment, under the decisions of this court at February term, 1894, so clearly and with so much certainty that we cannot conceive how there can be any misunderstanding about the matter. We therefore hold that the judgment of the court below, appealed from, gave plaintiffs all they are entitled to have. There is no error.

**Upon Motion to Reinstate Defendant's Appeal.**

**CLARK, J.** This is a motion to reinstate this appeal, which was dismissed at this term for failure to print, as required by rules 28 and 29. The motion to reinstate in such cases is allowed only for good cause shown. *Horton v. Green*, 104 N. C. 400, 10 S. E. 470; *Whitehurst v. Pettipher*, 105 N. C. 39, 10 S. E. 857. In the present case no affidavit was filed. Counsel filed a written statement, upon information, that the appellant had requested the clerk of the court of his county to request the clerk of this court to have the record printed, and send him the bill, which he would pay. This is not controverted, and, taking it to be true, still no money was sent, nor does it appear that the appellant ever took the trouble to ascertain whether his request had been complied with or not, though he had received no bill for the printing. As has often been said, this rule was adopted to expedite the trial of appeals, and appellants will not be permitted to obtain delay by neglecting to observe it. *Edwards v. Henderson*, 109 N. C. 83, 18 S. E. 779; *Pipkin v. Green*, 112 N. C. 355, 17 S. E. 534. Pointed notice was given in *Hunt v. Railroad Co.*, 107 N. C. 447, 12 S. E. 378, that the court would feel compelled thereafter to enforce the rule rigidly. As was said in *Paine v. Cureton*, 114 N. C. 603, 19 S. E. 631: "An appellant cannot simply take an appeal, pay the clerk's fees for transcript, and thereafter leave the appeal to take care of itself, like a log floating down a river, or corn put in the hopper of a mill. The appeal requires attention." The appellant has not shown such attention as entitles him to have the appeal reinstated. Motion denied.

(116 N. C. 976)

**STATE v. HART.**

(Supreme Court of North Carolina. Feb. 19, 1895.)

**CRIMINAL LAW—REVIEW ON APPEAL—CHARGE—FAILURE TO REQUEST—EXCEPTION AFTER VERDICT—STATEMENT OF CASE—INDICTMENT—WAIVER OF ERROR.**

1. Where the record does not show that any instructions were asked for, an assignment of

error that the court declined to charge as requested will not be considered.

2. In reviewing an assignment of error that the evidence did not justify the verdict, an appellate court will consider only the evidence introduced by the state.

3. An exception taken to a charge after the verdict was rendered will not be considered on appeal.

4. Where the trial judge in his statement of the case states that he recapitulated the evidence to the jury, and there is nothing in the record to contradict this statement, an assignment of error that the court did not recapitulate the testimony, will not be considered on appeal.

5. An indictment which contains all that is necessary, though inartistically drawn and liable to the criticism of duplicity, is sufficient on a motion in arrest of judgment.

**Appeal from superior court, Craven county; Brown, Judge.**

**E. S. Hart** was convicted of arson and appeals. Affirmed.

Indictment for burning a barn, tried before Brown, J., and a jury, at fall term, 1894, of Craven superior court.

The following testimony was offered for the state: **Mrs. Mary D. Dewey** testified that about 12 o'clock on the night of February 17, 1894, or a little thereafter, a building upon her premises was destroyed by fire. The building was used as a barn, for the storage of corn and feed and other produce, and there were also stables in it for horses. Witness further testified that she had been sitting up that night, and was awake when the alarm of fire was given; that she and **F. O. Small**, her tenant, and **George Tisdale** and his wife, went at once to the fire, and that neighbors came soon after, and joined them in extinguishing it; that she examined the tracks of one person, and recognized them as the tracks of the defendant; that the defendant had been her tenant, and they had had some disagreement about a corn sheller. Cross-examined: "A great many people went to see the fire. I did not see the defendant that night." The witness could not give any reason for saying the only tracks found where the fire originated were the defendant's tracks, except that his track was peculiar, and she knew it and recognized it. That there had been no other disagreement between her and the defendant, except about the corn sheller, and she supposed they had parted as friends. **Elizabeth Tisdale** testified: That she was present at the fire, and examined certain tracks in the rear of the stables where it was supposed the fire originated. They looked like the defendant's tracks. That she recognized them because more than two years before, while **Mrs. Dewey** was away from home, witness examined defendant's shoe tracks when he would be about his home. She further testified that in October, 1893, she heard the defendant say that the red cow would lick up the barn and stables of **Mrs. Dewey**. The building destroyed was a barn, and also had stables in it. Cross-examined: "There were a great many people at and around the stables

that night [naming some ten or more]. They came after we got to the fire." Witness did not see the defendant anywhere that night. A horse was in the building, and was taken out alive. Did not see the defendant at the fire. Johnson Ellison and George Bryan, two colored witnesses, testified: That on the night of the fire they saw the defendant on the road between the defendant's house and the Neuse road, leading to Mrs. Dewey's, called the "Piney Neck Road." That it was a road leading into the road which led to Mrs. Dewey's, but running up into a thickly-settled neighborhood, called "Piney Neck." That they saw defendant on said road, not very far from Vanceboro, going from his house along said road. That he was about a mile from his own house, and about a half mile from the Neuse road, and on the Piney Neck road, going towards the Neuse road, which Neuse road ran by Mrs. Dewey's. That it was cloudy and raining that night. That the defendant did not speak. It was Saturday night, about 10 o'clock. The road was much traveled, especially on Saturday night, but they saw nobody but the defendant. F. C. Small testified: That he was at the fire. Examined the track, and it looked like the defendant's. Examined the track with a lantern, and on the following morning followed the track to the defendant's house. That his opinion is that the track at the stable and the barn was the same track which led to defendant's house. Upon cross-examination, he said he could not follow the tracks closely, but found them every hundred feet or so. There were one or two intervals, of several hundred feet, in which no track could be seen. He went to defendant's house the following morning. It had been raining during the night, but did not obliterate the tracks. Did not know the tracks were defendant's tracks until next morning. Defendant was arrested next morning, and his tracks made then were compared with the track the witness had followed the night before, and they were alike. There was a horse in the building. The state further offered testimony tending to prove that defendant had escaped from the officer without giving bond for his appearance at court, as required by the justice to do, and that some time afterwards he was brought back.

Guilford Maucher, for defendant, testified that the fire occurred at 11 o'clock Saturday night, February 17, 1894. He had been fishing, and had just lain down to sleep, and saw the light of the fire about 11 o'clock. Other witnesses testified that the fire occurred about that time, and that defendant was at Vanceboro at 10 o'clock, or a little after, on the night of the fire, and left Vanceboro about that time. The witness Lane said that defendant was at his store about that time, and the witness Willis saw the defendant as he was coming out of the town of Vanceboro about same time. A number of witnesses testified that defendant's house

was about a mile from Vanceboro, and that Mrs. Dewey's place was about six miles from defendant's house, and that a man could not travel the distance between defendant's house and Mrs. Dewey's in the time defendant left Vanceboro, as testified to by defendant's witnesses. It was also in evidence that the road known as "Piney Neck Road" was much traveled, and that it ran into a thickly-settled neighborhood. It was a cloudy night, and had rained some between the time of the fire and next morning. Mary Hart, defendant's daughter, testified that defendant came home about 11 o'clock on the night of the fire, and remained there all night. There were but two rooms in the house, communicating. She would have known if defendant had left the house at all during the night. Defendant himself testified that he was home all night when the barn was burned. Got home a little before 10 o'clock, and stayed until next morning. Did not set fire to the property. Had been Mrs. Dewey's tenant, and their only disagreement had been about a corn sheller, and they had parted on friendly terms. Stated positively that he did not commit the crime. A number of witnesses testified as to the bad character of the state's witness and of Elizabeth Tisdale. Edward Tillett testified for defendant that he was sheriff of Currituck, and defendant stated to him that he wished to come back and stand a trial. Defendant was then in Currituck, living openly with his relatives, and making no attempt to conceal himself.

George Dudley testified, for the state: That he was at the fire, and went behind the barn, and saw the tracks of the person leading to and from the point where the fire had started. Was perfectly familiar with defendant's tracks. It was a peculiar track, on account of the way in which his shoes were worn at the toe, and track at the fire was defendant's track, and he was positive as to this. He had been in the habit of examining tracks all his life, and was able to detect them. That country people were more skilled in this than others.

Defendant requested the court, in apt time, to charge that the state had failed to make out its case; that there was not sufficient testimony to go to the jury. Refused. Defendant excepted.

The court recapitulated the evidence on both sides, and charged the jury that this was a case of circumstantial evidence relied on by the state, and pointed out the circumstances relied upon to prove defendant's guilt; that in order to convict they must be satisfied beyond a reasonable doubt; that the circumstances must point clearly and conclusively to the guilt of the accused, and must be inconsistent with his innocence; and that the jury must be fully satisfied of the truth of each circumstance. The court then called the attention of the jury to the testimony of defendant himself, explanatory of his alleged flight, and his whereabouts and

innocence, and to the testimony of Sheriff Tillett and the several witnesses offered by the defendant tending to prove an alibi, and to the testimony of defendant's witnesses as to the time the fire occurred, and his whereabouts, and to the unreliability and uncertainty of testimony in regard to tracks. There was a verdict of guilty, and a motion in arrest of judgment and for a new trial, both of which were overruled; and the defendant appealed from the judgment pronounced. The defendant assigns error—First, because the court declined to charge the jury as requested by defendant; and, second, because the court did not recite and recapitulate the testimony.

The indictment is substantially as follows: The jurors, etc., present that defendant, etc., willfully, unlawfully, wantonly, maliciously, and feloniously did set fire to and burn the barn and stable of one M. D. Dewey, with intent to injure and defraud the said M. D. Dewey, against the form of the statute, etc.

C. R. Thomas, for appellant. The Attorney General, for the State.

FURCHES, J. The defendant, having been convicted, moves for a new trial, and assigns two grounds for his motion: First, that the court did not charge the jury as requested, and, secondly, that the court did not recapitulate the evidence to the jury. And, these motions being denied, he then moved in arrest of judgment upon the ground that the bill of indictment was defective.

Defendant's motion for a new trial cannot be sustained, upon the first cause assigned, for more than one reason: First. Upon examination of the record, we fail to find any prayers or request for instructions, and therefore cannot see that the court failed to give the instructions asked, if any were asked. But the brief of defendant seems to put this part of the prayer for a new trial upon the ground that there was not sufficient evidence on the part of the state to justify a jury in finding a verdict of guilty, and the court should have so instructed the jury. We say "evidence in behalf of the state," because we, as a court, cannot consider the evidence in favor of the defendant. If we could, we might have a different opinion from that of the jury as to what the verdict should have been. But, if we should consider defendant's exception and assignment sufficient to authorize us to consider it as an exception to the charge of the court upon this ground, still it does not appear that it was made until after the verdict was rendered, and when it was too late to interpose such an exception. *State v. Kiger*, 115 N. C. —, 20 S. E. 456, and cases there cited. If it had appeared from the record that the defendant had asked the court to give this instruction, and the court had refused to do so, it would have presented an interesting question. But this question is not present-

ed, as we have seen, and we can see no good reason why we should review the many decisions we have upon this line, and we will not discuss the matter further, as whatever we might say would be but a dictum, and we think, as a general rule, they are not profitable to the courts or to the profession.

The second grounds assigned for a new trial cannot be sustained for the reason that the defendant is not sustained by the facts. As we find, the judge, in his statement of the case, says that he did recapitulate the evidence to the jury; and, there being nothing in the record to contradict this statement, we are bound by it.

This disposes of defendant's motion for a new trial, and the only remaining question is defendant's motion in arrest of judgment, and we do not think this can be sustained. The bill is inartistically drawn,—contains more than is necessary, but all that is necessary, and may be liable to the criticism of duplicity. But, as it contains all the averments that are necessary, we think the verdict must be sustained. *State v. Thorne*, 81 N. C. 555. But this is a motion in arrest of judgment, and not a motion to quash. And, if the bill is liable to the criticisms pointed out by defendant in his brief, such defects were cured by the verdict, and cannot avail the defendant on a motion in arrest of judgment. *State v. Simons*, 70 N. C. 336. There is no error, and the judgment is affirmed.

(116 N. C. 57)

#### RIGGAN v. SLEDGE.

(Supreme Court of North Carolina. Feb. 19, 1895.)

APPEAL—APPLICATION TO AMEND CASE — SUFFICIENCY OF AFFIDAVIT—MORTGAGE INDUCED BY FRAUD—KNOWLEDGE OF MORTGAGEE.

1. An application for leave to apply to the trial court to amend the case by including evidence omitted therefrom will be denied where the affidavit, merely states that appellant believes the trial court would make the amendment, but does not set out the ground of such belief, and there is nothing to show that the omission complained of was made by mistake or inadvertence.

2. On an issue as to whether a mortgagor was induced to execute the mortgage through the fraud of her husband, it was proper to refuse to charge that if she was ignorant of the contents of the mortgage, and was induced to sign the same by his fraud, then said mortgage was void, as, in order to invalidate it, it was necessary that the mortgagee should have had knowledge of the fraud.

Appeal from superior court, Warren county; Winston, Judge.

Action by John W. Riggan against Pattie Sledge to recover possession of land, and for damages for the withholding thereof. From a judgment for plaintiff, defendant appeals. Affirmed.

#### Complaint.

"The plaintiff, complaining, alleges: (1) That on the 24th day of May, 1888, and for a long time theretofore, the defendant was seized and possessed of the following de-

scribed tract of land, situated in the county and state aforesaid, and bounded as follows: On the south by Reedy creek, on the west by the lands of the heirs of the late William A. Dowtin (now known as 'Mrs. Mary Dowtin's Place'), on the north and east by the lands of B. R. Harris, containing one hundred and fifty-one acres, whereon the defendant now resides,—which said tract of land descended upon the defendant from her father, John Stallings, who died about the year 1867, intestate, leaving the defendant his only heir at law. (2) That on the 24th May, 1888, the defendant and L. H. Sledge, her husband, being indebted to J. W. Riggan & Co. in the sum of three hundred and fifty-eight dollars, as evidenced by their bond due and payable on the 1st January, 1889, to secure said indebtedness, executed to said J. W. Riggan & Co. a mortgage upon said land, which was duly recorded in office of register of deeds of Warren county on May 28, 1888, in Book 58, page 508, and that said defendant and her husband failed to pay said bond, or any part thereof, now shown to the court here. (3) That afterwards, to wit, on the 30th January, 1890, the defendant and her said husband became indebted to J. W. Riggan, the plaintiff, in the sum of three hundred and ten dollars and sixty-four cents, as is evidenced by their note, due on or before November 1st next thereafter, bearing interest from date at rate of eight per cent.; and, to secure said indebtedness, said defendant and her husband on the 30th of January, 1890, executed to said J. W. Riggan a mortgage on the land above described, which is duly recorded in the office of register of deeds of Warren county, in Book 54, page 619, on February 1, 1890, and shown to the court here; and that said defendant and her husband have never paid said indebtedness, nor any part thereof; and that said husband has since died. (4) That afterwards, to wit, on the 6th day of July, 1891, the said J. W. Riggan & Co. (the firm composed of J. W. Riggan and S. Johnston) and J. W. Riggan, default having been made in the payment of their respective debts secured in the mortgage deeds above referred to, in exercise of the power and authority in them vested by reason of their said respective mortgage deeds, sold said tract of land at the courthouse door in Warrenton, N. C., on the 6th day of July, 1891, and that one J. H. Hewey became the purchaser, at the price of eight hundred and fifty dollars, and thereupon said mortgagees, respectively, executed to said J. H. Hewey a deed to said land. (5) That said J. H. Hewey failed to pay the price of his said bid, and in satisfaction thereof, afterwards, to wit, on 23d November, 1892, said Hewey, together with his wife, Lucy S., conveyed by deed in fee the said tract of land to the said J. W. Riggan, which said deed is duly recorded in the office of register of deeds of Warren county, in Book 57, page 119, and now shown the court here. (6) That said plaintiff is now the owner of and enti-

tled to immediate possession of the said tract of land. (7) That the defendant unlawfully and wrongfully withholds the possession of said tract of land from the said plaintiff. (8) That the plaintiff is damaged by reason of said unlawful detention of said land in the sum of two hundred dollars. Wherefore plaintiff prays judgment against the defendant for the sum of two hundred dollars damages, for the immediate possession of said land, and for costs of suit."

Answer.

"The defendant, answering the complaint of the plaintiff, says: (1) In answer to allegation 1 of the complaint, the defendant says that she is the owner of the tract of land as set forth therein, except that her mother, Mrs. Alice Stallings, is entitled to dower therein, as the widow of John Stallings, deceased. (2) In answer to allegation 2, defendant says that on 24th day of May, 1888, and before that time, she was never indebted to the plaintiff in any sum whatsoever, and she denies that part of the said allegation. She admits that she signed the said bond and mortgage as set forth in said allegation, but avers that she was ignorant of what she was doing; that neither bond nor mortgage was read to her at the time she signed the same, or at any time theretofore, and that she was at that time unable to read and write herself; that the reason of her signing the same was that her husband told her that the mortgage was on her stock, and not on her land, and she signed the same under this deceit practiced upon her by her said husband, and believing that her said mortgage covered her said stock, and not her land. (3) In answer to allegation 3, she says that that part of said allegation which alleges that she was indebted to the plaintiff is not true, and she denies the same. She admits, however, that she executed the said bond and mortgage named in said allegation 3; but avers that she did so through ignorance. She says that the said bond and mortgage were not read over to her before she signed the same, and that she could not read and write herself. She further says that, at and before the execution of said bond and mortgage, her husband told her that the said mortgage conveyed only his real estate in Halifax county, North Carolina, and none of hers was embraced in it, and that under this deceit practiced upon her by her said husband she signed the said bond and mortgage believing that it conveyed no part of her land, but only the land of her aforesaid husband. (4) In answer to allegation 4, the defendant says that she admits that the forms of the sale of the land, as therein set forth, were carried out, but she is informed and believes that the said Hewey was not a genuine purchaser, and was a mere man of straw for plaintiff. (5) In answer to allegation 6 of the complaint, the defendant says that the same is not true, and she denies the same. (6) In answer to allegation 7, the defendant

admits that she is in possession of said land, and avers that she does not hold it wrongfully and unlawfully from the plaintiff, but lawfully and in her own right. (7) In answer to allegation 8, the defendant says that the same is not true, and she denies the same. Wherefore the defendant demands judgment against the plaintiff for costs, and that she go without day."

#### Issues.

"(1) Is the plaintiff the owner in fee and lawfully entitled to the immediate possession of the tract of land named in the pleadings? (2) What damages has the plaintiff sustained by reason of said defendant's unlawful possession? And the said jurors having found both of said issues in favor of the plaintiff and against the defendant, and having assessed the plaintiff's damages at sixpence, it is therefore considered and adjudged that the plaintiff recover of the defendant the tract of land particularly described in the pleadings, and also his damages and costs of action; and the said plaintiff prays for a writ of possession accordingly, which is granted to him."

#### Case.

Civil action, tried before Winston, Judge, and a jury, at fall term, 1894, of Warren court. In the above-entitled case, on motion of defendant's attorney, the court permitted an amendment to the answer setting forth that the fraud practiced by the husband, Lewis Sledge, upon his wife, the defendant, as alleged in said answer, was participated in by plaintiff, who was the mortgagee in the mortgage referred to in the pleadings, or that he at least had knowledge of the fraud at the time of the execution of said mortgage. Upon the pleadings so amended, the plaintiff stating that he was ready, the trial was proceeded with. At the close of the testimony, and in apt time, the defendant presented the prayer for instructions herewith sent, marked "Exhibit A." The instructions were refused, and the defendant excepted in apt time. The court then instructed the jury that from the admission in the pleadings and the whole evidence, if believed by the jury, the plaintiff was entitled to have the first issue answered, "Yea." Under the court's instruction, the jury so answered. The second issue, by consent, was answered, "Sixpence." The issues to which the above responses were made (the issues were submitted to the jury by consent) were as follows, to wit: (1) Is the plaintiff the owner in fee and entitled to the immediate possession of the land in controversy? (2) What damages is the plaintiff entitled to recover? The defendant excepted in apt time to the instructions of the court to so answer said issues. Motion by defendant for new trial overruled. Judgment for plaintiff. Appeal by defendant. The defendant asked no written instructions except those above referred to.

The testimony was, in substance, as follows, to wit:

Defendant and several witnesses testified that Mrs. Sledge never got out of the buggy at all; that only her husband got out and went into the store, and had a private conversation with Riggan, the plaintiff. The witnesses who testified to this were T. J. Stallings and Perry. It was in evidence that Wemyse was at the plaintiff's store on that day, and, at the request of plaintiff, immediately followed Sledge and defendant to Grove Hill, where they went to let private examination of defendant be taken. Riggan, the plaintiff, testified that Wemyse told him he was going to Grove Hill on other business, and that he (plaintiff) requested him to bring the mortgage back. Wemyse testified that he went to Grove Hill for the plaintiff for the purpose of bringing back other papers belonging to the plaintiff, and perhaps the mortgage also. Riggan, plaintiff, testified that Wemyse did not go to Grove Hill for him (plaintiff), but went on business for himself. Defendant and Sallie Stallings testified that defendant and her husband came straight back from Grove Hill on said day, and passed right by plaintiff's store in so doing. Defendant testified that she never went to plaintiff's store on the day of execution of the mortgage of 1890. Defendant, Sallie A. Stallings, and Sallie Brown testified that defendant did not leave home in a buggy on that day. Defendant and Sallie A. Stallings both testified that defendant did not go to plaintiff's store on that day, but that defendant and her husband walked to Ballard's, justice of the peace, and executed the mortgage there. Edward Brown testified that he had a conversation with plaintiff at the last Warren superior court, in Warrenton, in which plaintiff stated that he did not wish Mrs. Stallings (mother of defendant) to know, of the execution of the mortgages, before they were executed. The plaintiff, J. W. Riggan, testified that he never knew, heard of, nor had any reason to believe or suspect that Mr. Sledge, husband of plaintiff, either deceived or practiced any fraud upon his wife, or withheld from her any knowledge of the contents of either of said mortgages; he read them over to Sledge and his wife; that the first mortgage (1888) was read over in his store to Sledge and his wife, the defendant, at Mountain View, in the presence of C. N. Riggan, and that Robert Wemyse was sitting in the store a short distance off; that Sledge and his wife had come in a buggy together, and that, after he read the mortgage over to Sledge and his wife, he gave it to Mr. Sledge, and that he (Sledge) and his wife got in their buggy, saying they were on their way down to Halifax, and would stop at Grove Hill on their way, and execute the same before H. T. Egerton, a justice of the peace, and said Wemyse said that, as he was going over to Grove Hill, he

would bring said mortgage back. Riggan further testified that he did not say to witness Brown that he (Riggan) did not want Mrs. Stallings to know about the mortgage. Said Riggan further testified that the mortgage of 1890 was read over by him to Sledge and his wife at his store at Mountain View; that "Mr. and Mrs. Sledge came over and talked over the matter before signing it, and she said she was willing to sign the second mortgage (1890) if I would release the mortgage which I had on their chattels, her husband saying that, if I would not release the mortgage on the chattels, he would not have anything to mortgage to get supplies that year," and that he (said Riggan) thereupon agreed to do so, and gave them the 1890 mortgage to carry before Ballard, justice of the peace, to execute, and "a few days thereafter Sledge met me in Warrenton, and gave me the mortgage duly executed and proven, and I canceled the chattel mortgage I had on their property. They did not sign the second mortgage in my presence, but carried it before Ballard, the justice of the peace." C. N. Riggan testified as follows: "I was in the store of J. W. Riggan when Sledge and wife came to execute the first (or 1888) mortgage. They came in a buggy together. Both got out, and went into store. I heard my father, J. W. Riggan, read the note and mortgage over to Sledge and wife, and explain the same to them. Robert Wemyse was in the store at same time. Mr. Sledge took the mortgage, and he and his wife got in the buggy, and drove off to Grove Hill, to execute the same before H. T. Egerton, the justice of the peace." The justice who took the private examination testified that he told the husband, in presence of his wife, the defendant, that it was dangerous to give a mortgage; that the land would be sold if he did not mind; and that the husband responded that he was careful, and would sell or had sold some Halifax land with which to pay off the mortgage. Case, on appeal, settled by Winston, Judge, after due notice, upon disagreement of counsel, at Oxford.

M. H. Palmer, for appellant. C. A. Cook, for appellee.

CLARK, J. The appellant avers in his affidavit an omission of the trial judge to include in the case settled by him certain evidence deemed material by appellant, and, further, his belief that his honor will make the correction if given an opportunity. It has been repeatedly held by this court that the application is insufficient unless it also sets out the ground of such belief, that the court may judge of its reasonableness. *Porter v. Railroad Co.*, 97 N. C. 63, 2 S. E. 580; *Lowe v. Elliott*, 107 N. C. 718, 12 S. E. 383; and other cases cited in *Clark's Code* (2d Ed.) 549. It is usual to append the judge's letter to that effect to the affidavit, that the court may pass upon it. It must also ap-

pear that the omission complained of was made by mistake or inadvertence. *Bank v. Bridgers*, 114 N. C. 107, 19 S. E. 276; *State v. Sloan*, 97 N. C. 499, 2 S. E. 666. Nor is a suggestion of this kind sufficient to sustain a motion for a continuance, in order that the judge may be applied to for such letter. The appeal has already been docketed several days, and there has certainly been ample time since the "case settled" was accessible to appellant in which to apply to his honor for such statement in writing. "*Virgilantibus, non dormiantibus leges subveniunt.*" The defendant requested the judge to charge that if she was ignorant of the contents of the two mortgages, and was induced to sign the same by the fraud and deceit practiced on her by her husband, then said mortgages are void and plaintiff cannot recover possession of the land. This omits any reference to the participation in or knowledge of such alleged fraud and deceit on the part of the plaintiff, and was properly refused. The *privy examination* is properly certified. There is no evidence tending to show that the plaintiff participated in or had notice of any fraud or deceit practiced by the husband, if any there was, but there was evidence to the contrary, and also evidence that the mortgages were read over to defendant before being signed by her. Indeed, this being a civil case, upon the evidence his honor might have directed the jury to return the verdict on the first issue in favor of the plaintiff, as there was no evidence to the contrary. *State v. Riley*, 118 N. C. 648, 18 S. E. 168; *State v. Shule*, 32 N. C. 153.

Affirmed.

MONTGOMERY, J., having been of counsel, did not sit on the hearing of this appeal.

(116 N. C. 48)

WITZ et al. v. GRAY et ux.

(Supreme Court of North Carolina. Feb. 19, 1895.)

WIFE'S SEPARATE ESTATE—ACTION TO CHARGE—AUTHORITY OF HUSBAND.

1. The complaint in a bill against a husband and wife to entitle plaintiff to subject the wife's separate property to the payment of the judgment must describe the separate property sought to be charged.

2. The wife's separate property cannot be charged for goods sold to the husband.

3. A husband, who is the general manager of his wife's store, has not implied authority to execute in her name a note in payment for goods previously purchased.

Appeal from superior court, Beaufort county; Brown, Judge.

Action by Witz, Biedler & Co. against S. A. and J. M. Gray. From an order overruling a motion for the appointment of a receiver, and judgment thereupon for defendants, plaintiff's appeal. Affirmed.

Exhibit A, referred to in the opinion, is as follows: "\$735.85. Washington, N. C., June 6, 1893. One hundred and thirty-one days

after date, I promise to pay to the order of Witz, Biedler & Co. seven hundred and thirty-five 85/100 dollars, at Bank of Washington, Washington, N. C., without offset, for value received. Mrs. S. A. Gray, per J. M. Gray."

W. B. Rodman, for appellants. J. H. Small and Shepherd & Busbee, for appellees.

**FURCHES, J.** This is an action of Witz, Biedler & Co. against J. M. Gray and S. A. Gray, husband and wife, to recover \$735.85 for goods sold to defendants, for which note marked "Exhibit A" was afterwards given to plaintiffs, and is brought to this court upon a motion for a receiver before Brown, J., which was refused, and plaintiffs appealed. This motion is made, then, in aid of the main relief demanded; and, to entitle plaintiffs to this relief, they must allege and show that they are entitled to the main relief,—that is, that they are entitled to recover a personal judgment against S. A. Gray, if she were a feme sole. And then they must show their equity to entitle them to this ancillary relief in aid of their main relief.

Plaintiffs cannot have this ancillary relief under the first count in their complaint, for the reason that they have failed to name and describe any separate estate as belonging to the feme defendant. *Jones v. Craig-miles*, 114 N. C. 613, 19 S. E. 638. Plaintiffs cannot have this relief under the second count in their complaint for the same reasons assigned above (*Jones v. Craigmiles*, supra), and for the further reason that in this count they allege that they sold the goods to J. M. Gray, and that he is their debtor, and not S. A. Gray, the wife. And plaintiffs cannot have this relief under the fourth count in their complaint for the reasons given why they are not entitled to relief under the first count (*Jones v. Craigmiles*, supra) and for the further reason that, if they are entitled to recover on this count in their complaint, it would be upon the grounds of fraud practiced on plaintiffs by defendants in the purchase of the goods shipped to them, and that the title never vested in defendants, but is still in plaintiffs. But it is not alleged that the goods now in the store of defendants are the same shipped to them in 1893, which would be necessary to allege and show, to entitle plaintiffs to their motion under this count. In fact it was conceded by the learned counsel for plaintiffs that they were not entitled to this motion under either of these three counts, but he insisted that he is entitled to have a receiver appointed on the third count in his complaint. And this brings us to one of the questions to be considered and determined in this appeal, and we are of the opinion that plaintiffs are not entitled to a receiver under this count. We have said that plaintiffs are not entitled to have this

ancillary relief unless they are entitled to the main relief demanded in their complaint; that is, unless they are entitled to a personal judgment against Mrs. Gray, were she a feme sole. It is not alleged that Mrs. Gray signed the note declared on, but that J. M. Gray, the husband, signed the note, and that he was the agent of his wife, and, as such agent, was authorized to do so. The allegation of the complaint that plaintiffs insist constituted the husband the agent of his wife, and authorized him to execute the note sued on, marked "Exhibit A," is as follows: "That J. M. Gray, her husband, is the active business manager of the said business, and the same is carried on with his consent." And defendants admit that J. M. Gray is the husband of S. A. Gray, and that he is her clerk in said store, selling the goods therein, and that he is the general manager of the same, and that all this is by the wife's consent. But defendants deny that J. M. Gray was the agent of S. A. Gray to sign said note, and Mrs. Gray denies that she had any knowledge of the fact that her husband had given such a note, or that she has in any way ratified the same; that her husband, in signing said note, acted without any authority from her to do so, and without her knowledge or consent.

This presents the question as to the validity of the note, and involves the question of principal and agent. It was admitted on the argument that a husband may be the agent of his wife; and it is admitted in the answer of defendant that J. M. Gray is the clerk and general manager of his wife's store, and in these respects may be considered her agent. But did this make him her agent to sign her name to a promissory note, such as Exhibit A, for goods bought some time before, without her knowledge or consent? An agent, to bind his principal, must act within the scope of the power given him by the principal. He may be an agent for one or several things, and no agent for many other things. "An agent authorized to attend to and manage a grocery store—a mere clerk employed in a merchant's store—has no implied power to bind his principal by the execution of negotiable paper." *Mechem*, Ag. § 891, p. 225. "An agent authorized to buy goods and pay for them is not thereby authorized to draw, accept, or indorse negotiable paper; \* \* \* must see to it that his authority is adequate, and both they and the agent must keep strictly within the limits fixed to the agent's authority, or the principal will not be bound." *Mechem*, Ag. § 898, p. 236. It therefore seems to us that the execution of the note sued on, by J. M. Gray, was outside of his agency, and in excess of any authority alleged or shown by plaintiffs. And, if the defendant J. M. Gray was a single woman, plaintiffs would not be entitled to a personal judgment against her on said note, and plaintiffs are certainly not entitled to more than they would be if she



were unmarried. Then we are of opinion that plaintiffs have failed to establish their main relief,—the right to a personal judgment on this note against Mrs. Gray, if she were a single woman. And, that being so, they cannot have the ancillary relief asked, in this motion, in aid of a relief they are not entitled to.

Plaintiffs' counsel contended it would be a great hardship to his clients to deny them this relief. And if this were true it would not authorize the court to grant the order, unless plaintiffs had made a case entitling them to the relief sought, under the law and practice of the courts. But the court fails to see that great hardship complained of, and we do not mean to say by this that plaintiffs should not have pay for their goods. But it does not appear that there was any fraud practiced on plaintiffs. They knew Mrs. Gray was a married woman, and it is not alleged that she or her husband represented her as a free trader. In fact, the knowledge that she was a married woman doing business in her name, and her husband acting the part of a clerk, would have been sufficient to put most prudent business men on guard. But plaintiffs, knowing all these facts, sold her their goods (probably at a very good profit), took the chances, and are now having trouble to collect their money, as most business men would have expected; and, though costly, it may be a valuable lesson. There is no error in the judgment appealed from. Affirmed.

(116 N. C. 972)

#### STATE v. JENKINS.

(Supreme Court of North Carolina. Feb. 19, 1896.)

##### CRIMINAL LAW—NEW TRIAL—MISCONDUCT OF JURY—INTOXICATION.

Where a jury purchased whisky, and "some of them were under its influence" while deliberating on their verdict, a new trial will be granted.

Appeal from superior court, Beaufort county; McIver, Judge.

Thomas Jenkins was convicted of injuring stock running at large, and appeals. Reversed.

The defendant was convicted upon the trial of an indictment for injuring stock running at large, tried at fall term, 1894, of Beaufort superior court, before McIver, J., and moved for a new trial upon the ground of misconduct of the jury. Upon affidavits submitted by both the state and the defendant, the court found the following facts: "The court charged the jury before dinner, and they immediately returned to the jury room, which was on the lower floor of the courthouse, where they remained until supper time. At supper time the court instructed the sheriff to give the jury supper. The sheriff took them in a body down town, and

carried them to Mrs. Smith's restaurant, where they got supper. They stopped at Wright's, on the way back to the courthouse, and got some cigars or tobacco. They went upstairs in the court room on their return, and a deputy sheriff was placed with them. On that night the jury had some whisky,—one a pint and another a quart. Nearly all of them drank of this whisky. Some of them were under its influence. The next morning, being Saturday morning, the jury having been put in the grand-jury room, on the lower floor of the courthouse, some whisky was passed through the window into the room. All the whisky which the jury drank was purchased by them. There was no allegation, proof, or evidence that there was any outside influence brought to bear upon the jury, or that there was any improper influence, and no other misconduct on the part of the jury, except as above stated. The jury returned a verdict about 10 o'clock Saturday morning." The motion was overruled, and the defendant excepted, and appealed from the judgment pronounced, assigning as error the refusal of his honor to grant a new trial on account of the misconduct of the jury.

Charles F. Warren, for appellant. The Attorney General and W. B. Rodman, for the State.

MONTGOMERY, J. The question for determination is, do the findings of his honor show such misconduct on the part of the jury as to vitiate the verdict and to make it in law no verdict? for otherwise the verdict would simply be erroneous, and therefore under the final control of the judge below as to his discretion in granting or refusing a new trial. The answer to the question depends most largely upon the proper construction of the words: "Nearly all of them drank of this whisky. Some of them were under its influence." We think the fair, reasonable, and natural meaning of these words is that some of the jurors were under the controlling power, sway, and ascendancy of the whisky which they drank. This being so, they were in a condition which unfitted them to discuss evidence, and to properly consider its weight and the effect of their conclusions. They were on this account not good and lawful men, as the law required them to be, and therefore their verdict was null. There was a mistrial. There is no room for the inference that these jurors might have been under the influence of strong drink on the night before they delivered their verdict on the next morning at 10 o'clock, and have been sober at and before that hour. The findings of fact show that other whisky was passed through a window to the jury on that very morning. The law requires that jurors, while in the discharge of their duties, shall be temperate, and in such condition of mind as to enable them to discharge those duties honestly, intelligently, and free from the in-

fluence and dominion of strong drink. No prudent man would be willing to have the facts of his case passed upon by a jury some of whom were under the influence of whisky. Our Reports contain no case in which the facts found on motions for new trials for misconduct of jurors are the same, in words or substance, as in this case, and we do not by this decision overrule or modify any opinion heretofore rendered by this court in matters of this nature. In some of the states of the American Union, drinking in any degree by any of the jurors in the progress of a trial vitiates the verdict. This is not the rule in North Carolina. In the case of *State v. Sparrow*, 7 N. C. 487, the court held unanimously "that it had been settled rightly that taking refreshments vitiates the verdict only in those cases where they are furnished by the party for whom the verdict is found." In the case of *State v. Bailey*, 100 N. C. 528, 6 S. E. 372, the court found as a fact, upon motion for a new trial by defendant, "that after the retirement of the jury one of their number took a flask from his pocket, and upon his invitation four drank of the whisky it contained; none of the jurors were in any degree under the influence of the liquor, nor was the quantity taken sufficient to produce any sensible effects"; and overruled the motion, in which ruling this court declared there was no error. In the case of *State v. Miller*, 18 N. C. 500, the prisoner offered to prove, after motion for new trial on other grounds had been made and denied, that while a juror was absent from the body of the jury he visited the store of W. J. L. to get a drink of spirits, which store stands at the distance of 120 yards from the courthouse, and in view of it. The judge refused to receive this evidence, but this court, on appeal, discussed the point, though sustaining the ruling of his honor, and held that the matters attempted to be proved, if true, did not entitle the defendant to a new trial. Chief Justice Ruffin, who delivered the opinion in *Miller's Case*, said, however: "But in the present case there is no suggestion that he [the juror] drank to the slightest degree of intoxication." He said further: "I do not dispute that if a juror drink to excess, so as to disqualify him for his office, it is not only a misdemeanor, but it ought to vitiate the verdict. I will not deny that such a case appearing in the record could be acted on by a court of errors." As we have already said, we have no reported case in which the use of strong drink, to the extent found in this one, has been made to appear. All the cases reported on this subject are easily to be distinguished from this. We are of the opinion that his honor erred in refusing the motion for a new trial, and that there was a mistrial on account of disqualification of the jury, because some of them were under the influence of whisky while they were engaged in making up their verdict. The defendant is therefore entitled to a new trial.

(116 N. C. 341)

**SPRUILL v. DAVENPORT et al.**

(Supreme Court of North Carolina. Feb. 19, 1895.)

**SALES ON COMMISSION—DUTY OF FACTOR.**

1. A factor who receives, with general instructions, a consignment of fish for sale, may cause them to be inspected before putting them on the market, but must exercise ordinary diligence as to the time and manner of sale.

2. Where a factor receives a peremptory order from his principal to sell goods consigned to him, he must sell at once, or, if a sale cannot be made, inform his principal, and await instructions.

3. Where a principal instructed his factor to "sell fish shipped by me. \* \* \* Do so, please, at once,"—an advancement to the factor is not a condition precedent to the duty of selling, in the absence of a showing that the principal was insolvent, or that the factor could not have collected his commission.

Appeal from superior court, Chowan county; Graves, Judge.

Action by J. W. Spruill against Davenport & Morris. From a judgment for plaintiff, defendants appeal. Affirmed.

Battle & Mordecai and Pruden & Vann, for appellants. Spier Whitaker, J. H. Blount, and W. M. Bond, for appellee.

**FAIROLOTH, C. J.** The summons was issued December 3, 1892. It appears from the pleadings that in May, 1892, the plaintiff shipped from Edenton to the defendants, in Richmond, Va., a certain quantity of fish in barrels and kegs, to sell in that market on commission. The action is for damages by reason of defendants' failure to exercise due diligence and care in selling, and in failure to sell. Some of the fish had been sold, and some were in defendants' hands, when the summons issued. At the trial the plaintiff had judgment, and the defendants appealed.

The only exceptions are to the second, fifth, and sixth sections of his honor's charge to the jury. The plaintiff introduced evidence to show that the fish were good, and were No. 1, and that the defendants were negligent and careless in selling and failing to sell. The defendants introduced evidence to show the contrary in each particular. On June 6, 1892, the plaintiff wrote to defendants as follows: "Please sell fish shipped by me some time ago, and now in your hands. Do so, please, at once, and oblige, yours, truly. [Signed] J. W. Spruill." The whole evidence was submitted to the jury, and his honor charged: "(1) If defendants exercised proper care and diligence to sell the fish in the condition in which they were received, they performed their duty. The burden is upon the plaintiff to show a want of diligence, of which he must satisfy the jury. (2) That the defendants were bound to sell the fish of the plaintiff within a reasonable time after they were received, and for the best market prices they would bring in the Richmond market; and after the plaintiff's letter of June 6, 1892, it was the duty of defendants to sell at once for the best market price,

\* \* \* (5) If, however, they were instructed to sell at once by the plaintiff, it was their duty to sell as soon as they could sell, although they may have thought better prices could be obtained by waiting. (6) As to the proper care and handling of the goods intrusted to them for sale, for their own protection in business, they had the right to know the quality and condition of the goods (the fish) before offering them for sale. Although not bound by law to have the fish inspected, they had the right to do so; but, in having the inspection made, it was their duty to use every reasonable care, such as men of ordinary prudence in their lines of business would use in the management of their own goods, their own fish; but they did not have the right to procure a careless or incompetent inspector, or make a careless inspection, and to make an untrue report of the condition of the fish; and if they employed such a careless or incompetent inspector, and he made a careless and untrue report, and carelessly or corruptly made a wrong classification of the plaintiff's fish, reporting fish as second class which ought to have been reported as first class, and thereby the sale of the plaintiff's fish was injured, and they were made unsalable, the defendants would be liable for such damages as the plaintiff sustained thereby."

The defendants' exceptions to sections 2 and 5 are, in effect, that the charge in said sections takes no account of the state of accounts between the parties, nor of the defendants' interest because of their advancements; and, to section 6, that there was no evidence of the inspection and report classifying some of the fish as No. 2, nor of carelessness or negligence in selling or not selling, on the part of the defendants. The issue was for the jury, under proper instruction. The defendants examined witnesses to show that the fish were not in good condition, and that some were classed No. 2 by the inspector chosen by them. The plaintiff testified

that the goods were in good condition when shipped, and introduced one witness who said that on September 28, 1892, at request of plaintiff, he examined some of the fish, and found them in good condition, and that he told defendants they were No. 1, and that he could sell them to a Petersburg broker. Plaintiff also introduced two witnesses who testified that in September, after the fish had been inspected, they received some of the fish at Suffolk, Va., and sold and used some of them, and that they were in good condition. We think there was evidence on both sides fit to go to the jury, and we think that plaintiff's evidence, by strong implication, tended to show undue attention on the part of the defendants, and we see no error in the charge in the sections to which exceptions were filed. When the fish were received by defendants for sale with general instructions, it was proper and their duty to ascertain the condition and quality of the goods before putting them on the market. They were also invested with a discretion as to the time and manner of selling, provided they acted in good faith and with ordinary diligence. The defendant's duty, however, was materially changed after June 8, 1892, when they received an order to sell "at once." They were then bound to sell at once, exercising still due care and prudence in doing so; and, if they could not sell on any terms, it was their duty to report that fact to their principal, and receive directions. When a factor or broker has received express instructions, he must pursue those instructions strictly, and, if he does not, he is responsible to his principal in damages for any loss arising from such disobedience. *Russ. Fact.* (48 Law Lib.) marg. p. 18. The making the advances was not a condition precedent to the duty of selling under the instruction, June 6, 1892. Besides, there is no suggestion that plaintiff was insolvent, and non constat that the defendants could not have collected any balance due them on their account. Affirmed.









